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# CASES REPORTED

Vols. 38–40 P.

| | P. | |
|---|---|---|
| | Vol. | Page |
| Abila; Blackburn v. | 39 | 797 |
| Abila; Directors of Fallbrook Irrigation Dist. v. | 39 | 793 |
| Abila; Directors of Fallbrook Irrigation Dist. v. | 39 | 794 |
| Ackerson; Eisenhuth v. | 38 | 530 |
| Adams v. De Boom | 39 | 858 |
| Adams v. Grand Lodge of A. O. U. W. | 38 | 914 |
| Adams v. Helbing | 40 | 422 |
| Adlard v. Rodgers | 38 | 889 |
| Ahern v. McCarthy | 40 | 482 |
| Ainsworth; Whitmore v. | 38 | 196 |
| Alaska Imp. Co.; Wong Lang v. | 38 | 104 |
| Alexander v. Central Lumber & Mill Co. | 38 | 410 |
| Allen v. Allen | 39 | 436 |
| Allen; Southern Pac. R. Co. v. | 40 | 752 |
| Alvarado; Emeric v. | 40 | 11 |
| Alvord v. Spring Valley Gold Co. | 40 | 27 |
| American Fire Ins. Co. of City of New York; Union Ins. Co. of City of San Francisco v. | 40 | 431 |
| Anderson; People v. | 38 | 513 |
| Andrada; Field v. | 39 | 323 |
| Austin v. Pulschen | 39 | 799 |
| Auzerais; San Jose Imp. Co. v. | 39 | 859 |
| Ayres; Hinckley v. | 38 | 735 |
| Azoff; People v. | 39 | 59 |
| Bachman; Curtiss v. | 40 | 801 |
| Bacigalupo v. Superior Court of City and County of San Francisco, Department No. 10 | 40 | 1055 |
| Badgley; Freeman v. | 38 | 955 |
| Baird; People v. | 38 | 310 |
| Baird; People v. | 38 | 633 |
| Baldwin v. Zadig | 38 | 363 |
| Baldwin v. Zadig | 38 | 722 |
| Ball; Roberts v. | 38 | 949 |
| Balletto; People v. | 40 | 108 |
| Banbury; San Francisco & F. Land Co. v. | 39 | 439 |
| Bancroft v. Bancroft | 40 | 488 |
| Bancroft Co. v. Haslett | 39 | 602 |
| Bank of Escondido v. Superior Court of San Diego | 39 | 211 |
| Bank of Martinez v. Hemme Orchard & Land Co. | 38 | 963 |
| Bank of Martinez v. Zeising | 38 | 41 |
| Bank of Suisun v. Stark | 39 | 531 |
| Bank of Ukiah v. Gibson | 39 | 1069 |
| Bank of Ukiah v. Gibson, two cases | 39 | 1071 |
| Bank of Ukiah v. Moore | 39 | 1071 |
| Barnard v. Boller | 38 | 728 |

P.

| | Vol. | Page |
|---|---|---|
| Barnett v. Mulkins | 40 | 115 |
| Barton; Henry v. | 40 | 798 |
| Barton; MacDermot v. | 39 | 538 |
| Bates v. Howard | 38 | 715 |
| Bates' Estate, In re | 38 | 941 |
| Baumann; Churchill v. | 38 | 43 |
| Beam; McVey v. | 38 | 515 |
| Bean v. Steinman | 38 | 39 |
| Bedell v. Scoggins | 40 | 954 |
| Beer; White v. | 38 | 513 |
| Beisel's Estate, In re | 40 | 961 |
| Belser v. Hoffschneider | 38 | 312 |
| Berge; Green v. | 38 | 539 |
| Berry v. Woodburn | 40 | 802 |
| Bidleman; People v. | 38 | 502 |
| Biggins v. Raisch | 40 | 333 |
| Bills v. Silver King Min. Co. | 39 | 43 |
| Bjorman v. Ft. Bragg Redwood Co. | 38 | 451 |
| Black v. Coughlin | 38 | 730 |
| Black; Vermont Marble Co. v. | 38 | 512 |
| Black; Vermont Marble Co. v. | 38 | 961 |
| Blackburn v. Abila | 39 | 797 |
| Blake; Board of Education of City and County of San Francisco v. | 38 | 536 |
| Blaney; Wood v. | 40 | 428 |
| Block; Tuttle v. | 38 | 109 |
| Blyth v. Torre | 38 | 639 |
| Blythe's Estate, In re | 38 | 1108 |
| Board of Directors of Home for Adult Blind; Tuck v. | 39 | 607 |
| Board of Education of City and County of San Francisco v. Blake | 38 | 536 |
| Board of Education of City and County of San Francisco; Fairchild v. | 40 | 26 |
| Board of Education of City and County of San Francisco; Stoutenborough v. | 38 | 449 |
| Board of Sup'rs of San Diego County; Geary v. | 40 | 800 |
| Board of Trustees of Town of Hayward; Rice v. | 40 | 551 |
| Boller; Barnard v. | 38 | 728 |
| Bolton v. Gilleran | 38 | 881 |
| Boob v. Hall | 38 | 977 |
| Boob v. Hall | 40 | 117 |
| Borda; People v. | 38 | 1110 |
| Borderre v. Den | 39 | 946 |
| Bosch; Malone v. | 38 | 516 |
| Boyd; Frankel v. | 39 | 939 |
| Boyle; Hyde v. | 38 | 643 |
| Brady v. Times-Mirror Co. | 39 | 209 |
| Bray; People v. | 38 | 731 |
| Brickell; Wheelan v. | 38 | 85 |
| Broder; Rauer v. | 40 | 430 |
| Broderick; Smith v. | 40 | 1033 |
| Brown; McGuire v. | 39 | 1060 |
| Brown v. Merrill | 40 | 557 |
| Brown; People v. | 38 | 518 |
| Brown v. Rouse | 38 | 507 |
| Bruch v. Colombet | 38 | 45 |
| Bryson; De Camp v. | 39 | 861 |
| Buckley, Appeal of | 38 | 628 |
| Buckley, Ex parte | 38 | 686 |
| Buckman v. Ferguson | 40 | 1057 |
| Buckman; Newman v. | 39 | 209 |

|  | P.<br>Vol. | Page |
|---|---|---|
| Buena Vista Fruit & Vineyard Co. v. Tuohy | 40 | 386 |
| Bull; Winona Wagon Co. v. | 40 | 1077 |
| Bullard; Janes v. | 40 | 108 |
| Burdick's Estate, In re | 40 | 35 |
| Burke v. Gould | 38 | 733 |
| Burling v. Newlands | 39 | 49 |
| Burnett; Savings & Loan Soc. v. | 39 | 922 |
| Burns; Lewis v. | 39 | 778 |
| Burns; Savings Bank of San Diego County v. | 38 | 102 |
| Burris v. Kennedy | 38 | 971 |
| Burton; Cochrane v. | 38 | 952 |
| Butin; Heim v. | 40 | 39 |
| Butterworth v. Levy | 38 | 897 |
| Button; People v. | 38 | 200 |
| Button; People v. | 39 | 1073 |
| Byrne v. Luning Co. | 38 | 454 |
| Cady; Rogers v. | 38 | 81 |
| California Academy of Sciences v. City and County of San Francisco | 40 | 426 |
| California Bank v. Superior Court of Los Angeles | 39 | 604 |
| California Bituminous Rock Co.; Greenberg v. | 40 | 1053 |
| California Bridge Co.; Jager v. | 38 | 413 |
| California Horseshoe Co.; Mullin v. | 38 | 535 |
| California Pac. R. Co.; People v. | 38 | 912 |
| California Street Cable R. Co.; Davis v. | 38 | 647 |
| California & N. R. Co. v. Mecartney | 38 | 448 |
| Capps; Hall v. | 40 | 809 |
| Cardenas v. Miller | 39 | 783 |
| Carriger's Estate, In re | 40 | 1032 |
| Cator v. Pacific Bank | 39 | 218 |
| Center; Central Lumber & Mill Co. v. | 40 | 334 |
| Central Lumber & Mill Co.; Alexander v. | 38 | 410 |
| Central Lumber & Mill Co. v. Center | 40 | 334 |
| Central Pac. R. Co.; People v. | 38 | 905 |
| Central St. R. Co.; Santa Rosa City R. Co. v. | 38 | 986 |
| Chapell v. Schmidt | 38 | 892 |
| Chapman; Dennison v. | 39 | 61 |
| Chapman v. Hughes | 38 | 109 |
| Chapman v. Pennie | 39 | 14 |
| Chapman v. State | 38 | 457 |
| Chevalier v. Commins | 39 | 929 |
| Childers v. San Jose Mercury Printing & Publishing Co. | 38 | 903 |
| Chinette v. Conklin | 38 | 1107 |
| Christensen v. Jessen | 40 | 747 |
| Churchill v. Baumann | 38 | 43 |
| City and County of San Francisco; California Academy of Sciences v. | 40 | 426 |
| City and County of San Francisco; Demartini v. | 40 | 496 |
| City and County of San Francisco v. Mooney | 39 | 852 |
| City of Eureka v. Fay | 40 | 235 |
| City of Los Angeles; Los Angeles Lighting Co. v. | 39 | 535 |
| City of Los Angeles; Vernon Irrigation Co. v. | 39 | 762 |
| City of Modesto; E. M. Derby & Co. v. | 38 | 900 |
| City of San Bernardino v. Southern Pac. Co. | 40 | 796 |
| City of San Jose; Darcy v. | 38 | 500 |
| City of Santa Rosa; Skinner v. | 40 | 742 |
| Clancy v. Plover | 40 | 394 |
| Clark; People v. | 39 | 53 |
| Clark; Thruston v. | 40 | 435 |
| Clisham, In re | 39 | 37 |

|  | P. |  |
|---|---|---|
|  | Vol. | Page |
| Close, In re | 39 | 1067 |
| Cochrane v. Burton | 38 | 952 |
| Cohen, Ex parte | 38 | 364 |
| Cohen v. Wallace | 40 | 101 |
| Colburn; People v. | 38 | 1105 |
| Cole; Hall v. | 38 | 894 |
| Colgan; Ingram v. | 38 | 315 |
| Colgan; Ingram v. | 38 | 366 |
| Colgan; Ingram v. | 39 | 437 |
| Collins; People v. | 39 | 16 |
| Colombet; Bruch v. | 38 | 45 |
| Colombet; Sinnott v. | 40 | 329 |
| Comassi's Estate, In re | 40 | 15 |
| Comerford; Wickersham v. | 38 | 101 |
| Commins; Chevalier v. | 39 | 929 |
| Conklin; Chinette v. | 38 | 1107 |
| Connelly; People v. | 38 | 42 |
| Conroy; Yocco v. | 38 | 107 |
| Contra Costa County; Hopkins v. | 39 | 933 |
| Cook, Ex parte | 39 | 16 |
| Cook; Le Breton v. | 40 | 552 |
| Coon; Pacific Fruit Co. v. | 40 | 542 |
| Cooper; Heintz v. | 38 | 511 |
| Cooper; Labs v. | 40 | 1042 |
| Cooper v. Monterey County | 38 | 106 |
| Cooper v. Monterey County | 38 | 311 |
| Corbit v. Kimball | 40 | 1029 |
| Cornwall v. McElrath | 39 | 617 |
| Cotter v. Lindgren | 39 | 950 |
| Coughlin; Black v. | 38 | 730 |
| Craig v. Hesperia Land & Water Co. | 40 | 1057 |
| Crane v. Pacific Bank | 39 | 215 |
| Crittenden; Wickersham v. | 39 | 602 |
| Crittenden; Wickersham v. | 39 | 603 |
| Crocker's Estate, In re | 38 | 954 |
| Crowe v. Dobbel | 38 | 957 |
| Cullen v. Glendora Water Co. | 39 | 769 |
| Cuneo; Williams v. | 39 | 207 |
| Cunningham v. Kenney | 38 | 645 |
| Cunningham v. Norton | 40 | 491 |
| Curtiss v. Bachman | 40 | 801 |
| Daggett v. Gray | 40 | 959 |
| Daniels; People v. | 38 | 720 |
| Darcy v. City of San Jose | 38 | 500 |
| Dare; Flagg v. | 40 | 804 |
| Dauphiny; Olmstead v. | 38 | 505 |
| Davis v. California Street Cable R. Co. | 38 | 647 |
| Davis v. Pacific Power Co. | 40 | 950 |
| Davis v. Wallace | 38 | 1107 |
| Davis' Estate, In re | 39 | 756 |
| De Adro; Morse v. | 40 | 1018 |
| Dean v. Ross | 38 | 912 |
| De Baker v. Southern Cal. R. Co. | 39 | 610 |
| De Boom; Adams v. | 39 | 858 |
| De Camp v. Bryson | 39 | 861 |
| Delafield v. San Francisco & S. M. R. Co. | 40 | 958 |
| Delmas; Lundy v. | 38 | 445 |
| De Long v. Warren | 38 | 725 |

| | P. | |
|---|---|---|
| | Vol. | Page |
| Demartini v. City and County of San Francisco | 40 | 496 |
| Demasters; People v. | 39 | 35 |
| Den; Borderre v. | 39 | 946 |
| Denby; People v. | 40 | 1051 |
| Dennison v. Chapman | 39 | 61 |
| Dennison; Gardner v. | 39 | 526 |
| Dennison; Royal v. | 38 | 39 |
| Derby & Co. v. City of Modesto | 38 | 900 |
| De Saisset; San Jose Imp. Co. v. | 39 | 860 |
| Dillwood; People v. | 39 | 438 |
| Directors of Fallbrook Irrigation Dist. v. Abila | 39 | 793 |
| Directors of Fallbrook Irrigation Dist. v. Abila | 39 | 794 |
| Dixon v. Gries | 39 | 857 |
| Dobbel; Crowe v. | 38 | 957 |
| Dobbel's Estate, In re | 38 | 87 |
| Dodge; People v. | 38 | 203 |
| Dodge; Whitney v. | 38 | 636 |
| Donovan's Estate, In re | 38 | 456 |
| Doughty, Appeal of | 40 | 13 |
| Dow v. Nason | 38 | 54 |
| Duff; Randall v. | 38 | 739 |
| Duff; Randall v. | 40 | 20 |
| Duff; Randall v. | 40 | 386 |
| Duffy v. Duffy | 38 | 443 |
| Duffy v. Wilhoit | 38 | 54 |
| Du Jardin; Shain v. | 38 | 529 |
| Duncan; Spencer v. | 40 | 548 |
| Duncan; Spencer v. | 40 | 549 |
| Dunne; Helms v. | 40 | 100 |
| Dyer; Prewit v. | 40 | 105 |
| Easton, Eldridge & Co. v. Millington | 38 | 509 |
| Eaton v. Jones | 40 | 798 |
| Eaton v. Metz | 40 | 947 |
| Edwards; Watson v. | 38 | 527 |
| E. E. Thomas Fruit Co. v. Start | 40 | 336 |
| Eichhoff v. Eichhoff | 40 | 24 |
| Eisenhuth v. Ackerson | 38 | 530 |
| Electric Imp. Co. of San Jose; Giraudi v. | 40 | 108 |
| Elk River Mill & Lumber Co.; People v. | 40 | 486 |
| Elk River Mill & Lumber Co.; People v. | 40 | 531 |
| E. M. Derby & Co. v. City of Modesto | 38 | 900 |
| Emeric v. Alvarado | 40 | 11 |
| Emigrant Ditch Co. v. Webber | 40 | 1061 |
| Eppinger; People v. | 38 | 538 |
| Evans v. Gerken | 38 | 725 |
| Evans' Estate, In re | 39 | 860 |
| F. A. Hihn Co. v. Fleckner | 39 | 214 |
| Fairchild v. Board of Education of City and County of San Francisco | 40 | 26 |
| Farmers' Exch. Bank; Gray v. | 38 | 519 |
| Farnum v. Warner | 38 | 421 |
| Farwell v. Murray | 38 | 199 |
| Fay; City of Eureka v. | 40 | 235 |
| Fealey v. Fealey | 38 | 49 |
| Feliz v. Feliz | 38 | 521 |
| Ferguson; Buckman v. | 40 | 1057 |
| Ferguson; Simson v. | 40 | 104 |
| Field v. Andrada | 39 | 323 |
| First Nat. Bank of Bridgeport v. Perris Irrigation Dist. | 40 | 45 |

P.

| | Vol. | Page |
|---|---|---|
| First Nat. Bank of South Bend v. Kelso | 40 | 427 |
| Fischer; Loftus v. | 39 | 1064 |
| Fish; Johnston v. | 38 | 979 |
| Fisher; Pacific Mut. Life Ins. Co. v. | 39 | 758 |
| Fisher; Pacific Mut. Life Ins. Co. v. | 39 | 761 |
| Fitchpatrick; People v. | 39 | 605 |
| Fitzpatrick v. Secord | 38 | 456 |
| Fiy; People v. | 40 | 805 |
| Flagg v. Dare | 40 | 804 |
| Flaherty, In re | 38 | 981 |
| Fleckner; F. A. Hihn Co. v. | 39 | 214 |
| Flynn v. Hite | 40 | 749 |
| Foote v. Hayes | 39 | 601 |
| Ford v. Kenton | 40 | 1031 |
| Ford; McGowan v. | 40 | 231 |
| Ft. Bragg Redwood Co.; Bjorman v. | 38 | 451 |
| Franke; Graham v. | 38 | 455 |
| Frankel v. Boyd | 39 | 939 |
| Fredericks, Ex parte | 38 | 51 |
| Fredericks; People v. | 39 | 944 |
| Freeman v. Badgley | 38 | 955 |
| Freese; Li Tai Wing v. | 39 | 30 |
| Frey; Utt v. | 39 | 807 |
| Frigerio; People v. | 40 | 107 |
| F. Thomas Parisian Dyeing & Cleaning Works; Warner v. | 38 | 960 |
| Gale; Van Praag v. | 40 | 555 |
| Garbe v. Wilks | 38 | 499 |
| Garcelon's Estate, In re | 38 | 414 |
| Garcia; People v. | 40 | 114 |
| Gard v. Gard | 40 | 1059 |
| Gardner v. Dennison | 39 | 526 |
| Gardner; Wormouth v. | 38 | 646 |
| Garibaldi Grove, No. 71, of United Ancient Order of Druids; Grand Grove of United Ancient Order of Druids of California v. | 38 | 947 |
| Garoutte v. Haley | 38 | 194 |
| Garrity's Estate, In re | 38 | 628 |
| Gates v. Lindley | 38 | 311 |
| Geary v. Board of Sup'rs of San Diego County | 40 | 800 |
| Gerken; Evans v. | 38 | 725 |
| Germain Fruit Co.; Hewes v. | 39 | 853 |
| Giant Powder Co.; Judson v. | 40 | 1020 |
| Gibson; Bank of Ukiah v. | 39 | 1069 |
| Gibson; Bank of Ukiah v. | 39 | 1071 |
| Gibson; People v. | 39 | 864 |
| Gilleran; Bolton v. | 38 | 881 |
| Gillis; Stinchfield v. | 40 | 98 |
| Giraudi v. Electric Imp. Co. of San Jose | 40 | 108 |
| Giselman v. Starr | 40 | 8 |
| Glendora Water Co.; Cullen v. | 39 | 769 |
| Golden Gate Lumber Co. v. Sahrbacher | 38 | 635 |
| Goodrich; People v. | 38 | 954 |
| Goodwin; McCabe v. | 39 | 941 |
| Goodwin v. Scheerer | 40 | 18 |
| Gould; Burke v. | 38 | 733 |
| Graham v. Franke | 38 | 455 |
| Grand Grove of United Ancient Order of Druids of California v. Garibaldi Grove, No. 71, of United Ancient Order of Druids | 38 | 947 |
| Grand Lodge of A. O. U. W.; Adams v. | 38 | 914 |

| | P.<br>Vol. | <br>Page |
|---|---|---|
| Grant v. Superior Court of Los Angeles | 39 | 604 |
| Gray; Daggett v. | 40 | 959 |
| Gray v. Farmers' Exch. Bank | 38 | 519 |
| Gray; Lee Sack Sam v. | 38 | 85 |
| Gray Bros. Artificial Stone Paving Co.; Hawley v. | 39 | 609 |
| Great Western Ins. Co.; Meyer v. | 38 | 82 |
| Green v. Berge | 38 | 539 |
| Greenberg v. California Bituminous Rock Co. | 40 | 1053 |
| Gress; People v. | 40 | 752 |
| Gries; Dixon v. | 39 | 857 |
| Griffin & Skelley Co. v. Magnolia & Healdsburg Fruit-Cannery Co. | 40 | 495 |
| Grimes v. Linscott | 40 | 421 |
| Gutierrez v. Hebbard | 39 | 529 |
| Gutierrez v. Hebbard | 39 | 530 |
| Gutierrez v. Hebbard | 39 | 935 |
| Haines v. Stilwell | 40 | 332 |
| Haley; Garoutte v. | 38 | 194 |
| Hall; Boob v. | 38 | 977 |
| Hall; Boob v. | 40 | 117 |
| Hall v. Capps | 40 | 809 |
| Hall v. Cole | 38 | 894 |
| Hall v. Kauffman | 39 | 756 |
| Hall; Rucker v. | 38 | 962 |
| Hames; Lower Kings River Reclamation Dist., No. 531 v. | 39 | 635 |
| Hansen v. Southern Pac. Co. | 38 | 957 |
| Harbaugh; Lamb v. | 39 | 56 |
| Harmon v. San Francisco & S. R. R. Co. | 38 | 632 |
| Harrelson v. Tomich | 40 | 1032 |
| Harrison; People v. | 40 | 956 |
| Haslett; Bancroft Co. v. | 39 | 602 |
| Hawley v. Gray Bros. Artificial Stone Paving Co. | 39 | 609 |
| Hayes; Foote v. | 39 | 601 |
| Hayward; Jameson v. | 39 | 1078 |
| Hearst; Taylor v. | 40 | 392 |
| Heaton; Santa Cruz Rock Pavement Co. v. | 38 | 693 |
| Hebbard; Gutierrez v. | 39 | 529 |
| Hebbard; Gutierrez v. | 39 | 530 |
| Hebbard; Gutierrez v. | 39 | 935 |
| Hecht; People v. | 38 | 941 |
| Heckman v. Swett | 40 | 420 |
| Heim v. Butin | 40 | 39 |
| Heintz v. Cooper | 38 | 511 |
| Helbing; Adams v. | 40 | 422 |
| Hellings, Appeal of | 39 | 788 |
| Hellings v. Heydenfeldt | 40 | 1026 |
| Helm v. McClure | 40 | 437 |
| Helms v. Dunne | 40 | 100 |
| Hemme Orchard & Land Co.; Bank of Martinez v. | 38 | 963 |
| Henderson v. O'Connor | 39 | 786 |
| Hendy; Steen v. | 38 | 718 |
| Hendy; Steen v. | 40 | 21 |
| Hendy; Steen v. | 40 | 386 |
| Henley; Redemeyer v. | 40 | 230 |
| Hennessy v. Nicol | 38 | 649 |
| Henry v. Barton | 40 | 798 |
| Henry v. Merguire | 39 | 599 |
| Herrlich v. McDonald | 38 | 360 |
| Hertz; People v. | 39 | 32 |

|  | P. |  |
|---|---|---|
|  | Vol. | Page |
| Hesperia Land & Water Co.; Craig v. | 40 | 1057 |
| Hewel; Woodside v. | 40 | 103 |
| Hewes v. Germain Fruit Co. | 39 | 853 |
| Heydenfeldt; Hellings v. | 40 | 1026 |
| Heydenfeldt v. Jacobs | 40 | 492 |
| Heydenfeldt v. Jacobs | 40 | 493 |
| Heydenfeldt's Estate, In re | 39 | 788 |
| Hihn Co. v. Fleckner | 39 | 214 |
| Hinckley v. Ayres | 38 | 735 |
| Hitchcock; People v. | 38 | 198 |
| Hite; Flynn v. | 40 | 749 |
| Hoffschneider; Belser v. | 38 | 312 |
| Holbrook, Merrill & Stetson v. Superior Court of Sacramento County | 39 | 936 |
| Holley v. Orange County | 39 | 790 |
| Holt v. Holt | 40 | 390 |
| Holt v. Thomas | 38 | 891 |
| Home Ben. Life Ass'n; Mills v. | 38 | 723 |
| Hope's Estate, In re | 39 | 523 |
| Hopkins v. Contra Costa County | 39 | 933 |
| Horgan v. Zanetta | 40 | 22 |
| Houston; People v. | 40 | 756 |
| Howard, In re | 40 | 1043 |
| Howard; Bates v. | 38 | 715 |
| Howard; Treweek v. | 39 | 20 |
| Howe v. Johnson | 40 | 42 |
| Hubert; Hunter v. | 39 | 534 |
| Hughes; Chapman v. | 38 | 109 |
| Hulford v. Neale | 40 | 1044 |
| Hunt; Pacific Land Ass'n v. | 38 | 635 |
| Hunter v. Hubert | 39 | 534 |
| Hyde v. Boyle | 38 | 643 |
| Ingraham v. Lyon | 38 | 892 |
| Ingram v. Colgan | 38 | 315 |
| Ingram v. Colgan | 38 | 366 |
| Ingram v. Colgan | 39 | 437 |
| Irvine v. Tarbot | 38 | 896 |
| I. X. L. Lime Co.; Rountree v. | 39 | 16 |
| Jacobs; Heydenfeldt v. | 40 | 492 |
| Jacobs; Heydenfeldt v. | 40 | 493 |
| Jager v. California Bridge Co. | 38 | 413 |
| James; Lassing v. | 40 | 534 |
| Jameson v. Hayward | 39 | 1078 |
| Janes v. Bullard | 40 | 108 |
| Jessen; Christensen v. | 40 | 747 |
| Jochinsky; People v. | 39 | 1077 |
| Johns; People v. | 40 | 806 |
| Johnson; Howe v. | 40 | 42 |
| Johnson; People v. | 38 | 91 |
| Johnson; People v. | 39 | 622 |
| Johnson; Rohrbough v. | 40 | 37 |
| Johnson v. Superior Court of Napa County | 39 | 36 |
| Johnson; Wickersham v. | 38 | 89 |
| Johnston v. Fish | 38 | 979 |
| Jones; Eaton v. | 40 | 798 |
| Jones v. Shuey | 40 | 17 |
| Jordan; Zeller v. | 38 | 640 |
| Jorgensen; Shearman v. | 39 | 863 |
| Jory v. Supreme Council, American Legion of Honor | 38 | 524 |

|  | P.<br>Vol. | Page |
|---|---|---|
| Judson v. Giant Powder Co. | 40 | 1020 |
| Kauffman; Hall v. | 39 | 756 |
| Kehoe; Miller v. | 40 | 485 |
| Kelso; First Nat. Bank of South Bend v. | 40 | 427 |
| Kelso v. Teale | 39 | 948 |
| Kennedy; Burris v. | 38 | 971 |
| Kennedy's Estate, In re | 38 | 93 |
| Kenney; Cunningham v. | 38 | 645 |
| Kenton; Ford v. | 40 | 1031 |
| Kimball; Corbit v. | 40 | 1029 |
| Kirschbraun; Ramish v. | 40 | 1045 |
| Knowles v. Murphy | 40 | 111 |
| Knowles v. Sandercock | 40 | 1047 |
| Knox v. Moses | 38 | 318 |
| Kowalsky; Lawrence Nat. Bank v. | 38 | 517 |
| Kraemer; Randolph v. | 39 | 533 |
| Kruger v. Life & Annuity Ass'n | 39 | 213 |
| Krumdick v. White | 39 | 1066 |
| Kullmann v. Simmens | 38 | 362 |
| Kyser; Stewart v. | 39 | 19 |
| Labs v. Cooper | 40 | 1042 |
| Lacey v. Lacey | 40 | 1056 |
| Lagomarsino; Millett v. | 38 | 308 |
| Lagomarsino; Millett v. | 40 | 25 |
| Lamb v. Harbaugh | 39 | 56 |
| Lassing v. James | 40 | 534 |
| Law; Wells v. | 38 | 523 |
| Lawrence Nat. Bank v. Kowalsky | 38 | 517 |
| Lay v. Parsons | 38 | 447 |
| Leary; People v. | 39 | 24 |
| Le Breton v. Cook | 40 | 552 |
| Lee; People v. | 40 | 754 |
| Lee Sack Sam v. Gray | 38 | 85 |
| Lehmann; People v. | 38 | 422 |
| Lemon; People v. | 38 | 905 |
| Leonard; People v. | 39 | 617 |
| Levy; Butterworth v. | 38 | 897 |
| Levy v. Superior Court of City and County of San Francisco | 38 | 965 |
| Lewis v. Burns | 39 | 778 |
| Lichtenberg v. McGlynn | 38 | 541 |
| Liebes; London & Lancashire Fire Ins. Co. v. | 38 | 691 |
| Life & Annuity Ass'n; Kruger v. | 39 | 213 |
| Lindgren; Cotter v. | 39 | 950 |
| Lindley; Gates v. | 38 | 311 |
| Linscott; Grimes v. | 40 | 421 |
| Lion v. McClory | 40 | 12 |
| Li Po Tai's Estate, In re | 39 | 30 |
| Li Tai Wing v. Freese | 39 | 30 |
| Littlehead v. Wilhoit | 38 | 54 |
| Liverpool & London & Globe Ins. Co.; Smith v. | 40 | 540 |
| Loftus v. Fischer | 39 | 1064 |
| London & Lancashire Fire Ins. Co. v. Liebes | 38 | 691 |
| Long; Parker v. | 38 | 47 |
| Lopez; Los Angeles County v. | 38 | 42 |
| Los Angeles County v. Lopez | 38 | 42 |
| Los Angeles Lighting Co. v. City of Los Angeles | 39 | 535 |
| Loveren v. Loveren | 39 | 801 |
| Lowe; Rauer v. | 40 | 337 |

P.

| | Vol. | Page |
|---|---|---|
| Lowe v. Woods | 40 | 1047 |
| Lower Kings River Reclamation Dist., No. 531 v. Hames | 39 | 635 |
| Lower Kings River Reclamation Dist., No. 531 v. Phillips | 39 | 630 |
| Lower Kings River Reclamation Dist., No. 531 v. Phillips, two cases | 39 | 634 |
| Lower Kings River Reclamation Dist., No. 531 v. Wood | 39 | 634 |
| Lundy v. Delmas | 38 | 445 |
| Luning; Turner v. | 38 | 687 |
| Luning Co.; Byrne v. | 38 | 454 |
| Lutz v. Rothschild | 38 | 360 |
| Lyon; Ingraham v. | 38 | 892 |
| McCabe v. Goodwin | 39 | 941 |
| McCarthy; Ahern v. | 40 | 482 |
| McClory; Lion v. | 40 | 12 |
| McClure; Helm v. | 40 | 437 |
| MacDermot v. Barton | 39 | 538 |
| McDonald; Herrlich v. | 38 | 360 |
| McDonald v. Mezes | 40 | 808 |
| Macdonough v. Starbird | 38 | 510 |
| McDowell; Southern California Lumber Co. v. | 38 | 627 |
| McElrath; Cornwall v. | 39 | 617 |
| McGlynn; Lichtenberg v. | 38 | 541 |
| McGowan v. Ford | 40 | 231 |
| McGuire v. Brown | 39 | 1060 |
| Mackay v. Mackay | 40 | 558 |
| McLaughlin v. Menotti | 38 | 973 |
| McLaughlin v. Menotti | 39 | 207 |
| McMahon v. Thomas | 39 | 783 |
| McQueen v. Mechanics' Institute | 40 | 114 |
| McSweeney; People v. | 38 | 743 |
| McVey v. Beam | 38 | 515 |
| Magnolia & Healdsburg Fruit-Cannery Co.; Griffin & Skelley Co. v. | 40 | 495 |
| Mahan v. Wood | 38 | 507 |
| Malarin; Perry v. | 40 | 489 |
| Malarin; Perry v. | 40 | 490 |
| Malone v. Bosch | 38 | 516 |
| Malone v. Roy | 40 | 1040 |
| Mansfield, In re | 39 | 775 |
| Martin v. Santa Barbara County | 38 | 687 |
| Masterson v. Munro | 38 | 1106 |
| Mattingly v. Pennie | 39 | 200 |
| Mecartney; California & N. R. Co. v. | 38 | 448 |
| Mechanics' Institute; McQueen v. | 40 | 114 |
| Menotti; McLaughlin v. | 38 | 973 |
| Menotti; McLaughlin v. | 39 | 207 |
| Menzies v. Watson | 38 | 641 |
| Merguire; Henry v. | 39 | 599 |
| Meritt; Works v. | 38 | 1109 |
| Merrill; Brown v. | 40 | 557 |
| Merriman v. Walton | 38 | 1108 |
| Merritt, Appeal of | 38 | 414 |
| Metz; Eaton v. | 40 | 947 |
| Meyer, Ex parte | 40 | 953 |
| Meyer v. Great Western Ins. Co. | 38 | 82 |
| Mezes; McDonald v. | 40 | 808 |
| Millan; People v. | 39 | 605 |
| Miller; Cardenas v. | 39 | 783 |
| Miller v. Kehoe | 40 | 485 |
| Miller v. Price | 39 | 781 |

|  | P.<br>Vol. | Page |
|---|---|---|
| Millett v. Lagomarsino | 38 | 308 |
| Millett v. Lagomarsino | 40 | 25 |
| Millington; Easton, Eldridge & Co. v. | 38 | 509 |
| Mills v. Home Ben. Life Ass'n | 38 | 723 |
| Monterey County; Cooper v. | 38 | 106 |
| Monterey County; Cooper v. | 38 | 311 |
| Mooney; City and County of San Francisco v. | 39 | 852 |
| Moore; Bank of Ukiah v. | 39 | 1071 |
| Morasco; People v. | 38 | 423 |
| Morffew v. San Francisco & S. R. R. Co. | 40 | 810 |
| Morgan; Shenandoah Mining & Milling Co. v. | 39 | 802 |
| Morrow v. Norton | 38 | 953 |
| Morse v. De Adro | 40 | 1018 |
| Moses; Knox v. | 38 | 318 |
| Mt. Shasta Manuf'g Co.; People v. | 40 | 391 |
| Mulkins; Barnett v. | 40 | 115 |
| Mullin v. California Horseshoe Co. | 38 | 535 |
| Munro; Masterson v. | 38 | 1106 |
| Murphy; Knowles v. | 40 | 111 |
| Murphy v. Pacific Bank | 39 | 218 |
| Murphy; Wolseley v. | 38 | 543 |
| Murphy's Estate, In re | 38 | 543 |
| Murray; Farwell v. | 38 | 199 |
| Nagle; Ragsdale v. | 39 | 628 |
| Napthaly; People v. | 39 | 29 |
| Nason; Dow v. | 38 | 54 |
| Neale; Hulford v. | 40 | 1044 |
| Newlands; Burling v. | 39 | 49 |
| Newman v. Buckman | 39 | 209 |
| Newman; Rankin v. | 40 | 1024 |
| Nicol; Hennessy v. | 38 | 649 |
| Northern R. Co.; People v. | 38 | 912 |
| Norton; Cunningham v. | 40 | 491 |
| Norton; Morrow v. | 38 | 953 |
| N. P. Perine Contracting & Paving Co. v. Quackenbush | 38 | 533 |
| Oakland Bank of Savings v. Sullivan | 40 | 546 |
| Oakland & B. Rapid-Transit Co.; Wood v. | 40 | 806 |
| O'Brien; O'Hara v. | 40 | 423 |
| O'Brien; People v. | 39 | 325 |
| O'Connor; Henderson v. | 39 | 786 |
| Ogburn's Estate, In re | 38 | 498 |
| O'Hara v. O'Brien | 40 | 423 |
| Olmstead v. Dauphiny | 38 | 505 |
| Omnibus Cable Co.; Sutter v. | 40 | 484 |
| Orange County; Holley v. | 39 | 790 |
| Owens; Stone v. | 38 | 726 |
| Pacific Bank; Cator v. | 39 | 218 |
| Pacific Bank; Crane v. | 39 | 215 |
| Pacific Bank; Murphy v. | 39 | 218 |
| Pacific Bank; Payne v. | 39 | 218 |
| Pacific Bank; Waldron v. | 39 | 218 |
| Pacific Fruit Co. v. Coon | 40 | 542 |
| Pacific Land Ass'n v. Hunt | 38 | 635 |
| Pacific Mut. Life Ins. Co. v. Fisher | 39 | 758 |
| Pacific Mut. Life Ins. Co. v. Fisher | 39 | 761 |
| Pacific Postal Telegraph Cable Co.; Redington v. | 40 | 432 |
| Pacific Power Co.; Davis v. | 40 | 950 |
| Palomares; San Jose Imp. Co. v. | 39 | 860 |

P.

| | Vol. | Page |
|---|---|---|
| Parisian Dyeing & Cleaning Works; Warner v. | 38 | 960 |
| Parker v. Long | 38 | 47 |
| Parsons; Lay v. | 38 | 447 |
| Patent Brick Co. v. Wissinger | 38 | 639 |
| Pauly v. Pauly | 40 | 29 |
| Payne v. Pacific Bank | 39 | 218 |
| Pennie; Chapman v. | 39 | 14 |
| Pennie; Mattingly v. | 39 | 200 |
| People v. Anderson | 38 | 513 |
| People v. Azoff | 39 | 59 |
| People v. Baird | 38 | 310 |
| People v. Baird | 38 | 633 |
| People v. Balletto | 40 | 108 |
| People v. Bidleman | 38 | 502 |
| People v. Borda | 38 | 1110 |
| People v. Bray | 38 | 731 |
| People v. Brown | 38 | 518 |
| People v. Button | 38 | 200 |
| People v. Button | 39 | 1073 |
| People v. California Pac. R. Co. | 38 | 912 |
| People v. Central Pac. R. Co. | 38 | 905 |
| People v. Clark | 39 | 53 |
| People v. Colburn | 38 | 1105 |
| People v. Collins | 39 | 16 |
| People v. Connelly | 38 | 42 |
| People v. Daniels | 38 | 720 |
| People v. Demasters | 39 | 35 |
| People v. Denby | 40 | 1051 |
| People v. Dillwood | 39 | 438 |
| People v. Dodge | 38 | 203 |
| People v. Elk River Mill & Lumber Co. | 40 | 486 |
| People v. Elk River Mill & Lumber Co. | 40 | 531 |
| People v. Eppinger | 38 | 538 |
| People v. Fitchpatrick | 39 | 605 |
| People v. Fiy | 40 | 805 |
| People v. Fredericks | 39 | 944 |
| People v. Frigerio | 40 | 107 |
| People v. Garcia | 40 | 114 |
| People v. Gibson | 39 | 864 |
| People v. Goodrich | 38 | 954 |
| People v. Gress | 40 | 752 |
| People v. Harrison | 40 | 956 |
| People v. Hecht | 38 | 941 |
| People v. Hertz | 39 | 32 |
| People v. Hitchcock | 38 | 198 |
| People v. Houston | 40 | 756 |
| People v. Jochinsky | 39 | 1077 |
| People v. Johns | 40 | 806 |
| People v. Johnson | 38 | 91 |
| People v. Johnson | 39 | 622 |
| People v. Leary | 39 | 24 |
| People v. Lee | 40 | 754 |
| People v. Lehmann | 38 | 422 |
| People v. Lemon | 38 | 905 |
| People v. Leonard | 39 | 617 |
| People v. McSweeney | 38 | 743 |
| People v. Millan | 39 | 605 |
| People v. Morasco | 38 | 423 |

P.

| | Vol. | Page |
|---|---|---|
| People v. Mt. Shasta Manuf'g Co. | 40 | 391 |
| People v. Napthaly | 39 | 29 |
| People v. Northern R. Co. | 38 | 912 |
| People v. O'Brien | 39 | 325 |
| People v. Porter | 38 | 88 |
| People v. Reilly | 40 | 13 |
| People v. Royce | 39 | 524 |
| People v. Sausalito Land & Ferry Co. | 40 | 11 |
| People v. Schmitt | 39 | 204 |
| People v. Simonsen | 40 | 440 |
| People v. Smith | 39 | 38 |
| People v. Smith | 39 | 40 |
| People v. South Pac. Coast R. Co. | 38 | 912 |
| People v. Southern Pac. Co., two cases | 38 | 912 |
| People v. Stanton | 39 | 525 |
| People v. Swearinger | 38 | 972 |
| People v. Town of Linden | 40 | 115 |
| People v. Town of Sausalito | 39 | 937 |
| People v. Tucker | 38 | 195 |
| People v. Un Dong | 39 | 12 |
| People v. Verdegreen | 39 | 607 |
| People v. Ward | 38 | 945 |
| People v. Ward | 39 | 33 |
| People v. Ward | 40 | 538 |
| People v. West | 39 | 207 |
| People v. Worthington | 38 | 689 |
| People v. Yee Fook Din | 39 | 530 |
| People's Home Sav. Bank v. Superior Court of City and County of San Francisco | 38 | 452 |
| Pepper v. Southern Pac. Co. | 38 | 974 |
| Perine Contracting & Paving Co. v. Quackenbush | 38 | 533 |
| Perris Irrigation Dist.; First Nat. Bank of Bridgeport v. | 40 | 45 |
| Perry v. Malarin | 40 | 489 |
| Perry v. Malarin | 40 | 490 |
| Perry v. Quackenbush | 38 | 740 |
| Philbrook, In re | 38 | 511 |
| Philbrook, In re | 38 | 884 |
| Philbrook, In re | 40 | 1061 |
| Phillips; Lower Kings River Reclamation Dist., No. 531, v. | 39 | 630 |
| Phillips; Lower Kings River Reclamation Dist., No. 531, v. | 39 | 634 |
| Pimentel; Town of Haywards v. | 40 | 545 |
| Plover; Clancy v. | 40 | 394 |
| Porter; People v. | 38 | 88 |
| Prewit v. Dyer | 40 | 105 |
| Price; Miller v. | 39 | 781 |
| Pulschen; Austin v. | 39 | 799 |
| Quackenbush; N. P. Perine Contracting & Paving Co. v. | 38 | 533 |
| Quackenbush; Perry v. | 38 | 740 |
| Quigley; Secord v. | 39 | 623 |
| Quinn; Regensberger v. | 39 | 788 |
| Ragsdale v. Nagle | 39 | 628 |
| Raisch; Biggins v. | 40 | 333 |
| Ramish v. Kirschbraun | 40 | 1045 |
| Randall v. Duff | 40 | 20 |
| Randall v. Duff | 40 | 386 |
| Randall v. Duff | 38 | 739 |
| Randolph v. Kraemer | 39 | 533 |
| Rankin v. Newman | 40 | 1024 |

| | Vol. | Page |
|---|---|---|
| Rauer v. Broder | 40 | 430 |
| Rauer v. Lowe | 40 | 337 |
| Rea v. Wood | 38 | 899 |
| Redemeyer v. Henley | 40 | 230 |
| Redington v. Pacific Postal Telegraph Cable Co. | 40 | 432 |
| Regensberger v. Quinn | 39 | 788 |
| Reilly; People v. | 40 | 13 |
| Rice v. Board of Trustees of Town of Hayward | 40 | 551 |
| Riddell; Warren v. | 39 | 781 |
| Roberts v. Ball | 38 | 949 |
| Robinson v. Southern Pac. Co. | 38 | 94 |
| Robinson v. Southern Pac. Co. | 38 | 109 |
| Robinson v. Southern Pac. Co. | 38 | 722 |
| Robinson's Estate, In re | 39 | 862 |
| Rodgers; Adlard v. | 38 | 889 |
| Rogers v. Cady | 38 | 81 |
| Rohrbough v. Johnson | 40 | 37 |
| Ross; Dean v. | 38 | 912 |
| Rothschild; Lutz v. | 38 | 360 |
| Rountree v. I. X. L. Lime Co. | 39 | 16 |
| Rouse; Brown v. | 38 | 507 |
| Roy; Malone v. | 40 | 1040 |
| Royal v. Dennison | 38 | 39 |
| Royce; People v. | 39 | 524 |
| Rucker v. Hall | 38 | 962 |
| Sahrbacher; Golden Gate Lumber Co. v. | 38 | 635 |
| Salmon's Estate, In re | 40 | 1030 |
| Sandell; Sherman v. | 39 | 797 |
| Sandell v. Sherman | 40 | 493 |
| Sandercock; Knowles v. | 40 | 1047 |
| San Diego County v. Southern Pac. R. Co. | 40 | 1052 |
| San Francisco Breweries v. Schurtz | 38 | 92 |
| San Francisco & F. Land Co. v. Banbury | 39 | 439 |
| San Francisco & S. M. R. Co.; Delafield v. | 40 | 958 |
| San Francisco & S. R. R. Co.; Harmon v. | 38 | 632 |
| San Francisco & S. R. R. Co.; Morffew v. | 40 | 810 |
| San Jose Imp. Co. v. Auzerais | 39 | 859 |
| San Jose Imp. Co. v. De Saisset | 39 | 860 |
| San Jose Imp. Co. v. Palomares | 39 | 860 |
| San Jose Mercury Printing & Publishing Co.; Childers v. | 38 | 903 |
| Santa Barbara County; Martin v. | 38 | 687 |
| Santa Cruz Rock Pavement Co. v. Heaton | 38 | 693 |
| Santa Rosa City R. Co. v. Central St. R. Co. | 38 | 986 |
| Sargent v. Sargent | 39 | 931 |
| Sausalito Land & Ferry Co.; People v. | 40 | 11 |
| Savings Bank of San Diego County v. Burns | 38 | 102 |
| Savings & Loan Soc. v. Burnett | 39 | 922 |
| Schammel v. Schammel | 38 | 729 |
| Scheerer; Goodwin v. | 40 | 18 |
| Schmidt; Chapell v. | 38 | 892 |
| Schmitt; People v. | 39 | 204 |
| Schurtz; San Francisco Breweries v. | 38 | 92 |
| Scoggins; Bedell v. | 40 | 954 |
| Secord; Fitzpatrick v. | 38 | 456 |
| Secord v. Quigley | 39 | 623 |
| Shain v. Du Jardin | 38 | 529 |
| Shain v. Sresovich | 38 | 51 |
| Shain v. Sullivan | 39 | 606 |

P.

| | Vol. | Page |
|---|---|---|
| Shamp v. White | 39 | 537 |
| Shearman v. Jorgensen | 39 | 863 |
| Shenandoah Mining & Milling Co. v. Morgan | 39 | 802 |
| Sherman v. Sandell | 39 | 797 |
| Sherman; Sandell v. | 40 | 493 |
| Shuey; Jones v. | 40 | 17 |
| Silva v. Silva | 38 | 105 |
| Silver King Min. Co.; Bills v. | 39 | 43 |
| Simmens; Kullmann v. | 38 | 362 |
| Simons v. Webster | 40 | 1056 |
| Simonsen; People v. | 40 | 440 |
| Simson v. Ferguson | 40 | 104 |
| Sinnott v. Colombet | 40 | 329 |
| Skinner v. City of Santa Rosa | 40 | 742 |
| Smith v. Broderick | 40 | 1033 |
| Smith v. Liverpool & London & Globe Ins. Co. | 40 | 540 |
| Smith; People v. | 39 | 38 |
| Smith; People v. | 39 | 40 |
| Smith v. Smith | 38 | 43 |
| Smith's Estate, In re | 38 | 950 |
| Smith's Estate, In re | 40 | 1037 |
| Soberanes v. Soberanes | 39 | 39 |
| Soberanes v. Soberanes | 39 | 527 |
| Southern California Lumber Co. v. McDowell | 38 | 627 |
| Southern Cal. R. Co.; De Baker v. | 39 | 610 |
| Southern Pac. Co.; City of San Bernardino v. | 40 | 796 |
| Southern Pac. Co.; Hansen v. | 38 | 957 |
| Southern Pac. Co.; People v. | 38 | 912 |
| Southern Pac. Co.; Pepper v. | 38 | 974 |
| Southern Pac. Co.; Robinson v. | 38 | 94 |
| Southern Pac. Co.; Robinson v. | 38 | 109 |
| Southern Pac. Co.; Robinson v. | 38 | 722 |
| Southern Pac. R. Co. v. Allen | 40 | 752 |
| Southern Pac. R. Co.; San Diego County v. | 40 | 1052 |
| Southern Pac. R. Co. v. Superior Court of San Francisco | 38 | 627 |
| South Pac. Coast R. Co.; People v. | 38 | 912 |
| Spencer v. Duncan | 40 | 548 |
| Spencer v. Duncan | 40 | 549 |
| Spring Valley Gold Co.; Alvord v. | 40 | 27 |
| Sresovich; Shain v. | 38 | 51 |
| Stanton; People v. | 39 | 525 |
| Starbird; Macdonough v. | 38 | 510 |
| Stark; Bank of Suisun v. | 39 | 531 |
| Starr; Giselman v. | 40 | 8 |
| Start; E. E. Thomas Fruit Co. v. | 40 | 336 |
| State; Chapman v. | 38 | 457 |
| Statler v. Superior Court of Alameda County | 40 | 949 |
| Steen v. Hendy | 38 | 718 |
| Steen v. Hendy | 40 | 21 |
| Steen v. Hendy | 40 | 386 |
| Steinman; Bean v. | 38 | 39 |
| Stewart v. Kyser | 39 | 19 |
| Stilwell; Haines v. | 40 | 332 |
| Stinchfield v. Gillis | 40 | 98 |
| Stoddard v. Superior Court of Stanislaus County | 40 | 491 |
| Stone v. Owens | 38 | 726 |
| Stoutenborough v. Board of Education of City and County of San Francisco | 38 | 449 |

| | Vol. | Page |
|---|---|---|
| Sullivan; Oakland Bank of Savings v. | 40 | 546 |
| Sullivan; Shain v. | 39 | 606 |
| Superior Court of Alameda County; Statler v. | 40 | 949 |
| Superior Court of City and County of San Francisco; Levy v. | 38 | 965 |
| Superior Court of City and County of San Francisco; People's Home Sav. Bank v. | 38 | 452 |
| Superior Court of City and County of San Francisco; Van Eman v. | 40 | 14 |
| Superior Court of City and County of San Francisco, Department No. 10; Bacigalupo v. | 40 | 1055 |
| Superior Court of Los Angeles; California Bank v. | 39 | 604 |
| Superior Court of Los Angeles; Grant v. | 39 | 604 |
| Superior Court of Napa County; Johnson v. | 39 | 36 |
| Superior Court of Sacramento County; Holbrook, Merrill & Stetson v. | 39 | 936 |
| Superior Court of San Diego; Bank of Escondido v. | 39 | 211 |
| Superior Court of San Francisco; Southern Pac. R. Co. v. | 38 | 627 |
| Superior Court of Stanislaus County; Stoddard v. | 40 | 491 |
| Supreme Council, American Legion of Honor; Jory v. | 38 | 524 |
| Sutter v. Omnibus Cable Co. | 40 | 484 |
| Swearinger; People v. | 38 | 972 |
| Swett; Heckman v. | 40 | 420 |
| Sylvester's Estate, In re | 38 | 648 |
| Tarbot; Irvine v. | 38 | 896 |
| Taylor v. Hearst | 40 | 392 |
| Teale; Kelso v. | 39 | 948 |
| Thomas; Holt v. | 38 | 891 |
| Thomas; McMahon v. | 39 | 783 |
| Thomas Fruit Co. v. Start | 40 | 336 |
| Thruston v. Clark | 40 | 435 |
| Times-Mirror Co.; Brady v. | 39 | 209 |
| Tomich; Harrelson v. | 40 | 1032 |
| Torre; Blyth v. | 38 | 639 |
| Town of Haywards v. Pimentel | 40 | 545 |
| Town of Linden; People v. | 40 | 115 |
| Town of Sausalito; People v. | 39 | 937 |
| Treweek v. Howard | 39 | 20 |
| Tuck v. Board of Directors of Home for Adult Blind | 39 | 607 |
| Tucker; People v. | 38 | 195 |
| Tully v. Wilhoit | 38 | 54 |
| Tuohy; Buena Vista Fruit & Vineyard Co. v. | 40 | 386 |
| Turner v. Luning | 38 | 687 |
| Tuttle v. Block | 38 | 109 |
| Tyler, Ex parte | 40 | 33 |
| Un Dong; People v. | 39 | 12 |
| Union Ins. Co. of City of San Francisco v. American Fire Ins. Co. of City of New York | 40 | 431 |
| Utt v. Frey | 39 | 807 |
| Van Eman v. Superior Court of City and County of San Francisco | 40 | 14 |
| Van Praag v. Gale | 40 | 555 |
| Van Reynegom, Appeal of | 40 | 961 |
| Verdegreen; People v. | 39 | 607 |
| Vermont Marble Co. v. Black | 38 | 512 |
| Vermont Marble Co. v. Black | 38 | 961 |
| Vernon Irrigation Co. v. City of Los Angeles | 39 | 762 |
| Von Schmidt v. Von Schmidt | 38 | 361 |
| Von Schmidt v. Widbur | 38 | 682 |
| Waldron v. Pacific Bank | 39 | 218 |
| Walkerley's Estate, In re | 40 | 13 |
| Wallace; Cohen v. | 40 | 101 |

| | P.<br>Vol. | Page |
|---|---|---|
| Wallace; Davis v. | 38 | 1107 |
| Walton; Merriman v. | 38 | 1108 |
| Ward; People v. | 38 | 945 |
| Ward; People v. | 39 | 33 |
| Ward; People v. | 40 | 538 |
| Ward; Yorba v. | 38 | 48 |
| Warner; Farnum v. | 38 | 421 |
| Warner v. F. Thomas Parisian Dyeing & Cleaning Works | 38 | 960 |
| Warren; De Long v. | 38 | 725 |
| Warren v. Riddell | 39 | 781 |
| Watkins v. Wilhoit | 38 | 53 |
| Watson v. Edwards | 38 | 527 |
| Watson; Menzies v. | 38 | 641 |
| Wax's Estate, In re | 39 | 624 |
| Webber; Emigrant Ditch Co. v. | 40 | 1061 |
| Webster; Simons v. | 40 | 1056 |
| Welch's Estate, In re, two cases | 39 | 805 |
| Wells v. Law | 38 | 523 |
| West; People v. | 39 | 207 |
| Wheelan v. Brickell | 38 | 85 |
| White v. Beer | 38 | 513 |
| White; Krumdick v. | 39 | 1066 |
| White; Shamp v. | 39 | 537 |
| Whitmore v. Ainsworth | 38 | 196 |
| Whitney v. Dodge | 38 | 636 |
| Wickersham v. Comerford | 38 | 101 |
| Wickersham v. Crittenden | 39 | 602 |
| Wickersham v. Crittenden | 39 | 603 |
| Wickersham v. Johnson | 38 | 89 |
| Widbur; Von Schmidt v. | 38 | 682 |
| Wilhoit; Duffy v. | 38 | 54 |
| Wilhoit; Littlehead v. | 38 | 54 |
| Wilhoit; Tully v. | 38 | 54 |
| Wilhoit; Watkins v. | 38 | 53 |
| Wilks; Garbe v. | 38 | 499 |
| Williams v. Cuneo | 39 | 207 |
| Winona Wagon Co. v. Bull | 40 | 1077 |
| Winthrop, Ex parte | 40 | 751 |
| Wissinger; Patent Brick Co. v. | 38 | 639 |
| Wolseley v. Murphy | 38 | 543 |
| Wong Lang v. Alaska Imp. Co. | 38 | 104 |
| Wong Yon Ting, Ex parte | 39 | 627 |
| Wood v. Blaney | 40 | 428 |
| Wood; Lower Kings River Reclamation Dist., No. 531, v. | 39 | 634 |
| Wood; Mahan v. | 38 | 507 |
| Wood v. Oakland & B. Rapid-Transit Co. | 40 | 806 |
| Wood; Rea v. | 38 | 899 |
| Woodbridge v. World Pub. Co. | 40 | 231 |
| Woodburn; Berry v. | 40 | 802 |
| Woods; Lowe v. | 40 | 1047 |
| Woodside v. Hewel | 40 | 103 |
| Works v. Meritt | 38 | 1109 |
| World Pub. Co.; Woodbridge v. | 40 | 231 |
| Wormouth v. Gardner | 38 | 646 |
| Worthington; People v. | 38 | 689 |
| Yee Fook Din; People v. | 39 | 530 |
| Yocco v. Conroy | 38 | 107 |
| Yorba v. Ward | 38 | 48 |

| | P. | |
|---|---|---|
| | Vol. | Page |
| Younger v. Younger | 39 | 779 |
| Zadig; Baldwin v. | 38 | 363 |
| Zadig; Baldwin v. | 38 | 722 |
| Zanetta; Horgan v. | 40 | 22 |
| Zeising; Bank of Martinez v. | 38 | 41 |
| Zeller v. Jordan | 38 | 640 |

# CALIFORNIA REPORTER

## 38 PACIFIC REPORTER

(104 Cal. 49)

BEAN v. STEINMAN et al. (No. 19,396.)

(Supreme Court of California. Oct. 10, 1894.)

In bank.

On rehearing. Denied.

For opinion on appeal, see 37 Pac. 777.

PER CURIAM. Rehearing denied.

BEATTY, C. J. I concur in the order denying a rehearing of this cause; but, as the latter part of the opinion heretofore filed is capable of misconstruction, I wish to explain that I do not understand it to decide that the largest augmented head of water to which the plaintiff is entitled is to be measured by a cumulation of his two-fortieths for 10 days. Under the covenant of Stoneman, the plaintiff's predecessors had the right to demand water for irrigation as often as once in 10 days, but they were not bound to take it that often; and if it appears that the practice has been to take it at longer intervals, and in correspondingly larger heads, and if it also appears that by so doing the plaintiff can irrigate to greater advantage, and without laying an unjust burden upon the defendant, the plaintiff should be allowed to take the water in the manner most beneficial to him, and the defendant is bound to provide the means of discharging into the head of the ditch the larger augmented head required.

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(4 Cal. Unrep. 851)

ROYAL v. DENNISON et al.[1] (No. 19,482.)

(Supreme Court of California. Oct. 3, 1894.)

Exchange of Land — Assignment of Contract — Defect in Title — Evidence — Tender of Deed.

1. One to whom a person has agreed to convey land is entitled to a deed from such person, and need not accept a deed from a stranger to the contract.

2. Where, in a contract for the exchange of land, the values of the respective parcels have been fixed, a party to the contract, who had no title to the land he contracted to convey, and who has placed himself in such a position that he cannot acquire title, cannot object to the tender of the deed by the other party because made on condition that he pay the amount fixed by the contract as the value of the land to be conveyed by him.

3. In ejectment, where defendant claims that plaintiff agreed to convey him the land in exchange for other land, the judgment roll in a creditors' action against defendant to have a deed by him of his land declared void is admissible to show that defendant is unable to convey his land.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; William P. Wade, Judge.

Action of ejectment by Aaron W. Royal against C. L. Dennison and others. Judgment was rendered for plaintiff, and defendants appeal. Affirmed.

E. C. Bower, for appellants. Geo. W. Knox, for respondent.

HAYNES, C. In ejectment to recover possession of a certain house and lot in the city of Los Angeles. The answer, after denying the averments of the complaint, for a separate answer and equitable defense alleged, in substance, that in August, 1887, the defendant G. L. Dennison purchased the demanded premises from the plaintiff, and as the consideration thereof agreed to convey to the plaintiff four certain lots in or near the city of Pasadena, and prior to the commencement of the action had tendered to plaintiff a deed for said lots, and demanded from plaintiff a deed of the demanded premises, and prayed for a specific performance of the agreement. The action was tried by the court. Findings were duly filed, and judgment for the plaintiff was entered thereon, and this appeal is by the defendants from the judgment and an order denying their motion for a new trial.

The findings are very full, and cannot be inserted in this opinion, but an outline of the facts found may be thus stated: In August or September, 1887, the plaintiff and the defendant G. L. Dennison made a verbal agreement whereby plaintiff agreed to sell to Dennison a house and lot on Courthouse street in the city of Los Angeles, at a valuation of $4,000, to be paid for by the conveyance of four lots in "Dennison's subdivision of Fair Oaks Avenue Park tract, in the Rancho San Pasqual," said lots to be taken at a valuation of $1,000 each. Dennison shortly afterwards went into possession of the house and lot. At the time of the agreement the survey and subdivision of Dennison's land had not been completed, but in January, 1888, plaintiff selected and marked upon the map the four lots described in the answer. No time was ever agreed upon when the mutual conveyances were to be made. At the time said agreement of exchange was made G. L. Dennison did not have title to said four lots, but held a contract of purchase of a larger tract of which they were a part, upon which he had made one payment, and was to obtain a deed only upon full payment; that he never made any other payment, but on October 30, 1888, conveyed all his right, title, and interest in said premises to Lucius Dennison, who afterwards—but at what date does not appear, except that it was prior to July 8, 1890—procured title to the tract of which these lots were a part; that between December, 1887, and the last of May, 1889, the plaintiff obtained from G. L. Dennison $750 as loans, to be secured on said lots; that on July 8, 1890, plaintiff tendered to defendant G. L. Dennison a good and sufficient deed of conveyance of the house and lot, and demanded of Dennison payment of $3,250, being the agreed value of the property, less $750, the amount of said loans. Dennison refused to make such payment, and at the same time tendered to plaintiff a deed of conveyance of said four lots, executed by Lucius Dennison, but which deed the plaintiff refused to accept, the grantor therein being a stranger to the contract or agreement between plaintiff and G. L. Dennison. It was further found that on May 6, 1890, a judgment was rendered in the superior court of Los Angeles county against G. L. Dennison for $20; that on September 25, 1890, one Marriner obtained a money judgment in said court against said G. L. Dennison for $2,500; that on December 28, 1888, F. K. and O. M. Harriman foreclosed in said court a certain mortgage against said G. L. Dennison, and on March 29, 1889, a deficiency judgment therein was docketed against said Dennison for $2,174.55; that on September 27, 1890, in an action brought by said Harrimans in said court against said G. L. Dennison and Lucius Dennison, a decree was entered adjudging the said conveyance so made by said G. L. Dennison to said Lucius Dennison of said tract embracing said four lots to be fraudulent as to creditors, and subjecting the same to the lien of said deficiency judgment. Lucius Dennison, the father, and Robert Dennison, the brother, of G. L., were occupants of the demanded premises with G. L., and were made defendants.

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[1] Reversed in banc. See 42 Pac. 39, 109 Cal. 558.

Respondent contends that he was not bound to accept a conveyance of the four lots from a stranger to the contract; that G. L. Dennison, by the conveyance of the lots in question to his father, put it out of his power to fulfill his contract with the plaintiff; that such conveyance was made without his consent; that under section 1457 of the Civil Code "the burden of an obligation may be transferred with the consent of the party entitled to its benefits, but not otherwise * * *;" that by section 1731, Id., "an agreement to sell real property binds the seller to execute a conveyance * * *;" that, unless it was part of the agreement that it should bind the assigns of the parties, it could not bind them, and was merely a personal contract which could not pass to their assigns except by mutual agreement. In support of this contention respondent cites La Rue v. Groezinger, 84 Cal. 281, 24 Pac. 72. That case, however, clearly holds the general rule to be that contracts are assignable unless the contract provides otherwise, though the nature of some contracts may show that they cannot be assigned, though there is no language showing such intention, instances of which are stated in that case at page 285, 84 Cal., and page 72, 24 Pac. Of course, Dennison could not free himself from the burden or obligation of making a conveyance of these lots to the plaintiff without the plaintiff's consent, though either party could assign to another any benefit he was entitled to under the contract; that is, the plaintiff could assign to another his right to receive a conveyance of the four lots, and the defendant could assign his right to receive a conveyance of plaintiff's house and lot. The burden or obligation of each to make the conveyance may, however, be transferred or performed by another only with the consent of the party who is to receive such performance or conveyance. The reason therefor can be illustrated by this case. At the time the exchange of property was agreed upon, G. L. Dennison did not have the legal title to these lots. He had contracted for their purchase, and was to receive a conveyance upon making full payment therefor. Before obtaining title, he conveyed them, with other property, to his father, and thereafter the payments were completed, and the property was conveyed to his father. A deficiency judgment was afterwards docketed against G. L., and a suit was commenced against him and his father to cancel or set aside said conveyance as fraudulent and void as against the creditors of G. L., and a decree was granted declaring such conveyance void as against said creditors. The implied covenants in a grant, bargain, and sale deed from the father to the plaintiff would only reach to incumbrances done, made, or suffered by the father, the grantor therein, and would not protect the plaintiff against incumbrances or liens suffered by G. L. Dennison, and the plaintiff was entitled to this implied covenant. Civ. Code, § 1113. No time having been fixed for the mutual conveyances to be made, the conveyance of these lots by G. L. Dennison to his father was not necessarily an abandonment of his contract with the plaintiff. He offered to prove that he had an agreement with his grantee that he, Lucius Dennison, would carry out the agreement with the plaintiff, and convey the four lots to the plaintiff. The plaintiff objected, and the objection was sustained. It does not appear that this agreement was communicated to the plaintiff, or that he assented thereto in any manner. The evidence was properly excluded, as was also the deed from Lucius Dennison to the plaintiff, upon the ground hereinbefore stated. Subsequently the defendant G. L. Dennison, during the trial, on the 7th of May, 1891, wrote upon said deed and executed and acknowledged the following: "I, G. L. Dennison, of said county and state, do hereby go in with the grantor herein in the written deed to A. W. Royal, of said county and state, and do by these presents grant, bargain, and sell to A. W. Royal all my right, title, and interest in and to the property described in the within deed, in consideration of exchange for house and lot No. 215 Court street, Los Angeles city and county." Whether this instrument was effectual for the purpose of binding G. L. Dennison by the implied covenants of a grant, bargain, and sale deed, it is not necessary to inquire, since, on the 27th of September preceding, the conveyance made by him to his father was adjudged fraudulent as against the plaintiffs therein, and the property was thereby made subject to the lien of the deficiency judgment hereinbefore noted, and which is not shown to have been satisfied. Whether the court erred in excluding the deed with the additional instrument executed by G. L. Dennison, at the stage of the case at which it was offered, need not be decided, inasmuch as the decree above referred to being afterwards introduced rendered the exclusion, if it was error, harmless.

Appellants contend, however, that plaintiff's tender of a conveyance was not sufficient to put Dennison in default, because the tender was made upon the condition that he pay plaintiff $3,250 in money; that under section 1494 of the Civil Code "an offer of performance must be free from any conditions which the creditor is not bound, on his part, to perform;" and that he was not bound to pay for the property in money. But Dennison was not at the time of the tender by plaintiff, nor, indeed, had he ever been, the owner of the legal title to these lots, and therefore could not have complied with a demand for a conveyance of them. Under such circumstances we think he cannot object to the form of the tender, or the condition attached to it, since he was not injured by the condition. His right to insist that the plaintiff should accept a conveyance of the lots was not affected by the fact that he did not have the legal title at the time he made the contract, nor by the fact that he afterwards conveyed his equitable title to his father, provided he had procured the legal title before he was required to perform his contract by a conveyance. This case does not come within the case of Burks v. Davies, 85 Cal. 110, 24 Pac. 613, where the defendant had no title to a part of the property, nor any contract for the purchase of it under which he could have compelled the owner to convey the title to him. The distinction between that case and the case at bar is clearly pointed out in Easton v. Montgomery, 90 Cal., at page 315, 27 Pac. 280, as well as by the remark of Mr. Justice Paterson in the former case, where it was said: "If, though he be not the absolute owner, it is in his power by the ordinary course of law or equity to make himself such owner, he will be permitted within a reasonable time to do so." Whether, if Dennison in this case had acquired the unincumbered legal title to these lots before the trial, he could have compelled a specific performance by the plaintiff, we need not consider, since the title was shown to have been subject to the judgment of Harriman, if not of others.

It is contended that these judgment rolls were improperly admitted. We think not. It was competent for the plaintiff to show that the title was not free from incumbrances. This was certainly the case as to the Harriman judgment, and if the conveyance by G. L. to Lucius Dennison was fraudulent as to one creditor it was presumably so as to all; or, if that be not the case, since one was competent and material, and would have been entirely sufficient to justify the plaintiff in refusing to accept the title, the introduction of the others could not prejudice the defendants. The date of the commencement of the Harriman suit against G. L. and Lucius Dennison, as well as of the other actions, must have been shown by the judgment rolls which were put in evidence, but by a singular omission the date at which these several actions were commenced, and especially of the Harriman suit to set aside the conveyance, nowhere appears in the record, since the commencement of that action was a direct attack upon the title of Lucius Dennison to these lots. Every point made by appellant in his attack upon the findings has been sufficiently covered by what has been said. The findings are justified by the evidence, and support the judgment. We find no error in the record which would justify a reversal of the judgment or order appealed from, and advise that they be affirmed.

We concur: BELCHER, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

104 Cal. 238

## BANK OF MARTINEZ v. ZEISING. (No. 15,749.)

(Supreme Court of California. Sept. 28, 1894.)

DISMISSAL OF APPEAL—SETTLEMENT OF CASE.

Where, pending an appeal, appellant pays respondent a sum of money in settlement of the suit, on an agreement that he is to be released from the judgment, the appeal will be dismissed.

In bank. Appeal from superior court, Contra Costa county; Joseph P. Jones, Judge.

Action by Bank of Martinez against Zeising. Pending an appeal, appellant made a settlement with respondent, and moves to have the appeal dismissed. Motion granted.

Otto Tum Suden, for appellant. W. S. Tinning, for respondent.

FITZGERALD, J. The moving papers upon which the motion to dismiss the appeal herein is based show that the appellant has paid to the respondent the sum of $200 to be released from the judgment from which this appeal is taken, and that the respondent has accepted said sum, and in consideration thereof has released the appellant from all liability thereunder. The motion was resisted by the opposing affidavit of the attorney of record for the appellant, but, as there is nothing contained therein that is at all material to this proceeding, it is not necessary to be considered. As the controversy arising out of this action was terminated by the settlement agreed upon between the parties thereto, there is nothing for this court to decide. It therefore follows that the motion to dismiss the appeal should be granted. So ordered.

We concur: BEATTY, C. J.; McFARLAND, J.; HARRISON, J.; DE HAVEN, J.; VAN FLEET, J.

104 Cal. 257

## LOS ANGELES COUNTY v. LOPEZ, Auditor. (No. 19,474.)

(Supreme Court of California. Sept. 29, 1894.)

BOARD OF SUPERVISORS—POWERS.

The board of supervisors cannot create the office of license tax collector. El Dorado Co. v. Meiss, 34 Pac. 716, 100 Cal. 268, followed.

Department 2. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Action by the county of Los Angeles against F. E. Lopez, auditor, etc. Judgment was rendered for plaintiff, and defendant appeals. Affirmed.

James McLachlan and Spencer G. Millard, for appellant. H. C. Dillon, for respondent.

PER CURIAM. The judgment appealed from in this case is affirmed on the authority of the case of El Dorado Co. v. Meiss, 100 Cal. 268, 34 Pac. 716, in which it was held that the board of supervisors had no authority to create the office of license tax collector, and in which the case of People v. Ferguson, 65 Cal. 288, 4 Pac. 4, was also expressly overruled on this point.

4 Cal. Unrep. 858

## PEOPLE v. CONNELLY. (No. 21,272.)

(Supreme Court of California. Oct. 4, 1894.)

EMBEZZLEMENT—INSTRUCTIONS—DEFENSES.

1. On a trial for embezzlement, where no request is made to limit evidence of similar embezzlements by defendant to proof of criminal intent, a voluntary instruction that defendant is not on trial for embezzling any other sum than that charged in the information is not prejudicial because it fails to make such a limitation.

2. The fact that an appropriation of an employer's money was made without attempt at concealment is no defense to a charge of embezzlement.

In bank. Appeal from superior court, city and county of San Francisco; J. M. Seawell, Judge.

Patrick Connelly appeals from a conviction of embezzlement, and from an order denying a new trial. Affirmed.

Lawler & Gray, for appellant. Atty. Gen. Hart, for the People.

PER CURIAM. The defendant was convicted of the crime of embezzlement, and appeals from the judgment, and from an order denying his motion for a new trial. The information charges that defendant embezzled $89.78, the property of M. Goodwin, which he had received from Vincent Leguns as the agent and collector of said Goodwin.

1. On the trial, evidence was introduced on the part of the people, without objection, to prove that defendant had embezzled other sums of money which he had collected for Goodwin, amounting to more than $5,000. As to this the court was not asked by either party to instruct the jury, but, of its own motion, instructed as follows: "Now, with reference to the matters outside,—the five or six thousand dollars that has been spoken of,—I charge you that the defendant here is not accused or on trial for embezzling any other sum than this money that was collected from Leguns; and, if you find that the defendant embezzled that money, why then you will find him guilty, and by your verdict you must state the amount." The verdict was that defendant was guilty of embezzling $78.43. It is admitted that evidence of the embezzlement of other sums was properly admitted for the purpose of showing criminal intent, as was held in the case of People v. Gray, 66 Cal. 271, 5 Pac. 240. Nor is there any objection on the ground that the court voluntarily instructed on that point. But it is contended that the court erred in that it did not add to the instruction given that the evidence of other like embezzlements could be considered only for the purpose of proving the fraudulent or criminal intent with which the money received from Leguns was converted. If the instruction is defective in this respect, it is so to the advantage of the defendant, for the reason that the jury may have understood that they were instructed not to consider the evidence as to other embezzlements for any purpose, and could not otherwise have understood the instruction to the prejudice of the defendant. It seems to have been intended for the benefit of defendant, and, so far as it went, surely was so. If the defendant desired any addition to the instruction, he should have asked it.

2. The venue was sufficiently proved. The evidence contained in the bill of exceptions tends to prove that the money was received and converted by the defendant in the city

and county of San Francisco, and should be deemed sufficient. People v. Marks, 72 Cal. 46, 13 Pac. 149; People v. Leong Sing, 77 Cal. 117, 19 Pac. 254; People v. Carroll, 80 Cal. 154, 22 Pac. 129; People v. Tonielli, 81 Cal. 279, 22 Pac. 678.

3. It is claimed that defendant was working for one-half of the profits on the sales made by him, and not for a definite commission, and therefore was interested in the business as a partner, and there was some evidence to this effect. But Mr. Goodwin testified positively that: "He was not working on profits at all. He was working on commissions on the amount sold. I am positive of that. The percentage of sales which he got as commission was 17 per cent. * * * In estimating the amount of his commission, I did not take the cost price of the goods. It did not make any difference what the goods cost. We allowed him his commission of just 17 per cent."

4. It is further claimed that the undisputed testimony of defendant was that he was authorized to spend money at his discretion to build up the trade, but this is a mistake. He did not say he was authorized to spend money for that or any purpose. He simply said: "The money, if any, that I was short was spent for the benefit of the house,—building up the trade. I collected the money from Leguns on that bill. Q. Did you ever account to Mr. Goodwin for the money you had spent building up the trade? A. Oh, yes; what I would be short. What I was short when I would turn in,—supposed to turn in,—I would say, 'Charge so much to my account.' Can't remember whether I told them to charge the Leguns money to my account, or whether I paid it in."

5. It is further contended that the money was appropriated by defendant openly, and without secrecy or concealment. While secrecy or concealment may be evidence tending to show a criminal intent, yet, if the evidence shows that the criminal acts constituting embezzlement were committed by the defendant, it is no defense that they were committed openly. The judgment and order are affirmed.

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104 Cal. 369

## CHURCHILL v. BAUMANN et al. (No. 18,164.)

(Supreme Court of California. Oct. 4, 1894.)

In bank.

On rehearing. Judgment affirmed.

For prior report, see 36 Pac. 93.

Spencer & Raker and C. A. Raker, for appellant. Goodwin & Goodwin and D. W. Jenks, for respondents.

PER CURIAM. Upon a reconsideration of the questions involved in this appeal, we are satisfied with the conclusion reached by department 1 in its opinion filed herein March 10, 1894 (36 Pac. 93), and for the reasons stated in that opinion the order appealed from must be affirmed. Order affirmed.

BEATTY, C. J. I dissent. Under our practice, I think a plaintiff may couple an application for an injunction to restrain future trespass with an action for damages for past trespasses of the same character, and that, notwithstanding his prayer for equitable relief, he is entitled to a jury trial of the issues involved in his action for damages.

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4 Cal. Unrep. 860

## SMITH et al. v. SMITH. (No. 18,162.)

(Supreme Court of California. Oct. 4, 1894.)

VENUE IN CIVIL CASES — HOW DETERMINED—LOCAL CAUSE OF ACTION.

1. The nature of a cause of action, so far as it determines the venue, must be ascertained from the complaint alone, without considering any amendment which plaintiff may intend to make.

2. A complaint asking that it be adjudged that certain deeds of land are mortgages, and that they have been paid, and that, if it be found that any part of the debt remains unpaid, plaintiffs be admitted to redeem, and that they be let into possession, states a local cause of action, which should be brought in the county in which the land lies.

Commissioners' decision. Department 1. Appeal from superior court, Tuolumne county; John Hunt, Judge.

Action by E. H. Smith and others against Cyrill C. Smith. From an order denying a change of venue, defendant appeals. Affirmed.

J. C. Law (James H. Budd, of counsel), for appellant. J. C. Campbell and F. D. Nicol, for respondents.

VANCLIEF, C. This is an appeal from an order denying defendant's motion to change the venue from Tuolumne county, where the action was commenced, to the county of Merced, where the defendant resided at the time the action was commenced, to wit, July 20, 1892. A former action by the same plaintiffs against the same defendant for the same and additional relief, and founded on the same and an additional cause of action, was commenced in Tuolumne county on July 20, 1891, in which defendant's motion to change the venue of that action to the county of Merced was denied, and upon appeal from the order denying the motion this court reversed the order, and directed the court below to grant the change (Smith v. Smith, 88 Cal. 572, 26 Pac. 356); but before the change of venue was granted by the lower court the plaintiffs dismissed that action, and thereafter commenced the action in which was made the order from which the present appeal was taken.

It is contended by appellant that substantially the same grounds for a change of venue appear to exist in this case as in the former, and that upon the authority of the decision of this court in the former case the order denying a change of venue in this case should be reversed. The substance of the complaint in the former action is stated in the opinion of the court on the appeal from the order in that action (88 Cal. 573, 26 Pac. 356), whereby it appears that that complaint stated both a local and a transitory cause of action,—a cause of action to compel the defendant to convey to plaintiffs certain lands situate partly in Tuolumne county and partly in the county of Merced, and a cause of action to compel the defendant to account for money and other personal property alleged to have been received by him as partnership property of a firm composed of himself and one D. G. Smith, deceased, under the latter of whom the plaintiffs claimed an interest in the partnership property by inheritance. It was held on that appeal that, inasmuch as the complaint stated a transitory as well as a local cause of action, the defendant was entitled to a change of venue to the county of Merced, in which he resided, the court saying: "The plaintiff cannot, by uniting in his complaint matters which form the subject of a personal action with matters which form the subject of a local action, compel the defendant to have both those matters tried in a county other than that in which he resides. It is only when real estate alone is the subject-matter of the action that the provisions of section 392, Code Civ. Proc., can be invoked against a defendant who resides in a county different from that in which the land is situated." The respondents claim that real estate alone is the subject-matter of this subsequent action, from the order in which this appeal was taken; that the facts constituting a personal or transitory cause of action in the complaint considered on the former appeal are entirely absent from the complaint involved in this appeal. The substance of the complaint in this action is that on July 29, 1876, D. G. Smith, under whom plaintiffs claim by inheritance, was the owner of several thousand acres of land, of the value of $200,000, situated partly in each of the counties of Tuolumne, Merced, and San Luis Obispo, and was then indebted to defendant in the sum of $31,000, and to other persons in the sum of $33,000; that for the sole purpose of securing the payment of such indebtedness he then conveyed all said lands by deeds absolute on their face to the defendant, under a contemporaneous agreement with defendant that the deeds should be considered only mortgages; that defendant should take possession of the mortgaged property, and manage the same, and pay all the indebtedness to secure which the deeds were executed, and when all such indebtedness should be paid the defendant should reconvey to him (D. G. Smith) all said mortgaged real property; that all said deeds were made at the same time, and as one transaction; that no other consideration passed between the parties than said agreement; that D. G. Smith died intestate February 2, 1883, and all the debts of his estate, including the debts of decedent to defendant and others to secure which said deeds were executed, have been fully paid and discharged; that ever since the 29th day of July, 1876, the defendant has had, and still has, the exclusive possession of said mortgaged lands, and during all that time has received all the rents, issues, and profits thereof, and that no part thereof has been administered upon as the estate of D. G. Smith, deceased; that defendant did not reconvey to D. G. Smith said mortgaged property, nor any part thereof, and upon their demand has refused to convey to the plaintiffs the undivided five-sixths thereof, to which they are entitled, or to admit them to the possession as tenants in common with him; and that the value of said mortgaged property is $300,000. Allegations not pertinent to the question of venue, including those showing the heirship of the plaintiffs, are omitted. The prayer of the complaint is substantially that it be adjudged that said deeds are mortgages, and that they have been paid and satisfied; that plaintiffs are owners of five-sixths of the mortgaged land, and that they be let into possession as tenants in common with defendant; that, should it be found that any part of the mortgage debts remain unpaid, plaintiffs be permitted "to redeem from the mortgages simultaneously with the execution of conveyances of said real property to them by defendant;" and that plaintiffs have such other and further relief as may be proper.

By comparing this complaint with that in the former action it will be seen that all the facts of that complaint held to constitute a transitory cause of action have been omitted from this complaint, and this is admitted by counsel for appellant. But they claim that the affidavit of the defendant on which the motion was made shows that plaintiffs intend so to amend their complaint in this action that they may introduce proof of all the facts alleged in their former complaint. They say: "We do not claim that under the present form of the complaint in this action, without any amendment thereto, that plaintiffs could introduce such proofs." That affidavit, among other things, contains the following: "That the complaint in this action was drawn and this action commenced in its present form with the intent of preventing a transfer of this action to Merced county, and with the purpose of litigating and determining in this action under said complaint or amendments thereto all questions and matters that might have been litigated under the former complaints in the dismissed actions aforesaid. And it is plaintiffs' purpose to have litigated and determined in this action under the allegations of the complaint herein, or an amendment to the complaint herein, all the questions as to the transfer of the afore-mentioned personal property from D. G. Smith to C. C. Smith, and the management thereof by C. C. Smith, that might have been or could be determined or litigated under a complaint in form of action No. 636 aforesaid." As to those statements in defendant's affidavit there was no counter affidavit, and it is therefore claimed by appellant that defendant's affidavit must be taken as true. Whether the affidavit is true or not, I think the nature of the cause of action, so far as it affects or determines the place of trial, must be ascertained from the complaint alone. Nor are the cases cited by appellant's counsel opposed to this view. In each of those cases, viz. Creditors v. Welch, 55 Cal. 469; Hastings v. Keller, 69 Cal. 606, 11 Pac. 218; McSherry v. Mining Co., 97 Cal. 637, 32 Pac. 711,—the affidavits related to the place of residence of the defendant, which constitutes no part of a cause of action. I think the complaint in this case states only a local cause of action, which cannot be distinguished from that stated in the case of Baker v. Insurance Co., 73 Cal. 182, 14 Pac. 686, which case was not overruled by the case of Smith v. Smith, 88 Cal. 572, 26 Pac. 356; and the lower court did not err in denying the motion to change the venue. What would be the effect of such an amendment of plaintiffs' complaint as anticipated by defendant is a question not involved in this appeal. Should it arise in the court below hereafter, it must be presumed that that court will properly dispose of it. I think the order should be affirmed.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

104 Cal. 347

## BRUCH v. COLOMBET. (No. 15,597.)

(Supreme Court of California. Oct. 4, 1894.)

CONSTITUTIONAL LAW—LOCAL AND SPECIAL LEGISLATION—MANAGEMENT OF COMMON SCHOOLS.

Pol. Code, § 1543, subd. 3, establishing different custodians for the funds of school districts having boards of education and those not having them, violates Const. art. 4, § 25, which prohibits local and special laws in the management of common schools.

Commissioners' decision. Department 1. Appeal from superior court, Santa Clara county; John Reynolds, Judge.

Application by Louis Bruch for a writ of mandamus to compel J. F. Colombet to pay a warrant drawn upon him as city treasurer. A writ was granted, and defendant appeals. Reversed.

H. V. Morehouse & Tuttle, for appellant. Wilcox & Patton, for respondent.

TEMPLE, C. This is an agreed case. It is stipulated that the school district of San José is a quasi municipal corporation, and that it embraces the same territory as the city of San José; that the school district has a board of education; that plaintiff possesses all the qualifications prescribed by law, or the rules and regulations of the county board of education for Santa Clara county, to teach in the grammar and primary schools of said district, and July 5, 1893, was employed by the said board of education as principal of a school in said district at a salary of $120 per month, and immediately entered upon such service, and therefore was entitled to receive as his salary for the month of November, 1893, the sum of $120; that, during all of said time, defendant was treasurer of the city of San José; that the state school fund was duly apportioned among the counties, and Santa Clara county received its portion, of which $11,747.40 was apportioned to the school district of San José; that July 17, 1893, the said board of education drew an order upon the county superintendent in favor of the treasurer of the city of San José for said sum, which order was presented by defendant, as treasurer of the city, to the county superintendent, who thereupon drew his requisition upon the county auditor against the said state school fund so apportioned to the school district; that the auditor thereupon drew his warrant upon the county treasurer in favor of the city treasurer for said amount, and said city treasurer received the said money in pursuance thereof, and placed the same in the city treasury; at divers times the board of education drew warrants against the same, which warrants were paid as drawn, until only $852 of said funds now remain in the treasury; that plaintiff duly procured a warrant in his favor for the said amount due him as salary, and presented the same to defendant, as city treasurer, and demanded payment of the same, which defendant refused. Wherefore, he demands a peremptory writ of mandate.

In the affidavit attached to the agreed statement, it is said that the treasurer has been in the habit of paying warrants drawn upon the money apportioned to the district by the county superintendent from the state and county school funds; that in March, 1893, the supreme court decided that under the law as it then existed the custody of state and county school funds belonged to the county treasurer; that subsequently to said decision the legislature passed an act making the city treasurer the custodian of state and county school moneys apportioned to school districts within municipalities, and having boards of education; that in consequence of said decision a controversy has arisen as to the legal custodian of such state and county school money, and this proceeding is instituted in good faith to determine the rights of the parties and such controversy; that there is now in the county treasury $17,000 belonging to said school district, but, owing to the uncertainty of the law, "no one knows who is entitled to the custody of said moneys."

The doubt whether the amended statute is valid arises from the fact that it establishes a different rule in regard to the custody of the moneys belonging to school districts within municipalities, and having boards of education, from that prevailing in those in which there are no such boards. The amendment referred to is of subdivision 3 of section 1543, Pol. Code, by the legislature of 1893. It is as follows: "Third. (1) On the order of the board of school trustees, to draw his requisition upon the county auditor for all necessary expenses against the school fund of any district, or of any city or town which has not a board of education. The requisitions must be drawn in the order in which the orders therefor are filed in this office. Each requisition must specify the purpose for which it is drawn; but no requisition shall be drawn unless the money is in the fund to pay it; and no requisition shall be drawn upon the order of the board of school trustees against the funds of any district, except for teachers' salaries, unless such order is accompanied by an itemized bill showing the separate items, and the price of each, in payment for which the order is drawn; nor shall any requisition for teachers' salaries be drawn unless the order shall state the monthly salary of the teacher, and name the months for which such salary is due. Upon the receipt of such requisition the auditor shall draw his warrant upon the county treasurer in favor of the parties for the amount stated in such requisition. (2) On the order of the board of education of any city having a board of education, the county superintendent shall draw his requisition upon the county auditor in favor of the city treasurer of said city for all state and county moneys, and for all other moneys apportioned by the said superintendent to said city. Upon the presentation of said requisition the county auditor shall draw his warrant upon the county treasurer in favor of the treasurer of said city for the amount stated in said requisition. It shall be the duty of the county treasurer to pay the amount stated in the warrant of the county auditor to the treasurer of said city; and it shall be the duty of the treasurer of said city to receive and safely keep all moneys so received, and to pay the same out upon the order of the board of education of said city, which order must be issued by said board of education as provided in division (1) one of this subdivision of section one thousand five hundred and forty three of the Political Code." It is contended that this is special and local legislation. The constitution provides (section 5, art. 9): "The legislature shall provide for a system of common schools by which a free school shall be kept up and supported in each district at least six months in every year, after the first year in which a school has been established." In regard to this section, it was said in Kennedy v. Miller, 97 Cal. 429, 32 Pac. 558: "The term 'system' itself imports a unity of purpose as well as an entirety of operation, and the direction to the legislature to provide 'a' system of common schools means one system which shall be applicable to all the common schools within the state." The constitution also provides (section 25, art. 4) that the legislature shall not pass local or special laws providing for the management of common schools, nor in any case where a general law can be made applicable. Also, section 11, art. 1: "All laws of a general nature shall have a uniform operation." Section 22, art. 1, makes the provisions of the constitution mandatory and prohibitory, unless expressly otherwise provided. The legislature has practically classified the school districts throughout the state into (1) school districts not having boards of education; and (2) school districts having boards of education. The laws make many and important differences in the management of these two classes. Of course, as has been frequently decided, the prohibition of special and local laws cannot be evaded by arbitrary classification. In fact, a special law—special, as opposed to general laws on one hand and private acts on the other—classifies the subjects of the law for the purpose of the special provisions. This classification is the very thing prohibited by the constitution. In Earle v. Board of Ed., 55 Cal. 489, it is said by Myrick, J.: "A special law is one referring to a selected class, as well as to a particular object. This act refers to a selected class, viz. teachers in cities of one hundred thousand inhabitants." The act was held void, as special legislation. Of course, the legislature may classify for the purpose of legislation where there is some intrinsic reason why the law should operate upon some and not on others, or should affect some differently from its effect upon others. This has been often expressed, and with particular care in City of Pasadena v. Stimson, 91 Cal. 238, 27 Pac. 604. It is there said: "The conclusion is that, although a law is general and constitutional when it applies equally to all persons embraced in a class founded upon some natural or intrinsic or constitutional distinction, it is not general or constitutional if it confers particular privileges or imposes peculiar disabilities or burdensome conditions, in the exercise of a common right, upon a class of persons arbitrarily selected from the general body of those who stand in precisely the same relation to the subject of the law." I think this a very good statement of the rule, so far as it goes, and it was sufficient for the purposes of the case in which it was laid down. I think, however, one purpose of the inhibition of special and local legislation was to make as many as possible interested in every act passed. As a rule, the entire effect of an act of the legislature cannot be foreseen, and those seeking vicious legislation have often succeeded in covering their designs under apparently harmless provisions. It was easier to do this in special or local bills, in which few were interested. This, I think, was the principal consideration which moved the convention and the people of the state in adopting the provision. It was to make all the members of the legislature responsible so far as possible, and therefore alert as to all legislation. I think, therefore, special legislation is prohibited even when we can see, or think we can, that special privileges are given to no one. It is obvious, however, that what may be called the extreme view in regard to these limitations cannot prevail; otherwise, the legislature would be shorn of all power to adapt its laws to differing conditions. An efficient system of common schools must differ in some respects in its details as to schools in sparsely-settled districts and in towns. No absolute, inflexible rule has ever been formulated, and probably never will be, by which to determine what departure from uniformity is permissible and what will be fatal. The courts must determine each case as it arises, presuming in favor of the rightful exercise of the legislative power. Yet the inhibition should be enforced unless there is discoverable some reasonable ground for a distinction.

In Kennedy v. Miller, supra, it is said that the constitution imposed upon the legislature the duty of establishing a uniform system of school districts; that, nevertheless, boards of education were created in local laws for the incorporation of cities, and in the law concerning municipal corporations. It is suggested that boards of education perform nearly the same functions as trustees of school districts, and the question is reserved as to whether the laws are valid which impose different duties upon the two sets of officers. The school law seems to have been drafted without much regard to the constitutional requirement of uniformity, but we have here to consider only this one provision in regard to the custody of state and county school moneys. Now the fact that the money for school districts having boards of education can all be drawn out of the county treasury on one requisition, and not as required for school necessities, does make a difference for which I can discover no reason in the nature of things. By the first subdivision of the same section, in which this requisition is authorized, the school superintendent is required to apportion the school moneys to each school district four times a year. For this purpose he may require a report from the county auditor of the amount of school moneys on hand, and whenever an excess of money has accumulated to the credit of a school district, by reason of a large census roll and a small attendance, beyond a reasonable amount necessary to maintain a school for eight months in such district for the year, the superintendent of schools shall place such excess of money to the credit of the unapportioned school funds of the county, and shall apportion the same as other school funds are apportioned. The county auditor cannot keep such an account as will show whether funds have accumulated to the credit of districts having boards of education or not, and, if the superintendent can ascertain the facts in any other way, I can discover no mode in which the funds can be replaced in the county treasury. See Welsh v. Bramlet, 98 Cal. 221, 33 Pac. 66. I find also a provision in the same act, in a subsequent section, which seems inconsistent with the provision requiring the state and county school moneys to be deposited in the city treasury. Subdivision 2, § 1617, directs both trustees of school districts and boards of education to pay all moneys collected by them from any source whatever for school purposes into the county treasury, to be placed to the credit of the special fund of their districts. This would imply that there is kept in the county treasury a special fund for the districts having boards of education, and that all moneys collected by the board shall be deposited there by them. I think the law authorizing the city treasurer to have the custody of state and county school money is invalid because it violates the requirement of uniformity, and the provisions prohibiting special and local laws in the management of common schools, and that the writ should be denied.

We concur: BELCHER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and the court is directed to enter an order denying the plaintiff's application.

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## PARKER v. LONG. (No. 19,416.)

(Supreme Court of California. Oct. 4, 1894.)

Department 2. Appeal from superior court, San Diego county; W. L. Pierce, Judge.

Action by one Parker against one Long. Judgment was rendered for plaintiff, and defendant appeals. Affirmed.

M. L. Ward and A. Haines, for appellant. Parrish & Mossholder, for respondent.

PER CURIAM. Upon the authority of Bruch v. Colombet (No. 15,597, this day decided) 38 Pac. 45, the judgment herein is affirmed.

(109 Cal. 107)

## YORBA v. WARD.[1] (No. 19,437.)

(Supreme Court of California. Oct. 4, 1894.)

COUNTERCLAIM—CROSS COMPLAINT—ADMISSIBILITY.

1. A holder of a junior judgment lien sold the land at judicial sale, subject to the senior lien, and bid it in himself. Subsequently the senior lienor sold the land, and bid it in, but before receiving a deed agreed to pay the junior lienor a certain sum for the latter's rights in the land. *Held*, in an action by the senior against the junior lienor to recover possession of the land, that a counterclaim for the sum agreed to be paid was not a demand arising out of the transaction set out in the complaint or connected with the "subject of the action."

2. Neither did the demand of the junior lienor affect the property to which the action relates so as to permit it to be set up in a cross complaint, under Code Civ. Proc. § 442.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; W. L. Pierce, Judge.

Action by Vicente Yorba against Shirley C. Ward to recover land. From the judgment plaintiff appeals. Reversed.

Smith & Winder, for appellant. Edwin A. Meserve and Shirley C. Ward, in pro. per., for respondent.

TEMPLE, C. Plaintiff appeals from the judgment and from an order refusing a new trial. There is considerable conflict in the evidence, but, stating the facts as strongly as possible for the defendant, I think even then the judgment in his favor cannot be maintained. Omitting immaterial matters, defendant's theory as to the facts is about as follows: Plaintiff and defendant each had a money judgment against the same person. Both judgments were liens upon the demanded premises, but plaintiff's lien was prior to defendant's. Defendant, however, caused the land to be first sold, and was purchaser at the sale. Plaintiff also caused the land to be sold and purchased under his judgment. Defendant received a deed upon the expiration of the time for redemption. While defendant was thus the owner of the premises, subject to the prior lien of plaintiff and plaintiff's rights as purchaser, as stated, the parties entered into an agreement by which plaintiff agreed to purchase defendant's right to the premises, and pay him $4,750 therefor. One hundred dollars was paid in cash, and 30 days' credit given for the balance. Nothing was said in the agreement in regard to the possession of the premises, nor does it appear whether defendant was at that time in possession or not. The agreement simply fixes the amount to be paid for defendant's rights, and the time of payment. The time allowed for redemption under the sale had about expired, and plaintiff soon received his deed from the sheriff. He then commenced this suit against defendant to recover the premises. Defendant, in a cross complaint, set up his claim for $4,650, which was still due him on the agreement mentioned, and asked that the agreement be specifically enforced, and for general relief. The plaintiff demurred to the counterclaim or cross complaint on the ground that the facts stated did not constitute a counterclaim, or the proper subject of a cross action. He also moved to strike it out as redundant and immaterial matter. The court overruled the demurrer, and denied the motion. After trial, judgment was rendered that defendant recover from plaintiff the sum of $4,650, and that, if the same be paid, defendant execute to plaintiff a deed for the demanded premises, and that thereupon plaintiff be let into possession. In other words, the judgment is that he shall not recover possession except upon condition that he pay the sum agreed upon to the defendant. The court found, however, that plaintiff is the owner of the land.

Plaintiff's title does not come through defendant, although, even if it did, and defendant had a vendor's lien upon the land, plaintiff would still be entitled to possession according to his title. According to defendant's claim, both parties knew the true condition of the title; that defendant had no right save the right to redeem, which had nearly expired; that when plaintiff received his deed his title would be absolute, and his right to immediate possession undoubted. Their contract left this state of things as it was, plaintiff promising to pay defendant $4,750 not to redeem. Certainly his rights under the deed which he received from the sheriff do not depend upon his paying his debt to defendant. Although he may never be able to pay his debts, he is entitled to possession of the land. This being so, the facts stated in the cross complaint do not constitute a counterclaim. The relief sought will not to any extent defeat, overcome, or affect plaintiff's cause of action, nor lessen, modify, or interfere with the relief to which plaintiff is entitled. Pom. Code Rem. § 745. Nor does defendant's demand arise out of the transaction set out in the complaint. The only transaction there set out—if it could be so denominated—is that defendant withholds from plaintiff the demanded premises, claiming some title to it. The cross complaint does not show any right or title to the demanded premises in defendant. By it defendant asserts no rights with reference to the land, nor any claim save his alleged right to demand from plaintiff $4,650. This demand is not connected with the "subject of the action," however that phrase be defined. Nor is defendant's demand one which can be set up in a cross action under section 442, Code Civ. Proc. The relief sought by defendant does not affect the property to which the action relates. An action enforcing specific performance of a contract to pay $4,650 is merely an action for so much money. Plaintiff cannot compel defendant to convey to him his claim to the land unless he pays the money, but plaintiff is not estopped from setting up a right derived from an independent source. He did not purchase the land from defendant, as already stated. Defendant's theory is that plaintiff bought knowing that his right was prior to defendant's, and that defendant was only a redemptioner. In other words, that upon receiving his deed his title would be complete without any conveyance from defendant. Except that there is no vendor's lien, the situation is exactly as it would have been if defendant, being the owner of the land, had conveyed to plaintiff, and had taken his promissory note as payment. In such case the purchaser's right to possession would not depend upon the payment of the note. I think the judgment and order should be reversed.

We concur: BELCHER, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are reversed.

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104 Cal. 354

## FEALEY v. FEALEY. (No. 15,494.)

(Supreme Court of California. Oct. 4, 1894.)

ALLOTMENT OF HOMESTEAD — ANNULLING ORDER.

An order allotting a homestead to a widow on her false allegation that the property belonged to the community cannot be annulled at the instance of an heir at law of decedent, whose guardian knew of the application for a homestead, and did not contest it, because ignorant that the property belonged to decedent's separate estate.

Department 1. Appeal from superior court, Napa county; E. D. Ham, Judge.

Action by the guardian of Mrs. Fealey, mother of William Fealey, deceased, to annul an order allotting a homestead to Mrs. Fealey, widow of deceased. A demurrer to the complaint was overruled, and defendant appeals. Reversed.

Gesford & Thompson, for appellant. A. J. Hull, for respondent.

DE HAVEN, J. The defendant is the widow of William Fealey, deceased, and this action is brought for the purpose of annulling an order of the superior court of Napa county setting apart to her a homestead out of the estate of said deceased. The complaint alleges that the property so set apart was the separate property of the deceased, and that the defendant here, with knowledge of this fact, and for the purpose of deceiving the court in which the administration proceedings were pending, filed a petition in which she falsely alleged that such property was community property, and asked that the same be set apart to her absolutely as a homestead; and that, upon the hearing of the application, she was a witness, and testified that the statement in her petition in relation to the character or title of such property was true. The complaint further alleges that this testimony was willfully false, and that it was given by the defendant for the purpose of deceiving the court, and that by reason thereof the court was in fact misled and deceived, and induced to make the order granting the prayer of defendant's petition, and to set apart to her the land therein described as a homestead for her sole use and benefit. The order is set out in the complaint, and it appears from its recitals that the court found, "from the papers on file in the said matter and other evidence introduced," that the property so set apart was community property. The complaint also shows that the deceased died intestate, and that the plaintiff, who is his mother, and the defendant are his only heirs at law; and it is further shown that, prior to the making of the order sought to be annulled, the plaintiff was adjudged an incompetent person, and a general guardian—the same person who brings the present action in her behalf—had been appointed to manage her estate. The complaint alleges that this guardian had actual notice of the proceeding upon the part of the defendant to obtain the order setting apart the homestead, and that he consulted certain lawyers in relation to the rights of plaintiff, and, upon the facts which he laid before them, was by them advised that the defendant was entitled to the order asked for in her petition, and that it would subject the plaintiff to useless expense to contest the right of defendant to have the land therein described set apart to her absolutely; but in this connection the complaint alleges that said guardian did not learn the true facts concerning the title to such land until after the entry of the order here assailed. The complaint also contains an averment that there was community property belonging to the estate of the deceased, Fealey, out of which a homestead could have been set apart, and that the existence of this property was fraudulently concealed by the defendant. This latter averment adds no strength to the complaint, and need not be further considered by us. The defendant interposed a general demurrer to the complaint, which was overruled by the court; and, the defendant declining to answer, judgment was rendered in favor of the plaintiff, and in accordance with the prayer of the complaint. This ruling of the court presents the only question arising upon this appeal.

The demurrer to the complaint ought to have been sustained. The fraud which is set forth as the basis of the plaintiff's cause of action relates to the alleged falsity of defendant's statement made in her petition for the homestead, and again repeated in her testimony upon the hearing of such petition, concerning the nature of the title to the land set apart to her as a homestead; but the question thus presented and sought to be litigated in this action was necessarily involved in the proceeding to set apart the homestead, and the order or judgment of the court therein was a determination that the allegation of defendant's petition in regard to the nature of the title to the land so set apart was true, and that her testimony relating to the same matter given upon the trial of that proceeding was also true. The plaintiff had notice of the pendency of that proceeding, and no fraud was practiced upon her by which she was prevented from appearing therein and contesting the allegation of defendant's petition, and showing that the testimony given by her was unworthy of credit. Under these circumstances, that judgment is conclusive upon the plaintiff, and she cannot be permitted to bring into litigation the same matters therein involved and settled by that judgment. The case made by the complaint here falls exactly within the rule declared in U. S. v. Throckmorton, 98 U. S. 61; In re Griffith's Estate, 84 Cal. 113, 23 Pac. 528, and 24 Pac. 381; and Pico v. Cohn, 91 Cal. 129, 25 Pac. 970, and 27 Pac. 537. In the first of these cases it was said by Mr. Justice Miller, in delivering the opinion of the court, that "the acts for which a court of equity will on account of fraud set aside or annul a judgment between the same parties, rendered by a court of competent jurisdiction, have relation to fraud extrinsic or collateral to the matter tried by the first court, and not to a fraud in a matter upon which the decree was rendered." And in Pico v. Cohn the question was very carefully considered, and this court announced the same rule, saying: "The reason of this rule is that there must be an end to litigation; and when the parties have once submitted a matter, or have had an opportunity of submitting it, for investigation and determination, and when they have exhausted every means of reviewing such determination in the same proceeding, it must be regarded as final and conclusive, unless it can be shown that the jurisdiction of the court has been imposed upon, or that the prevailing party, by some extrinsic or collateral fraud, has prevented a fair submission of the controversy. * * * Endless litigation, in which nothing was ever finally determined, would be worse than occasional miscarriages of justice; and so the rule is that a final judgment cannot be annulled merely because it can be shown to have been based on perjured testimony; for, if this could be done once, it could be done again and again, ad infinitum." These cases are, we think, conclusive of the one now before us. So far as concerns the question here presented, there is no difference in principle in the nature of the judgments under review in the above-cited cases and the order here sought to be annulled. The order setting apart the homestead to defendant (no homestead having been declared during the lifetime of the deceased) operated to vest in the defendant a title to the land so set apart (Estate of Boland, 43 Cal. 640; Estate of Moore, 96 Cal. 522, 31 Pac. 584); and such order was in the nature of a judgment in rem (Kearney v. Kearney, 72 Cal. 591, 15 Pac. 769); and, the court having jurisdiction to pronounce it, it is conclusive upon plaintiff and all persons interested in the estate, and can only be successfully attacked in equity upon the same grounds upon which a judgment in personam may be annulled.

The conclusion we have reached in this case is not at all in conflict with Wickersham v. Comerford, 96 Cal. 433, 31 Pac. 358. The action in that case was brought by a creditor of the deceased to annul the order of the probate court setting apart a homestead to the widow of the deceased, the complaint alleging, in substance, that, prior to the death of deceased, he and his wife entered into a written agreement for a separation and division of the community property, and that such agreement was completely performed, and that deceased and his wife were at the time of his death living separate and apart, in accordance with the terms of said agreement. Under this state of facts, the widow was not entitled to a homestead out of the estate of her deceased husband (Estate of Noah, 73 Cal. 583, 15 Pac. 287); but the complaint in that action further alleged that in the petition which the widow filed, asking the court to set apart such homestead for her use, she did not disclose the fact of the existence of the agreement made between herself and husband for a separation, and that she and the deceased were not living together as husband and wife at the time of his death. It was held in that case that this omission, relating, as it did, to a material fact which ought to have been brought to the attention of the court, and submitted to its judgment, was such a fraudulent concealment as would justify a court of equity in annulling the order setting apart the homestead; but it is clear that the fraud which was made the basis of the action and judgment in that case was extrinsic to the judgment or order annulled. In the original proceeding for a homestead under review in that case the court did not even indirectly pass upon the question of the existence or non-existence of the agreement for separation, and that matter, not being before the court, was not concluded by the judgment or order in that proceeding; but, as we have seen, the direct question sought to be litigated here, viz. whether the land set apart to defendant as a homestead was or was not community property, was put in issue in the homestead proceeding, resulting in the order here assailed; and the court, upon the evidence submitted to it at the time of making that order, found the fact adversely to the plaintiff's present contention, and this marks the important distinction between the present and the case of Wickersham v. Comerford. Nor can the case of Bergin v. Haight, 99 Cal. 52, 33 Pac. 760, be regarded as an authority sustaining the complaint in this action. There the court expressly held that there was "nothing upon the face of the proceedings to indicate a fraudulent collusion between the administrator and his attorney," and that "there was no opportunity to determine any issue of fraud in the probate court." This being so, it was necessarily held that the fraud alleged and found in that action was extrinsic and collateral to the questions determined by the probate court when it confirmed the sale of the land in controversy there. The case of Dunlap v. Steere, 92 Cal. 344, 28 Pac. 563, comes nearer supporting the contention of plaintiff, and yet does not do so. In that case the plaintiff was only constructively served with summons, and had no actual notice of the pendency of the action in which the judgment there annulled was given; and referring to the rule above quoted from U. S. v. Throckmorton, 98 U. S. 61, to the effect that a judgment will not be set aside for false testimony given in relation to a matter upon which the judgment was rendered, it was held that such rule was only applicable "where the former judgment was the result of a trial between the parties, or where the one against whom the judgment was rendered had actual notice of the pendency of the action, and neglected to submit his proofs." It is alleged in the complaint here that the plaintiff was an incompetent person when the order sought to be annulled was made, and so it may be said that in one sense she had no personal knowledge of its pendency or comprehension of the matters involved in that proceeding; but it also appears from the complaint that her general guardian did have such knowledge, and, as the law devolved upon him the duty of protecting her rights in that proceeding, the case is not within the reason of the rule declared in Dunlap v. Steere. The plaintiff did have all the notice which it was possible for her to have, and had the full benefit of all the safeguards which the law deemed necessary for her protection in that proceeding, or which the law deems necessary for the protection of any incompetent person from unjust or fraudulent judgments.

Judgment reversed, with directions to the superior court to sustain the demurrer to the complaint.

We concur: HARRISON, J.; VAN FLEET, J.

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104 Cal. 400

## Ex parte FREDERICKS.

(Supreme Court of California. Oct. 5, 1894.)

APPEAL IN CAPITAL CASE—EFFECT ON SENTENCE.

Pen. Code, § 1243, provides that an appeal to the supreme court from a conviction in a capital case stays the execution of judgment. *Held*, that the warden of the state prison need not, on such an appeal by the prisoner, deliver him to the sheriff of the county where he was tried.

In bank.

Application for a writ of habeas corpus by William Fredericks to secure his release from the custody of W. E. Hale, warden of the state prison. Denied.

G. E. Coldwell, for petitioner. Atty. Gen. Hart, for respondent.

PER CURIAM. This is a petition for a writ of habeas corpus. The petitioner, having been convicted of murder in the first degree, was, on the 7th of May, 1894, sentenced to be hanged at the San Quentin prison, and on the same day a warrant was delivered to the sheriff, in obedience to which he immediately delivered the petitioner to the warden of said prison, by whom he is still detained. On the 23d of May, 1894, the petitioner appealed to this court from the judgment of conviction and the order denying his motion for a new trial. Afterwards a certified copy of his notice of appeal was served on the warden, with a demand for the return of the prisoner to the custody of the sheriff, which was refused. The imprisonment of the petitioner is not unlawful. It is true that by section 1243 of the Penal Code it is provided that an appeal to the supreme court from a judgment of conviction stays the execution of the judgment in all capital cases. But the intention of the legislature in adopting this provision was merely to prevent the infliction of the death penalty pending the appeal, and it has not acquired any different meaning or effect since or by reason of the change of the law by which in capital cases the prisoner is confined in the state prison pending the execution of the sentence of death. Even if this imprisonment is to be regarded as a part of the penalty, it stands upon the same grounds as other judgments of imprisonment. It is not stayed without a certificate of probable cause for the appeal, and no such certificate has been granted in this case. Writ denied.

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104 Cal. 402

## SHAIN v. SRESOVICH. (No. 15,274.)

(Supreme Court of California. Oct. 5, 1894.)

LIMITATION OF ACTIONS—RELIEF ON THE GROUND OF MISTAKE.

1. Under Code Civ. Proc. § 338, subd. 4, allowing three years within which to bring an action on the ground of mistake, and providing that the cause of action shall not be deemed to have accrued until the discovery of the mistake by the aggrieved party, a merchant, more than three years after the settlement of an account, cannot recover an overpayment caused by a mistake of his bookkeeper, which he might have discovered at any time on investigation.

2. The fact that the person receiving the overpayment knew of the mistake at the time is immaterial.

In bank. Appeal from superior court, city and county of San Francisco; Eugene R. Garber, Judge.

Action by Shain, assignee of a claim of J. Ivancovich & Co., against Sresovich, to recover an overpayment made to defendant

**by a mistake of plaintiff's assignors. Judgment for defendant, and plaintiff appeals. Affirmed.**

Vincent Neale, for appellant. Naphtaly, Freidenrich & Ackerman, for respondent.

HARRISON, J. In 1886, J. Ivancovich & Co., plaintiff's assignors, had a joint venture with the defendant in the importation and sale of some oranges; and on the 1st of July of that year they presented to the defendant a statement and account of the transactions relating to the venture, showing that they were indebted to him in the sum of $2,063.51, and paid him that sum of money. These accounts were kept by the plaintiff's assignors in one of their firm books, in which were also placed an account of importation of oranges by themselves on their own account. The statement of the account which was given to the defendant was prepared by the bookkeeper of Ivancovich & Co., who had been in their employ for many years, and who continued to remain as their bookkeeper for several years thereafter, and who was a competent bookkeeper, and entitled to full confidence for carefulness and accuracy. About the end of the year 1886 the book in which these accounts had been entered was stored away by the firm, and was not again examined until the latter part of 1890. In February, 1891, the firm made an examination of this book, and found that the account rendered to the defendant was erroneous, and that, owing to a mistake therein, they had paid him $630.25 too much. Thereupon they assigned the claim to the plaintiff herein, who brought this action May 5, 1891, to recover the amount of said former payment, alleging in his complaint the foregoing facts. The court below found that the cause of action was barred by the statute of limitations, and gave judgment for the defendant. The plaintiff has appealed upon the judgment roll, without any statement or bill of exceptions.

It is contended by the appellant that he has a right to maintain the action by virtue of section 338, Code Civ. Proc., subdivision 4 of which allows three years within which to bring "an action for relief on the ground of fraud or mistake. The cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake." Fraud and mistake are, by the above provisions of the statute, placed in the same category, and the rules applicable to the one must govern the other. Although the provision with reference to fraud, or one similar thereto, is found in the statute of nearly if not all of the states, we are not aware that a similar provision with reference to "mistake" exists in any of the states. The rule is well established that the means of knowledge is equivalent to knowledge, and that a party who has the opportunity of knowing the facts constituting the fraud of which he complains cannot be supine and inactive, and afterwards allege a want of knowledge that arose by reason of his own laches or negligence. Wood v. Carpenter, 101 U. S. 135; Ware v. Galveston City Co., 146 U. S. 115, 13 Sup. Ct. 33. The question has usually arisen in determining whether the facts alleged in the complaint are sufficient to show due diligence, or to take the case out of the statute of limitations, but the same rule is to be applied to the facts as found after a trial.

Applying the above rule to the present case, we are of the opinion that the plaintiff's assignors had, at all times after the payment to the defendant, such means of information with reference to the account between them and him, and of the mistake in the payment, that their failure to avail themselves of it charged them with the same result as though they had actual knowledge thereof. The accounts were kept under their supervision, or by their bookkeeper. The statement was made out by him. The book in which the account was kept, and from which the statement was presumably made, was retained by them, and was afterwards used by them, in which to place their own individual transactions, and was afterwards stored away by them. It is not claimed that the defendant ever saw the book, or took any part in the preparation of the statement, or that he sustained any relation to them which entitled them to rely upon any statement of his, or that he made any statement or did any act which induced them to make the payment. Under these circumstances they are not entitled to claim that the "discovery" of the mistake was within three years of the commencement of the action. If they could maintain the action under these circumstances, there is no limit to the time in which it might be commenced. It would be a new proposition in mercantile life, as well as in law, if we should hold that if a merchant, many years after he had retired from business, on looking over his account books through curiosity, should find that his bookkeeper had made a mistake in the account of one of his customers, he could recover from the customer for the merchandise that had been omitted from his account through such mistake, or get back from him the money which he had paid upon a settlement with him. "Statutes of limitation are vital to the welfare of society, and are favored in the law. They are found and approved in all systems of enlightened jurisprudence. They promote repose, by giving security and stability to human affairs. Important public policy lies at their foundation. They stimulate to activity and punish negligence. While time is constantly destroying the evidence of rights, they supply its place by a presumption which renders proof unnecessary. Mere delay, extending to the limit prescribed, is itself a conclusive bar." Wood v. Carpenter, supra.

The finding of the court that the defendant knew of the mistake and overpayment at or near the time the account was rendered, but never informed the firm thereof, does not add to the strength of the plaintiff's claim. It is not a finding that the payment was made to him with the knowledge on his part that it was a mistake, or that he contributed to the mistake; and, even if it had been, he had the right to rely upon the statute of limitations, if an action therefor was not brought within three years after Ivancovich knew, or had the means of knowing, of the mistake. The judgment is affirmed.

We concur: DE HAVEN, J.; FITZGERALD, J.; McFARLAND, J.; GAROUTTE, J.

(104 Cal. 395)

## WATKINS v. WILHOIT et al. (No. 18,167.)

(Supreme Court of California. Oct. 5, 1894.)

ASSIGNMENT FOR BENEFIT OF CREDITORS—VALIDITY.

An assignment of real and personal property for the benefit of creditors, which is recorded in a miscellaneous book of records, is valid as to creditors, though it might be avoided by a bona fide purchaser of the land for failure to record it in the deeds record.

In bank. Appeal from superior court, San Joaquin county; Ansel Smith, Judge.

Action by C. G. Watkins against R. E. Wilhoit and others to subject land to the payment of a judgment. A demurrer to the complaint was sustained, and plaintiff appeals. Affirmed. For commissioners' decision, see 35 Pac. 646.

John B. Hall, for appellant. F. T. Baldwin, P. S. Wilkes, and J. C. Campbell, for respondents.

BEATTY, C. J. This action is of the nature of a creditors' bill in equity to subject property in the hands or under the control of the defendants Wilhoit and Langford to the payment of a judgment at law against defendant Bryant in favor of the plaintiff. A demurrer to the complaint having been sustained, and the plaintiff having declined to amend his complaint, judgment passed for defendants. The plaintiff has appealed from the judgment upon the judgment roll, containing a bill of exceptions showing that the demurrer was sustained on the grounds "that the complaint does not state facts sufficient to constitute a cause of action, and that the action is barred by this statute of limitations."

The complaint shows that on June 2, 1890, the plaintiff recovered a judgment against Bryant for the sum of $2,342.60 on a promissory note made by the latter to the former on January 17, 1885, and that no part of the judgment has been paid. That before and on February 16, 1886, said Bryant was indebted to others besides the plaintiff, and was then, and ever since has been, insolvent, though he was then the owner of considerable real and personal property in the county of San Joaquin, where he resided. That on said 16th day of February, 1886, he executed to defendants Wilhoit and Langford and one Charles Bamert a deed purporting to convey to them all his real and personal property, except such as was exempt from execution, in trust for the benefit of all his creditors, without preference to any, except as provided by law, "to sell and dispose of said real estate and personal property, and to collect the said book accounts and choses in action, using a reasonable discretion as to the times and modes of selling and disposing of said estate as it respects making sales for cash or on credit, at public auction or by private contract or sale, with the right to compound for the said book accounts and choses in action, taking a part for the whole where and when the trustees deem and decree it expedient so to do;" then, after applying the proceeds to the payment of his debts according to law, to pay the surplus, if any, to him, Bryant. This instrument, with an inventory of the property thereby assigned attached thereto and made a part thereof, and the written acceptance of the trust by Wilhoit and Langford, are fully set out in the complaint. It is next alleged that said instrument has never been recorded in the office of the county recorder of said county in any book of records therein of grants, deeds or transfers of real estate, or in any book kept in said office for the recordation of conveyances or mortgages of either real or personal property, or otherwise or elsewhere recorded in said office, save and except that the instrument was, on the 16th day of February, 1886, transcribed into a book kept in said office, labeled "Book G, Miscellaneous." That within 30 days after the date of said instrument, pursuant to an order of a judge of the superior court, Wilhoit, Langford, and Bamert executed a bond with sureties for the faithful discharge of the trust as required by section 3467 of the Civil Code, and thereupon took possession of all the property described in said instrument, claiming title thereto as assignees. The complaint contains other allegations material to the cause of action, but not material to the points to be decided here.

The plaintiff contends that on the facts alleged the assignment of Bryant to Wilhoit and others was void as to him and other nonconsenting creditors, and his principal point is that it was void because it was never properly recorded. The argument is that since the assignment embraced real property it was subject to the provisions of article 4 of the chapter on recording transfers (Civ. Code, §§ 1213–1217, 3466); and that, never having been transcribed by the recorder into the proper book of records, in compliance with the provisions of chapter 4, it remained totally void as to all nonconsenting creditors. But conceding, for the purposes of this case, everything for which the plaintiff contends, as to the futility of filing a conveyance in the recorder's office, where such filing is not followed up by transcription into the proper book of records in due time, his conclusion that this assignment was void as to nonconsenting creditors does not follow. The whole object of article 4 of the chapter on recording transfers is to prescribe the effect of recording or failing to record upon subsequent purchasers or mortgagees. An assignment of real property for the benefit of creditors ought to be subject to these provisions as much as any other transfer of real property, because it as much within the policy of the statute as any other transfer of such property. Subsequent purchasers and mortgagees are entitled to the same notice in one case as in the other, and have a right to rely on the same means of knowledge as to the true state of the title when parting with value on the faith of the apparent ownership. But with respect to creditors of the assignor who do not part with anything the case is totally different, and they are not within the policy of these provisions. A transfer may be valid as to them although void as to subsequent purchasers in good faith and for value. To determine the validity of an assignment as to creditors, we look to the title "On Assignments for the Benefit of Creditors" (Civ. Code, § 3449 et seq.). Such assignments must be acknowledged or proved and certified like transfers of real property, and they must be recorded (section 3458); not, however, as prescribed in chapter 4, supra, but in accordance with sections 3463, 3464, of the Civil Code, neither of which, by its letter or spirit, requires transcription into any book of records in order to effect a complete transfer of the property to the assignee as against creditors. The object of recording, so far as they are concerned, seems to be to make the assignment public and irrevocable, and when that object is accomplished the creditors are fully protected. All are placed upon an equal footing. So far as creditors are concerned, the law is satisfied if the assignment is recorded in the county where the debtor resides, but to be effective against subsequent purchasers or mortgagees it must (under chapter 4, supra) be recorded in every county where any of the real property is situated, and it must be so recorded as to give them constructive notice. To determine what will give such constructive notice we look to section 1213 et seq., Civ. Code, but to determine what is recording without reference to the question of notice to subsequent purchasers we look to section 1170, Id. "An instrument is deemed to be recorded when, being duly acknowledged or proved and certified, it is deposited in the recorder's office with the proper officer for record." The complaint shows that this section was fully complied with. The assignment was recorded, and became binding and irrevocable as to the assignor and all creditors. True, it was subject to chapter 4 of the article on transfers, and if it was not recorded as that chapter requires it may be questioned by a subsequent purchaser or mortgagee; but the plaintiff in this case is not in that position.

The other objections to the assignment do not appear to merit particular discussion. The assignment was valid and effective, and the judgment of the superior court is affirmed.

We concur: McFARLAND, J.; FITZGERALD, J.; GAROUTTE, J.; VAN FLEET, J.

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## LITTLEHEAD v. WILHOIT et al. (No. 18,168.) TULLY v. SAME. (No. 18,169.) DUFFY v. SAME. (No. 18,170.)

(Supreme Court of California. Oct. 5, 1894.)

In bank. Appeal from superior court, San Joaquin county; Ansel Smith, Judge.

Three actions by S. S. Littlehead, John Tully, and Ann Duffy, respectively, against R. E. Wilhoit and others. Demurrers to the complaints were sustained, and the respective plaintiffs appealed. Judgments affirmed.

John B. Hall, for appellants. F. T. Baldwin, P. S. Wilkes, and J. C. Campbell, for respondents.

PER CURIAM. Upon the authority of Watkins v. Wilhoit (No. 18,167; this day decided) 38 Pac. 53, it is ordered that the judgment in each of the above-entitled causes be, and the same is hereby, affirmed.

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4 Cal. Unrep. 865

## DOW v. NASON et al. (No. 19,329.)

(Supreme Court of California. Oct. 4, 1894.)

PROMISSORY NOTE—PAYMENT BY PAYEE—EFFECT ON MAKER'S LIABILITY.

The payee of a note, in order to be able to have it discounted, induced another person to indorse it. An extension note, which was signed by the surety, but not by the maker, was paid, for the benefit of the surety, by the payee of the original note; and both notes were marked "Paid," and delivered to him. *Held*, that such payment did not extinguish the original maker's liability, as it was not by a mere volunteer.

In bank.

On petition for a rehearing. Denied.

For opinion on appeal, see 37 Pac. 656.

BEATTY, C. J. In his petition for a rehearing, counsel for appellant complains that his position has been misunderstood, and his points left undecided. As the opinion of the department is extremely brief, it will not be improper for me to state somewhat more fully the grounds upon which I concur in the order denying a rehearing. There is perhaps a slight verbal inaccuracy in that part of the opinion which states that the principal point in the case is whether the notes of H. W. Nason were paid. The question is rather whether they were so paid as to extinguish the indebtedness of H. W. Nason, and to restore to the plaintiff, as receiver of his estate, the ownership of the $5,000 note, by which they were partly secured. The superior court found that they were not paid, but were assigned to the Pamo Water Company, with their collateral. In order to support the judgment, it is not necessary that the evidence should sustain this finding, in the broadest sense of its terms. It is sufficient if there is evidence to show that, although the notes were paid, they were paid under such circumstances as to work an assignment to the water company; and I think the evidence does fully sustain the finding, in this sense. These are the facts: Nason bought from the water company 1,000 shares of its stock, and, in payment therefor, executed to Robinson, the president and trustee of the company, his note for $7,500, pledging the $5,000 note, which is in controversy here, as collateral security. The water company, being desirous of raising money, applied to the California National Bank of San Diego to discount Nason's note, which the bank agreed to do, but only on condition that Wood and Jones, members of the corporation, should indorse the note as sureties. This they did for the benefit of the company, and the bank took an assignment of the note, with its collateral. Nason did not pay it when it became due, but, by consent of the bank, renewed it several times; the accrued interest being added to the principal, and Wood and Jones signing as sureties. The last of these renewal notes was signed by Wood and Jones as sureties, but, owing to the temporary absence of Nason from the state, was not signed by him. Pending his return the bank retained possession of it and the previous renewal note. Before Nason had an opportunity of signing the last note, the bank went into the hands of a receiver, and this accounts for the existence of two notes for the same indebtedness. One of the points contended for by appellant was that one payment of this indebtedness extinguished both notes, and he complains that this point was overlooked. It was not necessary to notice this point, for the simple reason that there appears to be no controversy as to the fact that both notes were paid in the same sense. But the question, and the only material question, in the case, is whether they were so paid as to extinguish the indebtedness of Nason. Payment was made by the water company to the receiver of the bank. Both notes were marked "Paid," and delivered to the water company by the receiver, who at the same time transferred to the company the $5,000 note held as collateral. The contention of appellant is that the water company made this payment as a mere volunteer, and that the effect was to extinguish the indebtedness of Nason. He bases this contention upon the legal proposition that no man can be made debtor for money paid to his use unless he has requested the payment. But the fault in this argument is that the water company was not a volunteer. The sureties on the notes had become such for its benefit and accommodation. It was under a moral obligation certainly, and perhaps legally bound, to protect or reimburse them; and the circumstances under which it paid the notes fully warrant the conclusion that the payment was made in their behalf, and for their benefit. It was payment by one who was virtually, though not nominally, Nason's surety; and neither he nor his successor has any right to question the arrangement under which the company has merely discharged its own obligation, for really there is no substantial merit or equity in the claim of appellant, seeking, as he does, to reap where he has not sown, or, in other words, to subject another to loss in order that he may gain. In this view the findings of the superior court as to nonpayment and assignment of Nason's notes are fully sustained. They were paid as to the bank, but not as between Nason and the water company. They were not assigned to the water company by the receiver of the bank, but the water company was subrogated to the rights of the bank, and the collateral security transferred by the statute. Civ. Code, § 2349. This being so, the question as to the authority of the bank's receiver to assign the note becomes wholly immaterial.

(104 Cal. 288)

## ROGERS v. CADY, Sheriff, et al. (No. 18,296.)

(Supreme Court of California. Oct. 2, 1894.)

JUDICIAL NOTICE—COURTS—JURISDICTION—JUDGMENT—COLLATERAL ATTACK.

1. Courts will take judicial notice of the boundaries of a county, under Code Civ. Proc. § 1875, providing that the courts will take judicial notice of "whatever is established by law."

2. A government survey of public lands is a public, official act of the executive department of the United States, within the meaning of Code Civ. Proc. § 1875, providing that courts shall take judicial notice of such acts.

3. Under Const. art. 6, § 5, providing that all actions to recover possession of real estate, or for quieting title thereto or enforcing liens thereon, shall be commenced in the county in which the real estate is situated, the superior court of Lassen county has no jurisdiction of an action to foreclose a mortgage on land situated in Shasta county.

4. Where a judgment for foreclosure of a mortgage on land was rendered in the county of S., while the land was situated in L. county, the mortgagor, in an action to enjoin the sheriff from proceeding with the foreclosure sale, is not estopped from denying the jurisdiction of the court by a false recital in the judgment that the land was in S. county.

5. A court cannot, by rendering a decision in a cause, acquire jurisdiction of the subject-matter, denied it by the constitution.

Department 1. Appeal from superior court, Lassen county; W. T. Masten, Judge.

Action by Rogers against Cady, sheriff of Lassen county, and others, to enjoin a foreclosure sale of lands situated in Shasta county. Judgment for plaintiff, and defendants appeal. Affirmed.

Shinn & Shinn and S. Solon Holl, for appellants. Spencer & Raker, for respondent.

HARRISON, J. In 1884 the plaintiff executed to one Stanton a mortgage upon certain lands which are situate in Shasta county, but which were described in the mortgage as being in Lassen county, and the mortgage was recorded in Lassen county. In 1889 an action was commenced in Lassen county by the defendant Russell, as administrator of Stanton, to foreclose the mortgage, and in the complaint in this action the property sought to be foreclosed was described as follows: "The southeast quarter of northwest quarter, and lots 1 and 2 in section 31, township 37 north, range 6 east, Mt. Diablo base and meridian, containing 116 97-100 acres, according to government surveys." Service of the summons was had upon the defendant in the action (plaintiff herein), and, upon his failure to appear or answer the complaint, his default was entered, and judgment rendered August 26, 1889, foreclosing the mortgage, and directing a sale of the premises by the sheriff of Lassen county. An order of sale was issued upon this judgment October 5, 1892, by virtue of which the defendant Cady, as sheriff of Lassen county, was proceeding to sell the premises, when the plaintiff instituted the present action to enjoin him from making such sale. The case was tried by the court, and judgment rendered in favor of the plaintiff, as prayed for. A motion for a new trial was made and denied, and the defendants have appealed from both the judgment and order.

It is urged in support of the appeal that, by the judgment in the foreclosure suit, it was determined that the mortgaged premises are situated in Lassen county, and that by reason of this judgment the plaintiff herein is estopped from showing that said premises are not situated in that county. The lands affected by the foreclosure proceedings are clearly and distinctly described in the complaint therein, and in the judgment, by reference to the section and township of the government survey. The plaintiff was not required to introduce any evidence at the trial in support of his averment that these lands are situated in Shasta county. The county in which lands so described are situated is a matter within the judicial knowledge of the court, and is to be determined by it in the same manner as a legal proposition, and cannot be made an "issue" between the parties, to be determined by the court, in each case, upon conflicting evidence presented in that case. For the purpose of informing itself the court might inquire of others, or refer to books or documents, or any other source of information which it might deem authentic, but its action in this respect is not a part of the trial of issues in the action. Matters of which a court takes judicial knowledge are uniform and fixed, and do not depend upon uncertain testimony, and the failure or refusal of a trial court to take such notice does not prevent the appellate court from giving proper effect thereto. See Hunter v. Railroad Co., 116 N. Y. 615, 23 N. E. 9. Every court, by virtue of its organization, takes judicial knowledge of the extent and boundaries of the territory within which it can exercise jurisdiction, as well as the subject-matter over which jurisdiction has been conferred upon it. Section 1875, Code Civ. Proc., declares: "Courts take judicial notice of the following facts: * * * (2) Whatever is established by law. (3) Public and private official acts of the legislative, executive and judicial departments of this state and of the United States." The boundaries of Lassen county are "established by law" (Pol. Code, § 3912); and the government surveys of the public lands are "public, official acts of the executive department of the United States," and are matters of official record. It was therefore a matter for the court to determine, either from the personal knowledge of the judge, or from an examination by him of those records, whether any of the sections in township 37 N., range 6 E., M. D. M., were situated in Lassen county or not. Smitha v. Flournoy, 47 Ala. 348; Devine v. Burleson, 35 Neb. 238, 52 N. W. 1112; People v. Wood, 131 N. Y. 617, 30 N. E. 243; Faekler v. Wright, 86 Cal. 210, 24 Pac. 996; Cole v. Segraves, 88 Cal. 103, 25 Pac. 1109.

The judgment in the foreclosure proceedings did not estop the plaintiff herein from asserting that the mortgaged premises are situated in Shasta county. That judgment merely declared that the plaintiff herein had mortgaged "the southeast quarter of northwest quarter, and lots 1 and 2 in section 31, township 37 north, range 6 east, Mt. Diablo base and meridian, containing 116 97-100 acres, according to government surveys." In view of the fact that the court below, as well as this court, takes judicial knowledge that these sections are not within Lassen county, the further recital in the judgment that they are "situated in the county of Lassen" may be likened to a false call in a deed of conveyance. The lands which the court adjudged had been mortgaged were the designated sections, and the further inconsistent declaration by it that they are situated in Lassen county must yield to the determination of their particular situation.

Even if the language used by the court could be regarded as an express adjudication that the lands are within Lassen county, it would not estop the plaintiff from asserting that the court was without jurisdiction to render such judgment. The judgment of a court may always be impeached for want of jurisdiction, and, when the judgment is upon a subject-matter over which the court could under no circumstances have any jurisdiction, the objection may be taken at any time when such judgment is invoked. A judgment of one of the former district courts in this state, admitting a will to probate, or a judgment of one of the present superior courts in this state, convicting a person of smuggling, or enjoining a defendant from infringing a copyright, would have no validity, under any circumstances, for the reason that the subject-matter of such judgment was never within the jurisdiction of the court. There is no occasion in the present case to invoke a presumption of jurisdiction from the fact of its exercise. The want of jurisdiction appears upon the face of the judgment. By section 5 of article 6 of the constitution, an action for the foreclosure of a mortgage upon lands in Shasta county could not be commenced in the superior court of Lassen county; and, when it appeared from the description of the lands set forth in the complaint that they were not within Lassen county, the proceeding should have been dismissed. Fritts v. Camp, 94 Cal. 393, 29 Pac. 867. A court cannot, by any decision that it may make, either implied or direct, acquire jurisdiction over a subject-matter that has been denied to it by the constitution; and, whenever it appears upon the face of a judgment that it was rendered upon a subject over which the court could have no jurisdiction, such judgment has no validity. The constitution denied to the superior court of Lassen county any jurisdiction over the subject-matter of the foreclosure proceedings, and, as it never had any jurisdiction to entertain the action, its determination upon any question arising in this proceeding cannot have any authority. There are certain cases in which the jurisdiction of a court depends upon the existence of some quasi jurisdictional fact necessary to be proven in order to authorize the court to act, and which it must itself determine from evidence before it can have jurisdiction to determine the controversy. Brittain v. Kinnaird, 1 Brod. & B. 432, is a leading illustration of this principle; and in Noble v. Railroad, 147 U. S. 174, 13 Sup. Ct. 271, may be found reference to a number of cases of the same character. But the present case does not fall within this principle. As we have seen above, there was no question of fact to be determined by the trial court. When the subject-matter upon which the jurisdiction of a court rests is limited by the constitution, the court looks to that instrument for its jurisdiction, and cannot, by its mere decision, acquire jurisdiction over a matter therein denied to it. The plaintiff herein did not take any step in the foreclosure proceedings which could be regarded as an estoppel on his part, or a waiver of his right to object to the jurisdiction of the court. The first step taken by him was to make this objection, and he made it as soon as the plaintiff attempted to enforce the judgment. As the plaintiff did not attempt to enforce the judgment until more than three years had elapsed after its entry, he ought not to complain if in the meantime he has lost any rights by reason of his inaction. The judgment and order are affirmed.

We concur: **VAN FLEET, J.; GAROUTTE, J.**

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(104 Cal. 381)

## MEYER et al. v. GREAT WESTERN INS. CO. (No. 15,317.)

(Supreme Court of California. Oct. 5, 1894.)

MARINE INSURANCE — ACTION ON POLICY — EVIDENCE — BARRATRY OF MASTER — UNNECESSARY SALE OF GOODS—STATEMENTS OF AGENT—ADMISSIBILITY.

1. In an action on a marine policy on merchandise, the question whether a sale by the master of the merchandise was due to the perils of the sea depends on whether a reasonably prudent man would, under the circumstances, have deemed it necessary to sell the goods.

2. In an action on a marine policy insuring merchandise against the barratry of the master, evidence that much of the cargo was sold, some of it beyond its original price, before it was discharged, and before the damage to the vessel was ascertained; that the cost of repairing the vessel was trifling, and occupied only a few days; that the master, a part owner of the vessel, though knowing the owner, failed to notify him either of the damage to or sale of

the cargo; and that soon after the repair of the vessel he abandoned the voyage, and sailed to another, distant port,—is sufficient to sustain a verdict that the sale was barratrous.

3. The fact that the master of a vessel is also a part owner does not incapacitate him to commit barratry as to the cargo.

4. Where, at the instance of the insurer, a member of the Board of Underwriters, a telegram is sent to the board's agent at the port where an insured cargo was sold, such agent's letter to the board in answer thereto, in regard to the loss and sale, is admissible against the insurer, though it is not entirely responsive to the telegram, it being in the nature of a report to his principal by an agent, and therefore equivalent to admissions by the principal.

5. A letter by such agent to a reinsurer is not competent evidence against the insured, as it is merely a statement to a third party, with whom the insured has no relation.

Department 1. Appeal from superior court, city and county of San Francisco; John F. Finn, Judge.

Action by Meyer and others against the Great Western Insurance Company. There was a judgment for plaintiffs, and defendant appeals. Affirmed.

Milton Andros (E. W. McGraw, of counsel), for appellant. Page & Eells and Pillsbury & Blanding, for respondents.

HARRISON, J. The defendant issued its policy of insurance to the plaintiffs in the sum of $9,500, against an actual total loss of certain merchandise, consisting of coke, coal, soda crystals, and soda ash in the ship Melanesia on her voyage from Newcastle-on-Tyne to San Francisco, and also $500 on commissions and freight profits. The risks against which the insurance was made were the perils of the sea, barratry of the master and mariners, and other perils usually insured against in a policy of marine insurance. The Melanesia sailed from Newcastle on the 21st day of December, 1884, and on the 21st of June following, in consequence of having sprung a leak, she proceeded to Montevideo, where she was repaired and put in a fit condition to proceed on her voyage, and on the 17th of October, 1885, she sailed from Montevideo for Akyab, in India, where she arrived January 4, 1886. Upon her arrival at Montevideo, the master discharged the soda ash and soda crystals from the vessel, and sold them at public auction. The coke and coal were sold by him upon the vessel before they were discharged. Other portions of the cargo were sold by him, and the voyage to San Francisco was abandoned. The plaintiffs brought this action, claiming an actual total loss under the provisions of the policy, while the defendant denied that the loss had occurred within any of the risks assumed by it. Upon the issues thus made, evidence was presented to the jury, from which they were called upon to determine whether the sale by the master was necessitated by reason of the perils of the sea, or whether he was actuated by improper motives in making the sale. Upon these points the jury were fully instructed by the court in reference to the law applicable thereto, and to these instructions no exception was taken. The jury rendered a verdict for the plaintiff; and a new trial was asked upon the ground of insufficiency of the evidence to sustain the verdict, and for certain errors of law occurring at the trial. From the judgment and the order denying a new trial, the defendant has appealed.

In the statement on motion for a new trial the defendant specifies, as the particulars in which the evidence is insufficient to show that the cargo was lost by reason of any of the perils insured against, that it does not appear that there was any necessity for its sale, or that, if the cargo had been reshipped, it would not have arrived at San Francisco as the article originally shipped, or that it was in such a condition as to make it dangerous for the ship to carry it forward to its place of destination; and also that the evidence was insufficient to show that the master acted in bad faith, or fraudulently, or from any improper motive in making the sale. These specifications are pointed to the instructions of the court, in which the jury were told, in substance, that if, from the evidence, they found these facts, the plaintiffs were entitled to recover. There was evidence before the jury upon all of these matters, and at the request of the respective parties the jury were fully instructed by the court upon the propositions of law applicable thereto. They were told the conditions which would create a necessity for the sale, and what would be an actual total loss of the articles insured, within the meaning of the policy; and they were also told that the necessity of the sale was to be determined by them from all the circumstances of the case, as disclosed by the evidence. Their verdict in favor of the plaintiffs establishes that they were satisfied from the evidence that there was an actual total loss, within the meaning of the policy, as construed under the instructions of the court; and, if there is any evidence in support of the verdict, the verdict must be upheld. The refusal of the trial court to set it aside is itself of great weight, and shows that, in the opinion of the judge who heard the case, the evidence was sufficient to uphold it. It is not sufficient thereafter, upon an appeal, to point out, or even demonstrate to this court, that the verdict is against the preponderance of evidence, or that upon the same evidence other persons would come to a different conclusion. If there is any evidence upon which the jury could have found its verdict, it must be upheld.

It would serve no useful purpose to review the record, and point out the portions which sustain the conclusion of the jury. The intrinsic character of the cargo, its condition upon its arrival at Montevideo, and the extent of injury it had then received, the effect of discharging and reshipping the several portions thereof, the liability to further injury by a prosecution of the voyage, and the probability of risk or danger in attempting to continue the voyage to San Francisco with some portions of the cargo, were all laid before the jury; and they were required to determine whether, upon a fair consideration of all these circumstances, acting as reasonable men would act, there was that necessity for making the sale which the court had told them was necessary in order to bring the loss within the risks assumed by the defendant. It was not necessary to demonstrate with mathematical exactness the impossibility of continuing the voyage with the cargo, or that, if it was reshipped, it would not sustain injury or create danger; nor was the actual condition of the cargo at Montevideo an absolute test of the necessity of the sale. The question to be determined by the jury was whether a prudent man, in the exercise of his deliberate judgment, and upon a reasonable calculation of the future, under the light of these circumstances and the facts disclosed by this evidence, would deem it necessary to sell the cargo. The consideration of these circumstances as they were presented to the jury created at least a substantial conflict in the evidence upon this proposition, and we are not at liberty to disregard the conclusion at which they arrived.

The jury were also instructed that, if the sale by the master was barratrous, there was an actual, total loss, within the meaning of the policy; and upon this subject they were told that, "if the master acted in bad faith in selling the cargo of the Melanesia for the purpose of serving his own ends, or acted against what he knew or believed to be the law, though he thought he was advancing the interests of the owners of the cargo, then his conduct in selling the cargo was what is called 'barratrous.'" Upon this point there was evidence to the effect that the cost of repairing the vessel was trifling, and occupied only a few days; that much of the cargo was sold before it was discharged, and before the master had had an opportunity to ascertain the extent of damage to his vessel; that some of it was sold for a price beyond that of its original cost; that the master knew the insured and the owners of the cargo, and failed to communicate with them, or notify them of the damage, or of his sale of the cargo, or of his purpose to make the sale; that the master was himself a part owner of the vessel; and that, very soon after its repair, he abandoned the voyage to San Francisco, and sailed for a distant port in India. These facts might well cause the jury to believe that he had acted in bad faith in making the sale; that his interest in the vessel and its earnings prompted him to seek a different field therefor, and caused him to forego his obligation to protect the cargo, for the benefit that he might derive by abandoning the voyage. See New Orleans Ins. Co. v. Albro Co., 112 U. S. 506, 5 Sup. Ct. 289. Especially if the jury had believed, as is contended by the appellant upon the proposition previously discussed, that the ship was in a seaworthy condition and fit to make the voyage to San Francisco, and that there was no necessity for a sale of the cargo, would they be authorized to find that the sale was made in bad faith, and that the master had been guilty of barratry. The fact that the master was a part owner in the vessel did not incapacitate him from committing barratry, especially with reference to the cargo. Jones v. Nicholson, 10 Exch. 28.

Certain rulings of the court are assigned as error, but none of them are such as to authorize a reversal of the judgment. The plaintiff offered in evidence a letter from Theobald & Co., of Montevideo, to the secretary of the San Francisco Board of Underwriters, of which body the defendant was a member, acknowledging the receipt of a telegram regarding the loss of the Melanesia. The plaintiff Meyer had testified: "I had a conversation with the agent of the defendant with reference to the agents of the Board of Underwriters at Montevideo,—Theobald & Co. He several times told me they were waiting to get an answer from Theobald & Co. about the particulars of the accident to the Melanesia, and of the action taken thereupon. * * * From the conversations I had with the agent of the Great Western Insurance Company, he told me, while the risk on the Melanesia was pending, that the Union Insurance Company was interested as reinsurers of the Great Western, and he had to consult with Mr. Touchard, the then president of the Union Insurance Company, and that they had decided to telegraph to J. K. Theobald & Co. that the ship must continue on her voyage; and they gave me at the time even the terms of the identical cable which they had sent." The defendant objected to a portion of the letter "as being immaterial and irrelevant, and as being the talk of Theobald, giving his opinion on a variety of matters not responsive to any telegram sent to him;" but the objection was overruled. There was no error in this ruling. The portion objected to was not inadmissible for the reason that it was not responsive to the language of the telegram. It was written by reason of the telegram that had been sent at the instance of the defendant, and was a part of the correspondence by the defendant with reference to the loss. It was relevant to the issues before the court, and might become material upon showing the relations of Theobald & Co. to the defendant. No objection was made to its competency on the ground that Theobald & Co. were not the agents of the defendant, or that the scope of their agency did not include the disposition of the insured property. Meyer had referred to them as the agents of the Board of Underwriters, and it was admitted that the defendant was a member of that board, and the agent of the defendant had stated to him that the telegram had been sent at his instance. The statement of facts connected with the disposition of the cargo is to be considered in the nature of a report by a general agent to his principal. Such a report is equivalent to a declaration by the principal himself. See Whart. Ev. § 1177. The statements in the letter that the writer considered the sale best for all concerned, and that he considered the prices obtained very good, were, it is true, mere matters of opinion; but they were not specially objected to, and, even if they had been, they are of such a character that no harm could have resulted from their being brought to the knowledge of the jury. The subsequent letter from Theobald & Co. to the Union Insurance Company was properly excluded. It was merely a statement to a third party, with whom the plaintiffs had no relation. The other rulings objected to are not of such a nature as to require any comment. The court committed no error in modifying the instructions asked for by the defendant. The judgment and order are affirmed.

We concur: VAN FLEET, J.; GAROUTTE, J.

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4 Cal. Unrep. 830

## WHEELAN v. BRICKELL et al. (No. 15,557.)

(Supreme Court of California. Sept. 29, 1894.)

HUSBAND AND WIFE—PUBLIC LANDS—TRUSTS.

In 1860 a married man went into possession of government land known as the "Outside Lands" of San Francisco. In 1863 he died, and his wife, with their children, continued in possession, and was in possession at the passage of Act Cong. March 8, 1866 (14 Stat. 4), relinquishing the title of the United States in said lands to the city of San Francisco, in trust to be "disposed of and conveyed by said city, to parties in the bona fide actual possession thereof by themselves or tenants on the passage of this act," on such terms as the legislature should prescribe. While the husband and wife were in possession, they executed a declaration of homestead under the California homestead act of 1862, by which the homestead estate, on the death of either, vested absolutely in the survivor. Thereafter, the city deeded the land to the widow, she having complied with the various ordinances and legislative acts relative thereto. *Held*, that as she had bona fide, actual possession at the passage of the act, no trust arose, under the conveyance to her, in favor of said children. Baker v. Brickell, 25 Pac. 489, 1067, 87 Cal. 329, followed.

Department 1. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Action by Fairfax H. Wheelan, administrator of the estate of John H. Baker, deceased, against John Brickell and another, to quiet title to the said estate. Judgment by default for defendants, and plaintiff appeals. Affirmed.

King & Shaw, for appellant. A. N. Drown, for respondents.

PER CURIAM. This is an action by Fairfax H. Wheelan, administrator of the estate of John H. Baker, deceased, to quiet the title of the estate of the said John H. Baker, deceased, in and to certain lands, known as "Outside Lands," situate and being within the present limits of the city and county of San Francisco; to have said lands restored to the possession of said estate for administration and distribution; to recover damages from defendants as and for the value of the use and occupation, rents, issues, and profits thereof, etc. Defendants interposed a demurrer to the complaint upon several statutory grounds, among which was that the complaint does not state facts sufficient to constitute a cause of action. The demurrer was sustained by the court below, and, plaintiff having declined to amend his complaint within the time and pursuant to the leave for that purpose granted, his default was duly entered, and final judgment for costs was entered in favor of defendants, from which judgment plaintiff appeals. The questions arising on the appeal in this case are substantially the same as those considered by this court in the action No. 15,074, between the same parties, decided June 10, 1893 (not reported in California Reports, but see 33 Pac. 396), and in Baker v. Brickell, 87 Cal. 329, 25 Pac. 489, 1067. What was said in Wheelan v. Brickell, No. 15,074, will apply with equal force here; and upon the authority of that case, and of Baker v. Brickell, 87 Cal. 329, 25 Pac. 489, 1067, the judgment appealed from is affirmed.

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104 Cal. 243

## LEE SACK SAM v. GRAY. (No. 18,271.)

(Supreme Court of California. Sept. 29, 1894.)

REFERENCE—CLAIMS AGAINST ESTATE—FINDINGS.

Code Civ. Proc. § 643, requires referees to report their findings in writing, and state separately therein the facts and conclusions of law. Section 1508 provides that in case of a reference of a doubtful claim against the estate the same proceedings shall be had as in other cases of reference. *Held*, that findings by the court, sitting as a referee to determine the validity of a claim against the estate, stating that "the evidence produced herein is insufficient to establish the validity of said claim," without setting out any of the evidence, is insufficient to support a judgment.

Commissioners' decision. Department 1. Appeal from superior court, Fresno county; S. A. Holmes, Judge.

The validity of a note held by Lee Sack Sam against the estate of Man Wo Chan, deceased, was submitted to the judge of the superior court of Fresno county as referee. From a judgment disallowing the claim, Lee Sack Sam appeals. Reversed.

Thos. F. Barry and Wiley J. Tinnin, for appellant. M. Farley and J. W. Knox, for respondent.

SEARLS, C. This is an appeal from an order or judgment in probate made by the superior court of the county of Fresno, and comes up on the judgment roll, without any statement or bill of exceptions. The following facts will sufficiently illustrate the proceedings had: On the 4th day of April, 1892, Lee Sack Sam presented his claim against the estate of Man Wo Chan, deceased, duly verified, for $21,600, to William W. Gray, administrator of said estate, for allowance. The claim is founded upon a promissory note, of which the following is a copy: "$20,000. San Francisco, Dec. 29, 1889. Eight months after date (no grace), for value received in gold coin of the government of the United States, I promise to pay to Lee Sack Sam, or order, the sum of twenty thousand dollars, with interest from date, at the rate of one per cent. per month until paid, both principal and interest payable alike in gold coin. [Signed] Lee Sing." Which promissory note is indorsed as follows: "For value received, hereby waive protest, demand, and notice of nonpayment. Man Wo Chan. Man Wo Chan." No action was taken on said claim by the administrator of the estate of Man Wo Chan, deceased, until on or about January 16, 1893, when the administrator, being in doubt as to the correctness of the claim, entered into an agreement in writing with the claimant, under section 1507 of the Code of Civil Procedure, to refer the matter in controversy to the superior court of Fresno county for decision, "or, in other words, that a reference may be had in said court." The agreement was approved by the court, and duly filed in the office of the county clerk; and thereafter a minute of the order was entered, etc., as provided by section 1507, supra. The court, sitting as a referee, heard the case and made its report, wherein there is set out what purports to be the testimony taken, and found the facts and conclusions of law as follows: "(1) That said claim was presented to the administrator, E. H. Cox, within the proper time after first publication of notice to creditors. (2) That the evidence produced herein is insufficient to establish the validity of said claim, or to authorize the same to be allowed or approved. And, as a conclusion from the foregoing, said referee advises that said claim be not approved or allowed, but that the same be rejected. Dated April 23, 1893. S. A. Holmes, Judge of the Superior Court (said court sitting herein as referee)." The report of the referee was presented in open court April 22, 1893, and an order entered approving the same, and the claim "disallowed, disapproved, and rejected." On the 23d day of May, 1893, a judgment was entered by the court, adjudging that Lee Sack Sam take nothing by his claim and reference against the estate of Man Wo Chan, deceased, and awarding the costs of the proceeding against the said claimant, as provided by section 1508, Code Civ. Proc.

Counsel for respondent make several objections to the consideration of the testimony on this appeal, only one of which need be noticed. The report of the referee is simply a report of the evidence upon which he based his decision, and forms no part of the judgment roll. "A copy of the verdict of the jury, or finding of the court or referee," forms a part of the judgment roll. But the testimony, unless embodied in a bill of exceptions and filed, is not a part thereof. Code Civ. Proc. § 670; Harper v. Minor, 27 Cal. 109. It only remains to inquire in relation to the sufficiency of the findings to support the judgment. Section 1508, supra, provides that in cases of this character "the same proceedings shall be had in all respects, and the referee shall have the same powers * * * and be subject to the same control as in other cases of reference." The apparent object of this section seems to be to bring referees in this class of cases within the rules prescribed for their government and direction in ordinary cases. Turning to section 643 of the same Code, and we find it provided that "the referees or commissioner must report their findings in writing to the court, * * * and the facts found and conclusions of law must be separately stated therein;" and by section 645, "when the referee is to report the facts, the finding reported has the effect of a special verdict." "As the same proceedings shall be had in all respects" in the class of cases we are considering, it must follow that the referee should not only report in writing, but find the facts upon which the judgment of the court is thereafter to be pronounced. By no other means can the court be informed so as to intelligently act in the premises. In this view the findings in this case are fatally defective. No court can say from them whether the claim as presented was, in point of law, one that should have been allowed or rejected by the administrator. In cases tried by the court, written findings may be waived, as prescribed by section 634, Code Civ. Proc.; and in favor of the judgment, if no findings appear, such waiver will be presumed, unless the contrary is made to appear. This presumption can have no application to the report of a referee, for the reason that no provision is made for a waiver in such cases, and, in the very nature of the case, should not be. It will not do to say that in this instance the court or the judge thereof was the referee, and hence that no findings were necessary. The court or judge sitting as a referee is as distinct in law from the court acting as such within its own proper sphere as if a different referee had been selected. The Code fixes one rule for the guidance of all referees, and they are alike, and without exception, subject to its provisions. The judgment appealed from should be reversed, and a rehearing had.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is reversed, and a rehearing ordered.

104 Cal. 432

## In re DOBBEL'S ESTATE. (No. 15,569.)

(Supreme Court of California. Oct. 31, 1894.)

WIFE'S SEPARATE PROPERTY—POLICY ON HUSBAND'S LIFE—HUSBAND'S RIGHTS AS HEIR.

1. A life insurance policy taken out by a husband, and made payable to his wife, her executors, administrators, or assigns, is her separate property; and he is entitled to one-third thereof, as heir of the wife, in case she dies first.

2. The fact that there was no administration on the wife's estate until after the husband's death does not deprive his estate of his right as her heir.

Department 1. Appeal from superior court, San Mateo county; George H. Buck, Judge.

Appeal by Henry Dobbel and another from a judgment in the matter of the estate of Margaretha L. Dobbel. Reversed.

Geo. C. Ross and Henry W. Walker, for appellants. Edw. F. Fitzpatrick, for respondent.

GAROUTTE, J. This is an appeal from a decree of final distribution of an estate, and is taken by the administrator of the estate of Henry Dobbel, deceased, and by a creditor of his estate. The facts of the case may be briefly stated as follows: Henry Dobbel took out a paid-up policy of insurance upon his life in favor of his wife, Margaretha. Margaretha died intestate. Six years later, her husband, Henry, died. The policy was made payable to "Margaretha L. Dobbel, her executors, administrators, or assigns." Upon the death of Henry, his son was appointed administrator of Margaretha's estate; and the insurance company paid him, as such administrator, the amount of the policy. The husband and wife left, surviving them, seven children; and, by the decree of distribution appealed from in this case, the trial court awarded the proceeds of this policy to the children in equal shares. It is now claimed by appellant that the estate of Henry Dobbel is entitled to all of said moneys as community property; and, secondly, if this contention be unsound, that his estate is entitled to one-third of said moneys, the husband being an heir of the wife, and the money being her separate property.

It cannot technically be said that the money here in dispute was either the separate property of the wife, or common property of the spouses, for this money was the property of the insurance company until after the death of both, and until it passed to her administrator. But the insurance policy, when issued, was property, and valuable property. It could be sold, assigned, or bequeathed by the owner thereof. Its pecuniary value to its owners was as great as though they held a promissory note of the company for that amount, payable upon the same conditions. It was a chose in action, and, upon its satisfaction by a payment of the amount specified, the title to the money so paid followed the title to the policy. This policy was the separate property of the wife under any aspect of the case. If it was bought with the separate property of the husband, or with money of the community, it was a gift by the husband to the wife. That a policy payable as the present one is payable is the separate property of the wife there is no question, viewed in the light of the authorities. Pence v. Makepeace, 65 Ind. 345; Wilburn v. Wilburn, 83 Ind. 55; Harley v. Heist, 86 Ind. 196, and cases there cited; Bliss, Ins. § 317. The principle involved and decided in the case cited from 86 Ind. is in all material respects the same as that which is now before us, and the court there used the following language: "The policy in this case, by its terms, was executed for the benefit of the wife, and, by a fair construction, was payable to her, and not to the personal representatives of the husband. Upon its execution the title vested in the wife, and not in the husband. By the procurement of the husband, the wife became the owner of the policy, and entitled to collect the amount that might become due on the same upon the death of the husband. Had the wife procured the policy to be issued and paid the premiums, no one could doubt as to the ownership of the policy and the right to collect the money due thereon. We are unable to see in this case why there should be any difference in the ownership and title of the policy by reason of the application having been made and the premiums paid by the husband. Had the policy been made payable to the husband, he, doubtless, might have given it to the wife, and, by proper indorsements thereon, conveyed to her the legal title to the same. In such case it would have become her separate property by gift from her husband; and so, too, he had the legal right in the first instance to make the application, pay the premiums, and have the policy made payable to the wife for her benefit, and thus vest in her the legal title and ownership of the property as her separate property."

The policy of insurance, being her separate property, passed to her heirs at the time of her death, she having died intestate; and her husband took a one-third interest therein, by virtue of his heirship. There is no reason why the administration upon Margaretha's estate should have been delayed until her husband's death. Conceding her estate to have consisted alone of the insurance policy, still it was property, subject to administration and distribution as any other piece of personal property. If such administration and distribution had taken place prior to the husband's death, he would have stood in the same relation to this policy as he would to any other separate property owned by her, and title to a one-third interest therein would have passed to him, as an heir and distributee. If such a course had been followed, his interest in the policy would have passed to his estate like any other property which may have belonged to him at the time of his death, and the mere fact that no administration was had upon his wife's estate until after his death in no way affects the title to the policy. The husband's estate occupies exactly the same position with reference to this policy that it does with reference to any other piece of property belonging to the wife at the time of her death. As an heir of his wife, he had an interest in her estate, which he could at any time have sold, subject to the claims of administration thereon. He could have disposed of it by will; and if he had the right to sell or devise, and failed to exercise that right, it passed to his heirs, subject to administration.

For the foregoing reasons, we think one-third of the moneys forming the proceeds of this insurance policy should have been distributed to the administrator of the estate of Henry Dobbel. It is ordered that the judgment and order be reversed, and the cause remanded, with directions to the trial court to enter a decree in accordance with these views.

We concur: HARRISON, J.; VAN FLEET, J.

(104 Cal. 415)

## PEOPLE v. PORTER. (No. 21,111.)

(Supreme Court of California. Oct. 27, 1894.)

PERJURY—SUFFICIENCY OF EVIDENCE.

In a prosecution for perjury for making a false affidavit to schedules in insolvency, evidence that defendant, shortly before filing the schedules, collected large sums of money, for which he failed to account, and that his wife, accompanied by him, deposited in bank, shortly afterwards, a large sum in her own name, is insufficient to warrant a conviction.

Department 1. Appeal from superior court, Santa Cruz county; J. H. Logan, Judge.

Daniel M. Porter was convicted of perjury, and appeals. Reversed.

Geo. A. Knight and Spalsbury & Burke, for appellant. Atty. Gen. Hart, for the People.

GAROUTTE, J. Appellant was convicted of the crime of perjury, and appeals from the judgment and order denying his motion for a new trial. It appears by the information that the perjury charged against the appellant, and of which he was convicted, consisted in taking a false oath to his petition and schedules in insolvency; and the falsity of the oath consisted in the statement that he intentionally and fraudulently omitted therefrom certain of his property, to wit, "money and other personal effects." It is now claimed that the evidence is not sufficient to support the verdict, and, upon a careful examination of the record, we have arrived at that conclusion. The salient points in the evidence upon which the people rely for a conviction may be briefly stated as follows: (1) Appellant was engaged in the business of carrying on a sawmill for the manufacture of lumber. (2) About 10 days prior to the day upon which his petition in insolvency was filed, and in the after part of the night, his office and all his account books were destroyed by fire. It was attempted to show that he was the cause of this fire, but the evidence wholly fails to support the claim. (3) During the 90 days preceding the day of the commission of the alleged perjury, appellant collected large sums of money from his debtors; and, as shown by his schedule attached to his petition in insolvency, he had no money on hand at the time of the filing of the same (there is no evidence in the record indicating what disposition was made of these moneys). (4) Ten days after the filing of his petition in insolvency, his wife, accompanied by himself, deposited to her credit, in the Hibernia Savings Bank of the City of San Francisco, $3,250. There are a few other matters of evidence disclosed by the record which we deem of little importance, and unnecessary to here detail. It is now claimed by the prosecution that this $3,250 deposited in the name of the wife in the Hibernia Bank was money of the appellant, belonging to him at the time he filed his petition and schedule in insolvency and took the aforesaid false oath, and that therein lies the commission of the perjury. If the rule as to the character of evidence requisite to support a conviction upon a charge of perjury were the same as that demanded in all other cases, with a few exceptions, we would even hesitate, under such circumstances, to declare the charge here alleged proven, for a simple recital of this evidence could hardly be said to satisfy an unbiased, ordinary mind, beyond a reasonable doubt, that the money deposited in the bank by the wife was the money of the husband 10 days prior to that time. Such a conclusion could only be reached after an indulgence in surmises, speculations, and conjectures, not countenanced in criminal law. But whatever aspect the case may present, viewed in the light of the general and ordinary rules of evidence, the rule of evidence necessary to convict upon a charge of perjury is specially declared by the statute, and by that statute courts are bound. That rule declares that perjury must be proven by the testimony of two witnesses, or one witness and corroborating circumstances (section 1968, Code Civ. Proc.), and this case must be weighed and measured by that test, and, when so weighed and measured, it wholly fails to meet the requirements of that provision of the law. There are neither two witnesses to the act of perjury, nor one witness and corroborating circumstances. Possibly, the corroborating circumstances are sufficiently proven, but the one witness demanded by the terms of the statute is lacking. It is contemplated by the statute that there must be the testimony of one witness to facts that are absolutely incompatible with the innocence of the accused before a conviction is justified by the law, and there is no such evidence in this case. The principle here involved was considered and directly adjudicated upon in the recent case of People v. Wells (Cal.) 37 Pac. 529; and the views of the court there expressed are again approved and declared the true rule in prosecutions charging the offense of perjury. It becomes unnecessary to notice the remaining questions discussed. For the foregoing reasons, the judgment and order are reversed, and the cause remanded.

We concur: VAN FLEET, J.; HARRISON, J.

(104 Cal. 407)

## WICKERSHAM v. JOHNSON. (No. 15,564.

(Supreme Court of California. Oct. 26, 1894.)

LAWS OF FOREIGN COUNTRY — PRESUMPTIONS — SALE OF DECEDENT'S EFFECTS—VALIDITY—FOREIGN JUDICIAL RECORDS — PROOF — ATTESTED COPY.

1. As, in the absence of evidence to the contrary, the law of a foreign country is presumed to be the same as the law of California, one who purchases notes from an executor appointed by an English court, and fails to show that under the English law the executors had power to sell the notes, must show that they were sold in accordance with Code Civ. Proc. § 1517, which requires a sale of any property of a decedent to be authorized by an order of the superior court.

2. Code Civ. Proc. § 1906, providing that a judicial record of a foreign country may be proved by the attestation of the clerk, with the seal of the court, and certain other certificates, authorizes a copy of such record to be so proven.

3. To prove the probate of a will and administration granted in a foreign country, as to the procedure in which there is no evidence, a transcript of an order of the foreign court to the effect that on a certain day the will was proved and registered and administration granted is not sufficient, it being necessary to introduce the proceedings leading up to the order, and which gave the court jurisdiction.

Department 2. Appeal from superior court, Humboldt county; G. W. Hunter, Judge.

Action by George W. Wickersham against Richard Johnson on three promissory notes. Judgment was rendered for plaintiff, and defendant appeals. Reversed.

C. M. Wheeler and P. F. Hart, for appellant. Edward J. Ryan and J. N. Gillett, for respondent.

McFARLAND, J. The plaintiff brought three actions against the defendant, each upon a promissory note made by the defendant to one John Lancaster, since deceased, who was a British subject, and a resident of England, where he died testate on the 21st of April, 1884. The three actions were by the consent of parties and an order of the court consolidated. The court rendered judgment for plaintiff for the amount of the principal and interest of said three notes with costs, etc. Defendant appeals from the judgment.

The judgment of the lower court went upon the theory, founded upon the findings, that the two sons of the deceased, George Granville Lancaster and John Lancaster, Jr., were appointed by the will of the deceased as the executors thereof, and qualified as such, and were also appointed "administrators of the personal estate" of the deceased, John Lancaster; that the will of the deceased was duly probated in an English court; that by said will the said sons were also made residuary legatees; and that on November 15, 1880, the said sons, George and John, as such executors and administrators, and being the owners of said notes, "sold, transferred, and set over" the same to the plaintiff herein. The main evidence in the case introduced by plaintiff is found in a certain commission to take the testimony of said George and John Lancaster, issued to John C. New, consul general of the United States at London, by which it was undertaken to prove all the foregoing facts as to the death of John Lancaster, deceased, the existence of the will, its probate, issuance of letters testamentary and letters of administration to the sons, etc. Many objections were made by appellant to various parts of the evidence contained in said commission, but we will assume for the present that the evidence contained in this commission sufficiently shows the facts above referred to. There was no evidence at all tending to show what the law was in the foreign country touching any of the questions which are raised here, and it must therefore be assumed that the law with respect to those matters was the same there as in California. Norris v. Harris, 15 Cal. 254; Hickman v. Alpaugh, 21 Cal. 226; Hill v. Grigsby, 32 Cal. 60; Marsters v. Lash, 61 Cal. 624; Monroe v. Douglass, 5 N. Y. 447; Liverpool & G. W. Steam Co. v. Phenix Ins. Co., 129 U. S. 445, 9 Sup. Ct. 469. This rule applies to England as well as to sister states of the American nation. In Liverpool & G. W. Steam Co. v. Phenix Ins. Co., supra, the supreme court of the United States say: "The law of Great Britain since the Declaration of Independence is the law of a foreign country, and, like any other foreign law, is matter of fact, which the courts of this country cannot be presumed to be acquainted with, or to have judicial knowledge of, unless it is pleaded and proved." The alleged transfer or assignment of the said notes from the said George and John Lancaster was not by indorsement on the back of said notes, but consisted of a separate written instrument, in which they recited that they had "bargained, sold, and transferred" the said notes to the plaintiff herein, and that they "do hereby sell, transfer, and set over" the same to the plaintiff; and it is said in said instrument that they sell, etc., said notes "as executors of John Lancaster, deceased, and as representing themselves and said estate;" and the document is signed: "John Lancaster. George Granville Lancaster." Now, waiving all other points, and assuming the law of England to be the same as that of California, the said John and George Lancaster had no authority to sell and transfer said notes to the plaintiff. They were assets of the estate of John Lancaster, deceased, and could be sold only under and by an order of the probate court. Section 1517 of the Code of Civil

Procedure provides that "no sale of any property of an estate of a decedent is valid unless made under order of the superior court, except as otherwise provided in this chapter;" and the property involved here is not one of the exceptions. Section 1524 expressly provides that "choses in action may be sold in the same manner as other personal property." Belloc v. Rogers, 9 Cal. 123. The cases cited by respondent upon this point, such as Weider v. Osborn (Or.) 25 Pac. 717; Hough v. Bailey, 32 Conn. 288; and Marshall Co. v. Hanna, 57 Iowa, 375, 10 N. W. 745,—were cases arising under statutes which only provided that tangible personal property could not be sold, except by an order of the probate court. For this reason the judgment must be reversed.

The foregoing point is conclusive of this appeal, but, as the cause may be tried again, it is necessary to notice one or two other positions taken by appellant. The evidence introduced by respondent to prove the probate of the will of said John Lancaster, deceased, consisted of a copy of a judicial record of the probate division of her majesty's high court of justice, certified as correct by Charles John Middleton, registrar of said court, accompanied by the certificate of the judge of said court to the official position of Middleton as the custodian of its records and the genuineness of his signature, and also by a certificate of John C. New, United States consul general, to the genuineness of the signature of the said judge; all in accordance with the requirements of section 1906, Code Civ. Proc. But appellant contends that said section refers only to an original record, and not to a copy. The section is as follows: "A judicial record of a foreign court may be proved by the attestation of the clerk, with the seal of the court annexed, if there be a clerk and seal, or of the legal keeper of the record with the seal of his office annexed, if there be a seal, together with a certificate of the chief judge, or presiding magistrate, that the person making the attestation is the clerk of the court, or the legal keeper of the record, and, in either case, that the signature of such person is genuine, and that the attestation is in due form. The signature of the chief judge or presiding magistrate must be authenticated by the certificate of the minister, or ambassador, or a consul, vice-consul, or consular agent of the United States in such foreign country." While the word "copy" is not expressly used in the section, it is clearly included in the language which is used. It is included in the word "attestation," and is necessarily contemplated throughout the entire section. The notion of an original judicial record requiring the attestations and certificates mentioned in the section is incongruous and not to be entertained. A record proves itself. The certificate and signature of an American consul in a judgment book of an English court—in order to give it verity—would be a rare spectacle. It is not to be supposed that the legislature meant such a thing when express words to that effect were not used. In the absence of statutory provisions on this subject, an original record itself is rarely produced as evidence except when the cause is in the same court whose record it is. 1 Greenl. Ev. § 502. In other cases the proof is by exemplification. In section 1906 the word "attestation" is evidently used in its secondary or technical sense,—the certification by the keeper of a record of the verity of a copy. In Anderson's Law Dictionary a definition of "attest" is as follows: "To certify to the verity of a copy of a public document." In Abbott's Law Dictionary it is said: "Attest is also the technical word by which, in the practice of many of the states, a certifying officer gives assurance to the verity of a copy." See also Black's Law Dictionary under "Attest." Moreover, that part of section 1905 which provides for proof of a judicial record of a sister state, and section 905 of the Revised Statutes of the United States, which provides for proof of judicial records of the states and territories, are both substantially the same as said section 1906, Code Civ. Proc. In neither is the word "copy" used. But under those provisions it has been held that a certified copy is sufficient. Low v. Burrows, 12 Cal. 181; Parke v. Williams, 7 Cal. 247; Ferguson v. Harwood, 7 Cranch, 514. Some weight is attached by appellant to the fact that the next succeeding section—section 1907, Code Civ. Proc. —provides that a copy of a foreign judicial record is also admissible in evidence upon compliance with the provisions of that section. But evidently the stress of that section is not upon the word "copy," so as to distinguish it from original. Section 1906 having provided for a copy under attestation of the keeper of the record, accompanied by certain certificates of certain other officers, section 1907 provides that a copy may also be admitted, without the certificates of said officers, if it be accompanied by the oral testimony of a witness that he had compared the copy with the original, and that it was an exact transcript thereof; and also by certain other evidence required by said section. We are satisfied that a foreign judicial record may be proved by a copy thereof, attested and certified as provided by said section 1906 of the Code of Civil Procedure. We think, however, that appellant is right in contending that the judicial record introduced by respondent in this case is entirely insufficient to support any right asserted under it by respondent. It includes merely a transcript of a short order of the foreign court, to the effect that on a certain day the will of Lancaster, deceased, was proved and registered, and that administration of the personal estate was granted to John and George Granville Lancaster, sons, and executors named in the will, who had been sworn to well and faithfully administer the same. It contains no previous proceedings upon which the order rested,—no petition, no pleadings, no judgment roll other than said order. This was not sufficient, in the absence of proof of a procedure in the foreign country different from that of our own. The pleadings, petitions, or proceedings which led up to the order and gave jurisdiction to make it should have been introduced so as to have made the record complete. 2 Freem. Judgm. § 603; Young v. Rosenbaum, 39 Cal. 646; Mason v. Wolff, 40 Cal. 249; Harper v. Rowe, 53 Cal. 234. There are no other points necessary to be now noticed. The judgment is reversed, and the cause remanded for a new trial.

We concur: DE HAVEN, J.; FITZGERALD, J.

104 Cal. 418

## PEOPLE v. JOHNSON. (No. 21,137.)

(Supreme Court of California. Oct. 28, 1894.)

IMPANELING JURY — WAIVER OF IRREGULARITY— CRIMINAL LAW — INSTRUCTIONS — PROVINCE OF JURY—HARMLESS ERROR.

1. In a criminal case the bailiff selected from the persons present, and placed in the jury box, 12 men, who were regularly returned, under the court's order, to serve as jurors. The clerk obtained from each man his name, wrote it on a sheet of paper, returned to his place, and called the names. The jurors were then sworn to answer as to their qualifications. *Held*, that such mode of impaneling the jury was reversible error, unless objection was waived.

2. Such mode of impaneling the jury is an irregularity that can be waived by defendant's failure to object.

3. The judge, in his charge, told the jury that he denied a motion to dismiss for want of proof, "because there is testimony enough before you to sustain a conviction, provided you believe it; and it is for you to say what you believe about it." *Held* not a charge as to the effect of the evidence.

4. In a criminal case, where defendant is a witness, it is not error to charge as to the circumstances under which he testified, and as to his admission that he had previously been convicted of a felony.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

John Johnson was convicted of grand larceny, and he appeals from the judgment, and from an order denying his motion for a new trial. Affirmed.

D. J. Toohey and M. G. L. O'Brien, for appellant. W. H. H. Hart, Atty. Gen., for the People.

TEMPLE, C. The defendant was convicted of the crime of grand larceny, and, his motion for a new trial having been denied, he appeals from the judgment and from the order.

Appellant's first point is that the jury was irregularly impaneled. It seems that, when the case was called for trial, counsel for the people and for the defense each announced themselves as ready for trial. The judge then said: "Call the jurors." The bailiff then proceeded to select from the persons present 12 men, who were regularly returned, under order of the court, to serve as jurors in that department. The bailiff proceeded to place the 12 men in the jury box, and the clerk went to the jury box, and, interrogating each man as to his name, wrote it down on a sheet of paper; then, returning to his place, called the names, and they were sworn to answer as to their qualifications. They were accepted and sworn as jurors. This mode of impaneling a jury differs materially from that prescribed in the statutes of the state, and, if it had been done against the objection of defendant, it would have constituted sufficient reason for reversal. But no objection was raised.

Appellant contends that the irregularity is one that could not be waived; that the defendant has not had a jury trial unless the jury be impaneled in the mode prescribed. But we cannot take that view. The jurors were taken from those who had been regularly drawn and summoned, but not in the prescribed order. It is plainly but an irregularity, and was waived by failing to object.

Appellant next objects to an instruction given in the following words: "A motion was made here to dismiss this case, because of want of proof. I denied that motion, because there is testimony enough before you to sustain a conviction, provided you believe it; and it is for you to say what you believe about it." It is said that this is an instruction to the effect that, if the jury believe the evidence, they must convict, which is a charge as to the effect of the evidence. It is evident such is not the meaning of the instruction. The judge was cautioning the jury against concluding from this ruling that he had determined that the defendant was guilty. He says, in effect: "There being testimony which would sustain a conviction, if you convict, it was my duty to overrule the motion; but I did not decide that the testimony is true; that is for you."

Defendant was a witness on his own behalf, and the court gave some instructions as to the circumstances under which he testified; also in regard to defendant's admission that he had been previously convicted of a felony. A similar instruction was criticised by this court in People v. Murray, 86 Cal. 31, 24 Pac. 802. In that case, although the court intimated some regret that instructions of that character had ever been sanctioned, it was not deemed reversible error.

I think the judgment and order should be affirmed.

We concur: SEARLS, C; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

104 Cal. 420

## SAN FRANCISCO BREWERIES, Limited, v. SCHURTZ et al. (No. 19,314.)

(Supreme Court of California. Oct. 29, 1894.)

MORTGAGES — FORECLOSURE—VALIDITY—FIXTURES —RECEPTION OF EVIDENCE.

1. A mortgage covering both real and personal property may be foreclosed, and all the property sold, under one decree.

2. The fact that a chattel mortgage covers some property not the subject of mortgage under Civ. Code, § 2955, prescribing what personal property may be mortgaged, does not render it void as to other property covered by it.

3. The averment in a complaint to foreclose a mortgage that defendant "had, or claimed to have, some interest in the mortgaged property, which was subsequent and subject to the lien of plaintiff's mortgage," sufficiently alleges defendant's interest.

4. A mortgage by the lessee of the leasehold covers fixtures attached at the time of the execution of the mortgage.

5. The action of the court in refusing to allow a party to introduce evidence nearly three weeks after a decree of foreclosure had been ordered will not be disturbed on appeal.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; W. H. Clark, Judge.

Action by San Francisco Breweries, Limited, against Joseph Schurtz, Henry P. Wilson, and others. Judgment was rendered for plaintiff, and defendant Wilson appeals. Affirmed.

Wells, Monroe & Lee, for appellant. Diehl & Chambers, for respondent.

BELCHER, C. The defendant Joseph Schurtz had a lease for the term of four years and two months, dated October 5, 1889, of the basement of a building known as the "Wilson Block," in the city of Los Angeles. He used the leased premises for the purpose of a saloon and restaurant, and had caused to be attached to them certain personal property used in conducting his business. On June 25, 1891, he executed to the plaintiff his promissory notes for sums aggregating $4,500, and a mortgage to secure payment of the notes on his said leasehold estate, and on all fixtures, improvements, and appliances which had been attached to or made a part thereof, and also on all personal property, including a piano, used in and about said saloon and restaurant. The mortgage was properly executed as a mortgage of real and personal property, and on the day of its date was by the mortgagee caused to be recorded in the recorder's office of Los Angeles county. In August, 1892, the plaintiff commenced this action to foreclose its mortgage, making Henry P. Wilson, the appellant, and others parties defendant, upon the ground that they had, or claimed to have, some interest in the mortgaged property, which interests or claims, it was alleged, were subsequent and subject to the lien of said mortgage. All of the defendants, except Wilson, suffered their defaults to be entered. He demurred to the complaint, and, his demurrer being overruled, answered. The answer denied some of the averments of the complaint, and alleged that the only property subject to mortgage was the leasehold interest and the piano, and also alleged that on May 26, 1892, one Catherine Wilson recovered a judgment against Joseph Schurtz, the mortgagor, for $2,300, on which an execution was duly issued and levied upon most of the property involved in this action, other than the said leasehold interest and piano; that, under the execution, the property levied upon was sold on June 15, 1892, and bid in by said defendant, and is now owned by him and in his possession; and the prayer was that it be adjudged that defendant is the owner of the property so bid in by him, and that no part thereof is subject to plaintiff's mortgage. The court found that the mortgage was a valid lien on all the property described therein, "except such part of the personal property thereof as was purchased by said Henry P. Wilson, at sheriff's sale on June 15, 1892, said personal property * * * being as follows, to wit: The silverware, safe, and stock of wines, liquors, and cigars." A decree was accordingly entered foreclosing the mortgage upon, and directing a sale of, all the property found to be subject to the lien thereof; and from this decree the defendant Wilson appeals.

1. In support of the appeal, it is claimed that the demurrer to the complaint should have been sustained, but we think it was properly overruled. The mortgage covered real and personal property. Such a mortgage is valid, and may be foreclosed, and the real and personal property may be sold under the same decree (Tregear v. Water Co., 76 Cal. 537, 18 Pac. 658); and the fact that some of the personal property was not mortgageable, under section 2,955 of the Civil Code, did not render the mortgage void as to the other property covered by it (In re Fischer, 94 Cal. 523, 29 Pac. 961). The case of Dufficy v. Shields, 63 Cal. 332, is cited for appellant as declaring a different rule from that last above stated, and as holding that a mortgage like the one supposed is wholly void. But that case was also cited in Re Fischer, and, to the extent that it does declare a different rule, it was in effect overruled by the last-named case, and is no longer authority. The averment that the defendant had, or claimed to have, some interest in the mortgaged property, which was subsequent and subject to the lien of plaintiff's mortgage, was sufficient; and it cast the burden upon him to set up and show what interest he had. The complaint, in our opinion, stated all the facts required to constitute a cause of action, and was not ambiguous or uncertain.

2. It is further claimed that all the property purchased by appellant at the sheriff's sale was the personal property of the judgment debtor, Schurtz, and was subject to seizure and sale under execution against him; and it is said, quoting from Freem.

Ex'ns, § 114: "To determine whether a chattel affixed by the lessee can be seized on execution, we have only to ascertain whether the lessee can lawfully remove it; for whatever rights and interests the lessee has are subject to execution against him." The rule thus declared is undoubtedly correct when no intervening rights have accrued. But the fixtures attached by a lessee to leased property become a part of the realty, and remain so until they are severed. While so attached, a mortgage of the leasehold estate covers the fixtures, and on foreclosure they are sold as a part of the realty. McNally v. Connolly, 70 Cal. 3, 11 Pac. 320; Ewell, Fixt. p. 275; Jones, Mortg. §§ 426, 435. The case of Machine Co. v. Gould, 73 Cal. 153, 14 Pac. 609, is substantially on all fours with this case, and must be followed so far as the question in hand is concerned. In that case the lessees of land erected machinery thereon, and mortgaged the leasehold and machinery to the plaintiff therein. Subsequently, the machinery was levied upon and sold as personal property, under an execution against the mortgagor. The mortgagee brought suit to foreclose his mortgage, making the administrator of the estate of the purchaser at the execution sale a party defendant. The administrator answered, setting up the execution sale, and claiming to be the owner of the machinery by virtue thereof. A demurrer to the answer was sustained, and on appeal the ruling was held to be correct. The court said: "The defendant occupied no position superior to that of the mortgagor, Gould; and whatever interest he acquired by his purchase was subject and subordinate to the mortgage of plaintiff."

3. The point is made that, as a chattel mortgage, the mortgage sought to be foreclosed was void, because the affidavit required by section 2957 of the Civil Code, which was attached thereto, was made by one E. H. Meyer, for and on behalf of the corporation mortgagee, and it does not appear that he was the agent of the mortgagee. A sufficient answer to this point is that the affidavit expressly states that Meyer was the duly-authorized agent of the mortgagee, and was authorized to do all acts for it in reference to the mortgage; and there is a direct averment in the complaint, which is not denied by the answer, that, at the time of the execution of the mortgage, Meyer was duly authorized to act in regard thereto as plaintiff's agent.

4. It appears from a bill of exceptions that nearly three weeks after the case was tried and submitted, and findings and decree of foreclosure were ordered, the appellant asked leave to introduce testimony showing that Schurtz's lease had been broken and canceled; that the lessor had canceled the lease by bringing suit against him for rent due; and that from and after March 10, 1891, he had held the leased premises from month to month as a monthly tenant. The court refused to hear the offered testimony, and its ruling is assigned as error. The ruling was proper, and must be sustained, for two reasons: (1) The application was addressed to the discretion of the court (Miller v. Sharp, 49 Cal. 233; Briswalter v. Palomares, 66 Cal. 259, 5 Pac. 226; Consolidated Nat. Bank v. Pacific Coast S. S. Co., 95 Cal. 1, 30 Pac. 96); and there is nothing tending to show an abuse of that discretion. So far as appears, the evidence might as well have been offered during the trial. (2) No issue was raised by the pleadings to which the offered evidence was relevant.

It follows that the decree appealed from should be affirmed.

We concur: SEARLS, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the decree appealed from is affirmed.

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104 Cal. 429

## In re KENNEDY'S ESTATE. (No. 15,415.)

(Supreme Court of California. Oct. 30, 1894.)

IMPEACHMENT OF ONE'S OWN WITNESS.

A person whose witness testifies contrary to the way he has been led to believe he would do cannot prove that the witness had made prior statements to the contrary.

In bank. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Appeal by J. T. McCormick, in the matter of the estate of Catherine Kennedy, deceased, from an order denying him a new trial. Reversed.

For opinion in division, see 36 Pac. 1030.

Eugene Deuprey, for appellant. M. J. Platshek, M. S. Eisner, and F. S. Stratton, for respondent.

PER CURIAM. Catherine Kennedy died testate, at the city and county of San Francisco, April 13, 1887, leaving estate of the value of about $12,000. She was thrice married, and left surviving her one son by her second marriage, named John E. Tomlinson. By her last will she devised all of her estate to the said son, John E. Tomlinson, except three small legacies, of $100 each, bequeathed to Sarah McCloskey, John E. McCormick, and Rosa Malone, respectively, and naming James McCloskey as executor. The will was admitted to probate, McCloskey appointed executor thereof, and such proceedings were had in relation thereto that on the 11th day of December, 1889, a petition was filed by the executor, praying a distribution of the estate as in the will provided. On the 23d day of December, 1889, Mary Rogers made and filed her petition and opposition in the cause, in which, among other things, she set out that she was the daughter of Catherine Kennedy, deceased; that, by an omission not appearing to be intentional, deceased wholly failed to provide for petitioner in her last will; that she is entitled to a like share or interest in the estate as though deceased had died intestate, and prayed that one-half of said estate be distributed to her. Thereafter, on the 23d day of December, 1891, the matter of the petition of Mary Rogers to participate in the distribution of the estate of said Catherine Kennedy, deceased, came on to be heard. A trial by jury was waived by the parties. The contest was between said Mary Rogers and J. T. McCormick, the executor of the last will of J. E. Tomlinson, deceased, who had before that time departed this life. The question in litigation was as to the maternity of the said Mary Rogers. The decision was in favor of the respondent, said Mary Rogers, who was found to be the illegitimate daughter of Catherine Kennedy, the testator, and one-half of the estate was distributed to her. The appeal is from the decision, and from an order denying a new trial to said McCormick, executor of the last will of said Tomlinson, deceased.

At the trial, one McCloskey was called by respondent as a witness on her behalf, and by her attorney questioned as to statements previously made by him in the presence of respondent and her attorneys, as to Mrs. Kennedy having told him that she was going to send to Buffalo, N. Y., for a niece of hers, and that he gave five dollars to her to be used for that purpose; that he had seen Mrs. Rogers, the respondent, at Mrs. Kennedy's house, on Natoma street, in April or May, 1886; that the respondent was introduced to him by Mrs. Kennedy as her niece; that, after Mrs. Rogers moved from Mrs. Kennedy's house, Mrs. Kennedy told him that respondent did not like her place, and had gone away, and that she was displeased with her niece for having become a Protestant. These questions were answered evasively, or by a direct denial, and thereafter Attorney Eisner took the stand as a witness for respondent, and was permitted, against the appellant's objection, to contradict the evidence of his own witness, McCloskey, by testifying that at the time and place suggested in the questions, and in the presence of the persons named, the said McCloskey "stated in my presence that the deceased, Mrs. Kennedy, had often told him, just prior to the advent of the so-called niece, that she was going to send to Buffalo, N. Y., for a niece of hers, and had asked Mr. McCloskey for five dollars to send on to her niece, and he said that he was quite sure—that is the language taken down then—that he was quite sure that he saw Mrs. Rogers at Mrs. Kennedy's house, on Natoma street, in this city, about April or May, 1886, and he said that, after the niece left Mrs. Kennedy's home, Mrs. Kennedy had said to him (McCloskey) that she (the niece) did not like the place, and had gone away, and that Mrs. Kennedy expressed dissatisfaction or displeasure at her (the niece) having become a Protestant." The previous alleged statements of the witness McCloskey, if sworn to at the trial, would have corroborated the testimony of the respondent on the main issue, and would have tended to make out her case. The question then is, did the court err in permitting the witness Eisner, against appellant's objection, to contradict his own witness as to these previous statements, notwithstanding the fact that the witness McCloskey had not testified as he had led respondent to believe that he would? If so, was the appellant injured thereby? The rule is well settled in this state, on the authority of People v. Jacobs, 49 Cal. 385, and People v. Wallace, 89 Cal. 158, 26 Pac. 650, that such testimony is not admissible, for the reason that to admit it "would enable the party to get the naked declarations of the witness before the jury as independent evidence." It is therefore clear that the court erred in permitting the witness Eisner to contradict the testimony of his own witness by testifying to the previous statements made by him under the circumstances stated, and, as we cannot say that the appellant was not injured thereby, it follows that the judgment and order should be reversed. So ordered.

(105 Cal. 526)

## ROBINSON v. SOUTHERN PAC. CO.[1] (No. 15,283.)

(Supreme Court of California. Oct. 6, 1894.)

RAILROAD PASSENGER—RIGHT TO STOP OVER—REPEAL OF STATUTES—LEASE OF RAILROAD—WHAT PASSES—DISQUALIFICATION OF JUDGE.

1. Under Civ. Code, § 490, empowering the purchaser of a railroad ticket to ride from the station at which the ticket was bought to the station of destination, "and from any intermediate station to the station of destination," at any time within six months thereafter, the purchaser of a ticket may stop at any intermediate station, and resume his journey within the six months to the point named as his destination. McFarland, J., dissenting.

2. Civ. Code, § 490, empowering a passenger purchasing a ticket from a railway company to ride on its passenger cars from the station at which the ticket was bought to the depot of destination, and from any intermediate station to the station of destination, at any time within six months thereafter, is not repealed by Const. art. 12, § 22, creating a railroad commission, and authorizing it to fix rates, though section 489 is thereby repealed.

3. The exemption of a railroad company from the necessity of compliance with the provisions of the Civil Code, owing to its organization before the adoption of the Code, does not pass to its lessee.

4. Where a railroad company maintains several depots in a city, each depot is an "intermediate station," within the meaning of Civil Code, § 490, empowering passengers to stop at intermediate stations.

5. A judge who, by marriage, is a first cousin, or cousin-german, of a stockholder in a corporation, is not disqualified to hear a case in which the corporation is interested.

In bank. Appeal from superior court, city and county of San Francisco; John M. Hunt, Judge.

Action by W. H. Robinson against the Southern Pacific Company for damages for refusal to carry plaintiff on its passenger cars. Judgment was rendered for plaintiff, and defendant appeals. Affirmed.

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[1] For opinions on rehearing, see 38 Pac. 108, 722.

Foshay Walker and Baker, Wines & Dorsey (E. L. Craig, of counsel), for appellant. C. M. Jennings (Thos. V. Cator and James G. Maguire, of counsel), for respondent.

GAROUTTE, J. This action is brought to test the right of the holder of a railroad passenger ticket to stop at an intermediate station, and subsequently renew his journey on another train without further payment. Defendant is a common carrier of passengers, by ferry and railroad, between San Francisco and Oakland and Alameda. It has several lines between these points, and has provided and sells but one form of ticket from San Francisco to Oakland and Alameda. It is as follows:

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**S. P. Co.—Ferry and Local Trains.**

ONE

PASSAGE ONLY

CC

11

SAN FRANCISCO 15cts.

OAKLAND or ALAMEDA

T. H. Goodman. S

Gen. Pass. and Ticket Agent.

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The ticket entitles the holder to take either of three different lines, all operated by defendant, two of which pass through Oakland.

In May, 1891, plaintiff purchased such a ticket at the office of defendant at the foot of Market street, San Francisco, and proceeded with it to the ferry which carries the passengers to the Oakland pier in the city of Oakland, where defendant's railroad begins. He was required to pass through a gate on his way to the ferry. Here an employé of the defendant demanded his ticket. Plaintiff informed the gate keeper that he desired to stop over at Oakland, and insisted upon retaining his ticket or receiving a check, which would be evidence of his right. He was informed that stop-over tickets were not provided, and that no stop-over rights were allowed; and he was refused permission to go upon the ferry, except upon surrender of his ticket, which he then gave up. He proceeded by ferry and road to the intersection of Broadway and First streets, in the city of Oakland, where he alighted, and remained attending to some private business for a short time. At this point all passenger trains passing over the road habitually stop, and from 1,000 to 1,500 passengers get on and off daily. There is no station house or station agent there, but passengers are received, and pay their fare to the conductor. Subsequently, he took the train for Alameda at the point where he alighted, and, his fare being demanded by the conductor, he refused to pay it, basing his refusal upon the facts stated. But, notwithstanding his statement of these matters to the conductor, he was ejected from the train.

The only question involved in this litigation is, was the respondent entitled to a stop-over privilege at the city of Oakland? He claims this stop-over right under section 490 of the Civil Code, and that section reads as follows: "Sec. 490. Every railroad corporation must provide, and, on being tendered the fare therefor fixed as provided in the preceding section, furnish to every person desiring a passage on their passenger cars a ticket which entitles the purchaser to a ride, and to the accommodations provided on their cars, from the depot or station where the same is purchased to any other depot or station on the line of their road. Every such ticket entitles the holder thereof to ride on their passenger cars to the station or depot of destination, or any intermediate station, and from any intermediate station to the depot of destination designated in the ticket, at any time within six months thereafter. Any corporation failing so to provide and furnish tickets, or refusing the passage which the same calls for when sold, must pay to the person so refused the sum of two hundred dollars." The briefs of counsel contain an elaborate discussion of various legal principles that are claimed to be germane to the question here presented, and those principles which we deem necessarily involved in the final determination of this litigation we will take up and discuss seriatim.

1. Appellant insists that the true construction of section 490 is: "Such ticket entitles the holder, at any time within six months after the issuance of the ticket, to ride from the depot where he purchased the ticket to the depot of destination named in the ticket, or to any intermediate station, or, if he so elects, he may start from any intermediate station, instead of where he bought the ticket, and ride to the depot of destination designated in the ticket." Notwithstanding the statute appears to be plain and explicit upon its face, it is insisted that the conjunctions "and" and "or" are convertible terms, and that the conjunction "and," as it appears in the section should be read "or." There are times when it is entirely manifest from the context that the intention of the lawmaking power can only be given effect by holding these terms convertible. And this rule of construction is adopted for the very purpose of giving that force and effect to the text which plainly appears from the context was intended to be given it by the author of its creation, but this license of construction is only to be exercised upon the lines indicated, and in all other cases these two words are to be read and construed as they stand upon the page. Ordinarily, they are in no sense interchangeable terms, but,

upon the contrary, are used in the structure of language for purposes entirely variant. "There is a world of difference between the little words 'and' and 'or.'" State v. Beaucleigh, 92 Mo. 497, 4 S. W. 666. We see nothing here demanding the construction claimed. It is not plainly manifest that the legislature so intended. It is not manifest at all. The clause is full of meaning, reading it as it appears to the eye, and is entirely consistent with other portions of the section. If we should interpret "and" as "or" an entirely different meaning would be given the provision. This would be judicial legislation, pure and simple. Appellant contends for the construction claimed because it is said that formerly so-called "competitive points" were favored, and the object of the statute was the prevention of greater charges from intermediate stations to competitive points than were charged for longer distances from one competitive point to another. In view of the fact that the legislature provided in the immediately preceding section (489) that the amount of passenger fares should be regulated according to the distance traveled, there would seem to be no necessity for further legislation upon that question. That evil, whatever it may have been, was called to the attention of the legislature, and cured by said section. The only effect upon the statute, by appellant's construction, is to give a passenger the right to board a train at an intermediate station, and ride to the point of destination upon a ticket purchased at some station which, from the place of destination, is beyond the intermediate point. We see no demand for legislation of the character outlined by appellant's construction of the statute. The circumstance of a passenger purchasing a ticket from one point to another, and then only actually using it for a portion of the distance, would not seem to be an event of such common occurrence as to demand the needs of legislative action. Again, while not desirous of prejudging matters not necessarily involved in the consideration of the present case, we might remark that no legal rule now presents itself to our minds which ever denied a passenger the right to use a ticket of the character here contemplated from an intermediate station to the point of destination. Auerbach v. Railroad Co., 89 N. Y. 281. And, if such was the law prior to the passage of section 490, we are justified in saying that the legislature, in enacting that provision, was not doing an idle thing, and we must assume the provision was created for other purposes. Appellant's position as to the construction of section 490 of the Civil Code is not tenable.

2. It is insisted that section 490 of the Civil Code, upon which plaintiff relies for his stopover right, was repealed by section 22 of article 12 of the state constitution, and this claim of repeal is based upon the additional claim that the constitutional provision cited places the full and exclusive power of fixing railroad transportation charges within this state in the railroad commissioners. It is insisted that the repeal of section 490 is occasioned by the repeal of section 489; that this constitutional provision repealed section 489,—a section which pertains to the regulating and establishment of rates for freights and fares,—and that section 490 is so dependent upon section 489 that it cannot stand alone, and the fall of section 489 therefore necessarily carries with it the destruction of section 490. We will not discuss the interesting question as to whether or not the repeal of section 489 was occasioned by the adoption of that portion of the constitution referring to the election, powers, and duties of railroad commissioners, but, for the purposes of the case alone, will concede that such repeal was had. The single question then remains, did the repeal of section 489 result in the repeal of section 490? Chief Justice Shaw, in discussing a similar principle, said in the case of Warren v. The Mayor, etc., 2 Gray, 84: "When the parts of a statute are so mutually connected and dependent, as conditions, considerations, or compensations for each other, as to warrant a belief that the legislature intended them as a whole, and that if all could not be carried into effect the legislature would not pass the residue independently, if some parts are unconstitutional and void, all the provisions, which are thus dependent, conditional, or connected, must fall with them." The rule is well stated in the foregoing quotation, and the principle there declared has been recognized and declared the true one by the courts of many states. Measured by this doctrine, can section 490 stand the test? Is it manifest that the legislature intended that such section should stand or fall with section 489? Is section 490 so closely connected with and so entirely dependent upon the preceding section that its very life ends at the moment when that section is no more? Would section 490 have been enacted by the legislature if section 489 had never been placed upon the statute book? These interrogatories are answered by appellant, and to the legal soundness of those answers our attention shall now be addressed.

Section 489 provides that railroad corporations must fix and publish their rates of charges for freightage and fares from one depot to another on their various lines of road in this state, and declares a graduated scale of charges according to distance. It further provides that the maximum charges shall not exceed 10 cents per mile for each passenger, nor 15 cents per mile for each ton of freight transported upon its road, and also affixes a penalty for the violation of any of these provisions. Section 490 declares that the railroad company must provide, and, on being tendered the fare therefor fixed as provided in the preceding section, furnish to every passenger desiring passage on their passenger car, a ticket which entitles the purchaser to certain rights and privileges which we have already considered; and this section also affixes a penalty for the violation of any of its provisions. In all portions thereof, save a single one, the section is entirely disconnected from and independent of section 489. With this single exception, it appears to be full of its own vitality, and possessed of ample strength within itself to stand out alone; a law, as independent and complete as any other section within the lids of the Code. But, it is said in the language of defendant, to hold that section 490 is not dependent upon section 489, is to ignore the words of the section itself, namely, "on being tendered the fare therefor fixed as provided in the preceding section." This clause forms the connecting link between the sections, and upon the sole strength of that link depends the repeal or nonrepeal of section 490. It is claimed that it was the legislative intent that a passenger, in order to enjoy the rights and privileges granted by section 490, should tender the amount of fare fixed by the corporation, in accordance with section 489, and, that section being repealed, that it is impossible to make a tender of the fare therein provided; that a tender of the fare fixed by a later act of the legislature, or the tender of a fare fixed by the corporation itself in the absence of any law upon the subject, would be unavailing, and that consequently no rights and privileges can flow to the passenger under section 490. It is insisted, in other words, that the fare tendered must be the fare fixed according to section 489, notwithstanding that section may have been repealed, and in substance replaced by other legislation. We think appellant's interpretation of the section, as evidenced by the foregoing line of reasoning, too rigid and literal to satisfy well-settled rules of statutory construction. The subject-matter of these two sections has nothing in common. The sections relate to distinct and independent matters of legislation. Section 489 is in no way dependent upon section 490. There is no mutuality in their connections and dependencies. Section 490 could have been repealed, and the vitality of section 489 would not have been affected in the slightest degree. In accord with appellant's contention, we have conceded that section 489 is repealed by implication by certain provisions of the constitution. In order to declare a repeal by implication, it must be entirely apparent, by a comparison of the two provisions, that the subject-matter of section 489 is completely covered by the constitutional provision, and the repeal can be supported upon no other ground. In other words, the constitutional provision is a substitute for the section. It seems to follow that the question here presents itself in no different form, and involves no different principle, than though section 489 had been amended upon the lines embraced within the repealing clause of the constitution. If section 489 were still a live section, covering the general subject-matter embraced within it at the beginning, no matter how changed and modified, no matter how drastic the treatment by amendment, surely defendant would still be bound by its provisions. Hence, appellant's contention reduces itself to the single claim that the present law upon the question is not embraced in the "preceding section," and that the particular point of location of the law upon the statute book is the all-controlling element. Such a construction would result in the sacrifice of substance to the merest form. The gist of section 489 is the requirement that railroad corporations fix their rates, and fix them in accordance with certain rules there declared, and within certain limits, and, to a certain extent, regulate fares and freights; and a reference to this section in section 490 is simply a recognition of that fact, and nothing more. The words, "as provided in the preceding section," might almost be termed surplusage. Their only possible purpose is to make more certain that which was already certain. Strike them from the section, and nothing of weight or substance is taken away. The construction would be the same with or without them. There surely is not that magic in them which holds the power of life and death over the entire section. The fare to be tendered, in order to give the passenger a right to his ticket, is the lawful fare; and it is immaterial whether that fare be fixed by the "preceding section," or by other provisions of the Code, or by the corporation, in the absence of law, or by the constitution itself. It is the fare regulated by law, and, if there be no law regulating the fare, then it is the regular fare charged by the corporation. At the date of the enactment of section 490, it happened that fares were regulated by the preceding section 489, and hence the reference. There is nothing to indicate that the enactment of these two sections partook of the character of a contract between corporations upon the one side, and the people, through its legislative body, on the other, whereby corporations were granted valuable privileges and benefits under section 489 in consideration of reciprocal valuable privileges and benefits extended to the traveling public under section 490. It is further apparent that such conditions did not surround the creation of these sections, for we find the substance of section 489 to have been the law of this state for many years prior to the adoption of the Codes. St. 1861, p. 625. We conclude that it was not the intention of the legislature that these two sections should be taken as a whole, that section 490 should stand only while section 489 stood, and that the fall of section 489 should likewise mark the fall of section 490. We see no reason why the legislature should do such a thing, and such an intention is not manifest from the context. The repeal of section 489 does not result in the repeal of section 490.

3. The Central Pacific Company leased to the Southern Pacific Company certain railroads for the period of 99 years, and also assigned to the Southern Pacific Company certain leases it held of other roads. These leases included all the rolling stock, telegraph lines, steamboats, wharves, piers, and all other property, both real and personal, used in connection with these roads, together with the appurtenances thereto belonging, with the right to possess, use, maintain, and operate and enjoy said property. The leases held by the Central Pacific Company were assigned "with the right to take, hold, operate, maintain, and enjoy said railroads and other property in the same manner as the Central Pacific Company holds, operates, enjoys, and maintains the same under said leases." It is now claimed that section 490 of the Civil Code, upon which plaintiff relies to give him the privilege of "stop-over," does not apply to the defendant, the Southern Pacific Company, because it does not apply to its lessor, the Central Pacific Railroad Company, and section 288 of the Civil Code is relied upon to show its nonapplicability to the Central Pacific Railroad Company. That section provides: "No corporation formed or existing before twelve o'clock, noon, of the day upon which this Code takes effect, is affected by the provisions of part IV, of division first of this Code, unless such corporation elects to continue its existence under it as provided in section 287; but the laws under which such corporations were formed and exist are applicable to all such corporations, and are repealed subject to the provisions of this section." The Central Pacific Railroad Company has not elected to continue its existence under the law found in part 4 of division 1 of the Civil Code; and, section 490 being found therein, it would appear that that corporation was not bound by its provisions, for this language is comprehensive, and, judged by its face alone, has no uncertain meaning. But it is claimed by appellant that section 490 is highly penal in its character. If this be true, the power of the legislature to create penal statutes, and thereupon enact that they should be only applicable to corporations created subsequent to a certain time, may well be doubted. Such an exception would appear to be beyond the limits of legitimate legislation. This court said in the case of City of Pasadena v. Stimson, 91 Cal. 238, 27 Pac. 604: "A law is constitutional and general when it applies equally to all persons embraced in a class founded upon some natural or intrinsic or constitutional distinction. It is not general or constitutional if it confers particular privileges, or imposes peculiar disabilities or burdensome conditions in the exercise of a common right, upon a class of persons arbitrarily selected from the general body of those who stand in precisely the same relation to the subject of the law." But we will not enter into a detailed examination of section 288, with the object of determining its true force and effect as to either of these positions. For the purposes of this case, we will concede that by reason of that section the provisions of section 490 do not apply to the Central Pacific Company. That much being conceded, is its lessee, the Southern Pacific Company, by virtue of its leases, assignments, etc., likewise unaffected by the provisions of that section? The Southern Pacific Company is a foreign corporation, and was organized under the laws of the state of Kentucky in March, 1884,—more than 10 years after the enactment of sections 288 and 490 of the Civil Code; and, aside from any rights, privileges, or exemptions passing to it by virtue of these leases and assignments, it only exists in this state, and is enabled to do business in this state, by virtue alone of those provisions of the Code which, we have conceded, have no binding force and effect upon the Central Pacific Company. We are unable to appreciate the importance and gravity with which appellant surrounds its contention in this regard. A corporation, organized and carrying on its business under a certain set of laws, leases and assigns all or portions of its property to another corporation, organized and carrying on its business under another and different set of laws. Do such leases, assignments, and transfers give the second corporation the right to thereafter conduct its business under the laws which were only applicable to the first corporation? Such contention can have no support in the law. Prior to its transactions with the Central Pacific Company, the Southern Pacific Company, in the conduct of its business, was bound by the provisions of section 490 of the Civil Code, and no man or corporation, by contract or otherwise, possessed the power to relieve it in the conduct of its business from whatever restrictions or burdens were imposed by that section. These restrictions and burdens were imposed upon it by legislative power, and it is to that power alone it must look to be relieved of them. When organized and ready to do business in this state, part 4, division 1, of the Civil Code, formed the law regulating its conduct and defining its rights and duties; and now, by the sole virtue of a business transaction with another corporation, it is claimed that this entire body of law has become nugatory, and, in effect, repealed, as to such corporation. This law cannot be evaded in that way. It is not the legal method recognized for effacing a law from the statute books. The Southern Pacific Company was organized to conduct a general railroad business. If it had built its own roads, it would have been bound by the provisions of section 490, and its status as to the law is not changed by reason of the fact that it preferred to lease rather than build. Let us assume that it has constructed and is the owner of certain roads in connection with those it has obtained from the Central Pa-

cific Railroad Company. The result follows that one distinct and separate body of law governs its conduct as to certain portions of its business, and other portions thereof are controlled by another separate and independent body of law. It needs but a glance at the various provisions of the Code to see that such conditions would lead to inextricable confusion. If appellant's position be sound, its converse is equally sound, and a transfer by the Southern Pacific Company of its roads (if it has constructed any) to the Central Pacific Company would bring that corporation within the binding effect of section 490, as well as all other provisions of part 4 of the Code, nolens volens. This practice would not only effect results never contemplated by the legislature, but would effect them in a way absolutely forbidden by sections 287, 288, for those sections mark the only road that leads to such results. It is not necessary that we enter into a microscopic inspection of the writings evidencing the contracts between these corporations, for the purpose of determining all the properties and rights that actually passed thereby. It is sufficient to say that some things are not the subject of lease. This lessor could not lease the law. The law could not pass under those instruments, however apt words were used to indicate such a purpose. The legislature extended to each of these corporations the right to conduct its business in a certain way. That right, in each instance, was embodied in a separate and distinct set of laws. It was a purely personal right. It was in no sense an asset of the corporation which could be bought and sold. It was nothing that could be transferred. If the Central Pacific Company could transfer it to the defendant, it could likewise transfer it to a private individual, and this would be an absurdity. This right which is claimed to have passed to the lessee is a very intangible thing. It certainly is not the privilege which the lessor possessed of bringing itself within the provisions of the Code, for the lessee was already within those provisions. Prior to the lease the lessee was subject to the burdens of section 490. How any transfer of interest from the lessor could operate to relieve the lessee of burdens already resting upon it is not perceptible. Appellant terms this act an exemption. The only exemption the Central Pacific Company enjoyed was its exemption from the operation of general laws pertaining to corporations coming under the provisions of the Civil Code. It had the right to exist and do business under certain laws, but this right was not transferred to the defendant. It could not be transferred. The Central Pacific still exists, and has the right to do business. It can build new roads (perchance, it did not dispose of all its old ones), and operate them as it has ever done in the past. If this right has been transferred, the corporation no longer exists, for it constitutes its life. Neither is it possible that this right could be transferred pro tanto, nor that it may vest in both corporations at the same time. If section 490 does not apply to defendant, no part of the Code pertaining to corporations applies. We then have a corporation organized since the adoption of the Codes conducting its business under laws created prior to that adoption, and such a condition of things is directly opposed to the provisions of section 288. It would be the achievement of astonishing results by the practice of a legerdemain that has no place in the law, and the recognition of a doctrine striking at the very root and source of legislative power. Appellant, in this respect, relies firmly upon the case of Gilmore v. City of Utica, 121 N. Y. 561, 24 N. E. 1009. That was a street assessment case, and the judgment rendered in no way was dependent upon that portion of the decision here relied upon by appellant. The decision was not placed upon that ground, and the matter appears to have been but incidentally touched upon. The facts are briefly these: A street railroad corporation was organized and did business under a general law which provided that "every such corporation incorporated under, or constructing, extending or operating a railroad constructed or extended under the provisions of this act," shall pave between its tracks, and two feet on each side thereof. A second corporation, organized under a law containing no similar provision, leased its roads to the other corporation, and the court said: "But the Utica Belt Line Street-Railway Company (lessee) was not operating its road under that act. By a lease authorized by chapter 305 of the Laws of 1885, it had succeeded to all the rights of the Utica Street-Railroad Company, and was operating the road in the right of that company, and hence that section has no pertinency." We have not the laws of New York of 1885 before us, and consequently do not know exactly what may be the subject of lease under those statutes. If the language quoted goes to the length of holding that a lessee of a railroad corporation takes with the property leased the right to control and use it subject alone to the law operating upon the lessor corporation, we do not indorse it as sound. It would seem in this case that, as the road involved was not one constructed under the provisions of the act under which the lessee was incorporated, by the very terms of the act itself the lessee was not required to do the paving, and possibly the court viewed the question from that standpoint.

4. It is contended that section 490 has no application to this case, because the railroad begins at Oakland pier, within the corporate limits of the city of Oakland. Therefore, the point referred to in the complaint, instead of being an intermediate station, is the initial point; Oakland being the station at which the railroad begins, and there being no railroad between San Francisco and Oakland pier, but a ferry only. It seems very clear

that, as to a trip from San Francisco to Alameda via Oakland, Oakland is an intermediate station; and the fact that the defendant has two or more stopping places in Oakland, where, for the accommodation of the public, passengers are allowed to enter and leave its local trains, can make no difference. At whichever of these stopping places a passenger chooses to get off, he stops at Oakland; and under the law, as we construe it, he has the right, if he has made a reasonable demand for the privilege, to afterwards resume his journey to Alameda.

5. It is next contended that the line traveled by plaintiff was not the most direct route, and that passengers are allowed to take the more circuitous route on condition that they make a continuous passage. It is sufficient for present purposes to say that the ticket purchased by plaintiff in this case was an unlimited ticket, and subject to no such conditions. For the foregoing reasons, it is ordered that the judgment and order be affirmed.

We concur: DE HAVEN, J.; HARRISON, J.; FITZGERALD, J.; BEATTY, C. J.

VAN FLEET, J. I concur in the judgment. I think that section 489 of the Civil Code is, by clear and necessary implication, repealed by section 22 of article 12 of the constitution. But I am not strongly impressed with the position of appellant that section 490 is so dependent upon section 489, to which it refers, as that the repeal of the latter necessarily involved and carried with it the repeal of the former. I do not think there is any such dependence manifest from either the subject matter or the provisions of those two sections. To my mind, the reference in section 490 to the preceding section is merely in its nature incidental, and not such a bond of union as to make the life of the one measure that of the other. The vital question in the case, in my judgment, and the one giving rise to the greatest difficulty, is whether section 490 was ever intended or designed by the legislature to give to the passenger a stop-over privilege, or the right to a stop-over ticket. Upon this question, after a somewhat extended examination of the case and the arguments presented, I am not prepared to say that the conclusion reached in this opinion of the court is not the correct one.

McFARLAND, J. I dissent, and, if other duties permit, will hereafter express my views of the case in an opinion. At present I will merely give my conclusions on two points:

1. I think that the ticket purchased by respondent, on its face, and especially when considered in connection with the reasonable regulations of appellant of its business on the various routes from San Francisco to Oakland, Alameda, and other points near the bay, which regulations were well known to respondent, merely gave to the latter the right to go either to Oakland or Alameda, not to both, and when he elected to get off at Oakland the life of the ticket was ended.

2. A "stop-over" ticket is a thing well known, not only in railroad circles, but to the general public,—so well known as to have gone into the common dictionaries of the language. It is a ticket which gives one a right "to stop at a station beyond the time of the departure of the train on which one came, with the purpose of continuing one's journey on a subsequent train." Webst. Dict., under head "Stop." Now, section 490 does not use the phrase "stop-over," nor does it, in my judgment, use any equivalent words to denote an intention to give to the holder of an ordinary ticket the right to break up his trip into 2 or 20 different journeys on different days, and on 2 or 20 different trains. I think that the authorities are to the point that a ticket which merely designates in general terms a trip from one point to another means a continuous trip between those points, and such is surely the law where there are bylaws or regulations of the railroad company to that effect, especially where they are known to the purchaser of the ticket. See Com. v. Power, 41 Am. Dec. 478 et seq.; 1 Redf. R. R. p. 92 et seq., and cases there cited; Yorton v. Railway Co., 54 Wis. 234, 11 N. W. 482; Cody v. Railroad Co., 4 Sawy. 114, Fed. Cas. No. 2,940; Gale v. Railroad Co., 7 Hun, 670. This being the general law, there is no language in section 490 sufficient to show an intent to change it so as to make all tickets stop-over tickets. There is no necessity of substituting "or" for "and" where it occurs in the section. The language of the section merely provides for a ticket upon which the holder can ride from the "station where the same is purchased" to the point of destination, and also from any intermediate station to the point of destination, but not that he may stop over at any intermediate station, or at all intermediate stations, and proceed afterwards, piecemeal, on other trains, as he may choose. Whether or not the intention was to remedy a certain subsisting evil, as contended for by appellant, there is clearly no intention expressed of providing for stop-over tickets.

There are other points in the case, as to some of which I agree with respondent, and as to others with appellant. I think that the judgment should be reversed.

PER CURIAM. In this case, objection was made by respondent, at the oral argument, to the qualification of Mr. Justice VAN FLEET to sit in the case, upon the ground that he is related to one of the parties by affinity within the third degree, as provided by section 170 of the Code of Civil Procedure. The fact upon which the objection is based is that the said justice became by marriage, and is thus by affinity, a first-cousin, or cousin-german, of one of the stockholders of the corporation appellant. But such relation is not within the third degree. Section 1393 of the Civil Code provides as follows: "In the collateral line the degrees are counted by generations from one of the relations up to the common ancestor, and from the common ancestor to the other relations. In such computation the decedent is excluded, the relative included, and the ancestor counted but once. Thus, brothers are related in the second degree; uncle and nephew in the third degree; cousins-german in the fourth, and so on." As no other rule is elsewhere declared in any of the Codes, and as the four Codes are to be construed as one statute (Pol. Code, § 4480), section 1393 must be taken as establishing the degrees of relationship by consanguinity or affinity, and other sections of the Codes referring to such degrees must be construed as passed in view of said section 1393. People v. De la Guerra, 24 Cal. 73, and one or two previous cases, were decided before the adoption of the Codes, and under the rule that statutes in derogation of the common law must be strictly construed. Section 4 of each of the Codes provides as follows: "The rule of the common law, that statutes in derogation of the common law are to be strictly construed, has no application to this Code. The Code establishes the law of this state respecting the subjects to which it relates." We are satisfied, therefore, that Justice VAN FLEET is not disqualified to sit in this case, and the said objection is overruled.

VAN FLEET, J., did not participate in the foregoing.

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104 Cal. 494

## WICKERSHAM v. COMERFORD et al.

(No. 15,583.)

(Supreme Court of California. Nov. 5, 1894.)

SETTING APART HOMESTEAD — CANCELLATION FOR FRAUD.

1. In an action to annul an order setting apart a homestead to defendant, on the ground of fraud, the evidence showed that defendant failed to state to the court that articles of separation had been made between herself and deceased, from whose land the homestead was set apart, and that their property had been divided, but applied for the order through a mistaken view of her rights, and on the erroneous advice of an attorney. *Held*, that a finding that defendant practiced no fraud on the court is sustained by the evidence.

Department 1. Appeal from superior court, Sonoma county; R. F. Crawford, Judge.

Action by I. G. Wickersham against Sarah Comerford and another to annul an order of court fraudulently obtained to set apart a homestead to Sarah Comerford. Judgment for defendants, and plaintiff appeals. Affirmed.

For prior report, see 31 Pac. 358.

Lippitt & Lippitt, for appellant. Smith & Murasky, for respondents.

HARRISON, J. Action to vacate and annul an order of the superior court setting apart a homestead to the use of the defendants out of the estate of Richard Comerford, deceased. The facts alleged in the complaint are set forth in the report of the case when here upon a former appeal. 96 Cal. 433, 31 Pac. 358. After the cause had been remanded to the superior court, the defendants answered the complaint; and upon the trial of the issues the court rendered its decision and judgment against the plaintiff, from which, and also from an order denying a new trial, he has appealed. The court finds that the allegations in the petition of Mrs. Comerford for the homestead were not fraudulent, and that the court was not induced to make the order by reason of any false or fraudulent representations therein contained, or by any concealment of facts from it by her, or by any one on her behalf. This finding is challenged by the appellant as not supported by the evidence, but we are of the opinion that the evidence before the court justifies the finding. It was necessary for the plaintiff to establish by clear and indubitable proof, to the satisfaction of the superior court, that the order setting apart the homestead had been obtained through some fraud practiced upon that court by the defendant. It was not sufficient to show that she had made the application under an erroneous view of her rights in the premises, or that, upon the facts presented in her petition or at the hearing, the court had mistaken the law applicable thereto. She cannot be charged with fraud or any fraudulent imposition upon the court for merely failing to state in her petition any facts tending to show that the petition ought not to be granted, unless it is made to appear that she knew the import of these facts, and that they were willfully suppressed by her with the intention of deceiving the court, and thereby inducing it to grant her petition. Tested by these rules, and plaintiff failed to establish his right to the relief sought. It was shown that, after the death of her husband, Mrs. Comerford was advised by her attorney that she was entitled to have the property set apart to her as a homestead, and the petition therefor was prepared by him, and signed by her, and presented to the court. It is not claimed that this advice was not given in good faith, or that the facts set forth in the petition are not correctly stated; and the most that can be said is that the attorney was mistaken in his views of the law. It is claimed, however, that the petitioner "concealed" from the court the fact that "articles of separation" had been entered into between her and her husband, under which they had divided their property, and were living separate and apart from each other. It was not shown, however, that the legal effect of these articles of separation upon her right to a homestead out of the estate of her husband was ever called to the notice of the petitioner, or that she was advised in reference thereto, or that she had any purpose or motive in omitting to make mention thereof in her petition or at the hearing; and she cannot be charged with "concealing" them from the court by her mere silence in reference to their existence. She is not to be charged with a fraudulent concealment of any fact unless she was under some obligation to disclose it, and the mere omission to make mention of the fact, in the absence of any knowledge or notice on her part that it was requisite to make such mention, falls far short of fraud.

Whether the court determined that the property which it set apart was community property, or the separate estate of the deceased, is not shown by the record. The order purports to have been made upon "the papers on file" and other evidence; and in the inventory on file with the court it was stated to be community property, while the attorney for the petitioner testified at the trial herein that he informed the court that it was the separate property of the deceased. If the court held that it was community property, its finding would have been contrary to the evidence; while, if it determined that it was the separate property of the deceased, it committed an error of law in setting aside the homestead without any limitations. These, however, are insufficient grounds for maintaining the present action, as a court of equity will never set aside a judgment for mere error, whether of law or fact, committed in the rendition of the judgment.

The court did not err in refusing to grant the motion of the plaintiff for judgment on the pleadings. The matters which were denied on information and belief were not presumptively within the knowledge of the defendants. The judgment and order are affirmed.

We concur: GAROUTTE, J.; VAN FLEET, J.

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104 Cal. 473

## SAVINGS BANK OF SAN DIEGO COUNTY v. BURNS. (No. 19,422.)

(Supreme Court of California. Nov. 2, 1894.)

Exhibits to Pleadings—Construction of Statute—Resort to Title—Action on Contract—Defense of Invalidity — Plaintiff not in Fault.

1. An exhibit attached to a complaint, and referred to therein, becomes a part thereof, though the complaint does not expressly make it a part.

2. Where the body of a repealing act does not identify the act intended to be repealed, the title of such repealing act may be resorted to.

3. Where the president of a savings bank induces the bank to loan money, and take as security a mortgage on land, in order that a mortgage belonging to him may be paid, the mortgagor cannot, in defense to an action by the bank to foreclose, claim that its mortgage is invalid, under Civil Code, § 578, prohibiting any officer of a savings corporation from directly or indirectly borrowing its funds.

Commissioners' decision. Department 1. Appeal from superior court, San Diego county; George Puterbaugh, Judge.

Action by Savings Bank of San Diego County against Ann Burns to foreclose a mortgage. Judgment was rendered for plaintiff, and defendant appeals. Affirmed.

Wm. Darby, for appellant. W. T. McNealy, for respondent.

BELCHER, C. This is an action to foreclose a mortgage. The defendant demurred to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action, and the demurrer was overruled. She then answered, setting up that the plaintiff had not complied with the requirements of the act of April 1, 1876, "concerning corporations and persons engaged in the business of banking," and also that, in making the loan referred to in the pleadings, plaintiff had violated section 578 of the Civil Code. The plaintiff demurred to the answer, and the demurrer was sustained; and thereupon, defendant declining to amend, judgment of foreclosure was entered as prayed for, from which this appeal is prosecuted.

1. The first point made for a reversal is that the court erred in overruling the demurrer to the complaint. The alleged insufficiency of the complaint is based upon the fact that it simply avers that on a certain day the defendant "executed to the plaintiff a certain promissory note, and also a certain mortgage to secure the same; that a copy of said note is set out in said mortgage, and said mortgage is hereto attached, and marked 'Exhibit B'"; and it is claimed that, as the exhibit is not expressly made a part of the complaint, it does not constitute a part of it, and therefore it cannot be ascertained from the pleading when the note matured, nor what property was mortgaged to secure its payment. This point cannot be sustained. The exhibit, as attached to the complaint, forms a part of it, and must be so treated, notwithstanding no express words declaring it to be so are used. In Ward v. Clay, 82 Cal. 502, 23 Pac. 50, 227, it was held that a copy of a note annexed to the complaint, and referred to in the body of it as an exhibit, forms a part of the complaint, and may properly be referred to by the court for the purpose of ascertaining the form and contents of the note. And in Whitby v. Rowell, 82 Cal. 635, 23 Pac. 40, 382, it was held that when the complaint in an action to foreclose a mortgage has a copy of the mortgage annexed as an exhibit, to which it refers, a correct description of the land in the mortgage is sufficient for all purposes of the suit. There are other cases to the same effect, but they need not be cited. The cases cited by appellant are clearly distinguishable from this case, and are not in point. The complaint was not well drawn, but, when tested by a general demurrer, we think it must be held sufficient.

2. The next point is that the court erred in sustaining the demurrer to the first defense set up in the answer. That defense was that the plaintiff had failed to file with the county recorder, or publish, the statements required by the act of April 1, 1876 (St. 1876, p. 729), and therefore could not maintain the action. The only question to be considered under this head is as to whether or not the act referred to had been repealed. In 1893 an act was passed by the legislature, and approved March 9th, reading as follows (St. 1893, p. 112):

"An act to repeal an act entitled 'An act concerning corporations and persons engaged in the business of banking,' approved April 1, 1876.

"Section 1. Said act is hereby repealed.

"Sec. 2. This act shall take effect and be in force from and after its passage."

It is earnestly contended that this act did not repeal the act referred to in its title, for the reason that the title of an act is no part of the act, and therefore the words, "said act is hereby repealed," are meaningless. In Endlich on the Interpretation of Statutes (section 58), it is said: "In this country, whilst the title of a statute is not, in general, regarded as a part of the same, it is nevertheless regarded as a legitimate aid in ascertaining the intention of the legislature, when the language and provisions in the body of the act are ambiguous and of doubtful meaning and application." And again, in section 59: "The propriety of such reference is especially manifest where the title is referred to in the body of the act, and all the more justifiable, in cases of uncertainty, where the constitution gives significance and assigns particular importance to the title by requiring that a statute shall contain but one subject, and that it shall be expressed in the title." In Myer v. Car Co., 102 U. S. 1, Chief Justice Waite, in delivering the opinion of the court, said, commencing on page 11: "In cases of doubt the title might always be resorted to for the purpose of ascertaining the meaning of the body of the act; but especially is this true in states like Iowa, where the constitution provides that 'every act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title.'" In Wilson v. Spaulding, 19 Fed. 304, Mr. Justice Blodgett, after reviewing the authorities, said: "These authorities seem to fully sustain the right of the court to look at the title for the purpose of ascertaining the intent of congress, when the intent is doubtful or obscure from the body of the act; * * * but, reading the body of the act and the title together, there can be no question what section the act is applicable to." In Bank v. Henderson, 101 Cal. 307, 35 Pac. 899, one of the defenses set up in the answer was the same as that now under consideration here; and no question was raised by counsel or the court as to the validity of the repealing act of March 9, 1893. It was assumed that the act of April 1, 1876, was repealed by it, and the effect of the repeal was very fully discussed. In view of the authorities, we think the court below did not err in also assuming that the said act of April 1st was effectually repealed, and in sustaining the demurrer to the said first defense.

3. The only other point made for a reversal is that the court erred in sustaining the demurrer to the second defense set up in the answer. That defense was, in effect, that at all the times named in the pleadings one Bryant Howard was the president of the plaintiff corporation, which was a savings bank duly organized and doing business under the laws of this state; that, at the time of the execution of the note and mortgage set out in the complaint, defendant was indebted to Howard in the exact sum named in said note, and that said sum was secured by a mortgage executed by defendant upon the same land embraced in her mortgage to the plaintiff; that, immediately prior to the execution of the note and mortgage to the plaintiff, Howard importuned her to pay him the amount due upon her said note and mortgage, and that she then and there informed him that she was unable to pay the same, and he thereupon promised and agreed to renew and extend said loan; that immediately thereafter the note and mortgage set out in the complaint were sent to her by one of the officers of the plaintiff, and that, believing it to be an extension of her loan by Howard, she signed and executed the same without reading them; that, after deducting prior incumbrances on said property, the value thereof was much less than the sum named in said note, and that Howard procured and induced plaintiff to make said loan to her for the purpose of paying to himself her said note and mortgage to him; and that this fact, and all other facts alleged by defendant, were known to plaintiff and its officers at the time of the execution of her said note and mortgage to it. The contention is that the admitted averments of the answer show that the loan was made to defendant, and her note and mortgage taken, in violation of section 578 of the Civil Code, and therefore no action can be maintained to enforce payment of the same. The section referred to reads as follows: "No director or officer of any savings and loan corporation must, directly or indirectly, for himself or as the partner or agent of others, borrow any of the deposits or other funds of such corporation. * * * The office of any director or officer who acts in contravention of the provisions of this section immediately thereupon becomes vacant." We do not think this contention can be sustained. The obvious purpose of the section of the Code invoked and relied upon was to protect savings banks and their depositors. To hold, therefore, that, if the deposits or funds of such a bank should be borrowed by any of its officers, directly or indirectly, no action could be maintained

by the bank to recover back the money, would often work out great injustice and wrong. The general rule, undoubtedly, is that a contract founded upon an illegal consideration, or prohibited by statute, is void. There are, however, exceptions to this rule where the parties are not in pari delicto. Many of these exceptions are referred to in the note to Gray v. Roberts, 12 Am. Dec. 383, and among others the following: It is said: "Upon similar principles, it has been held that where a class of contracts is prohibited for the protection of particular parties thereto, the adverse parties cannot take advantage of the illegality of such contracts. Thus, when there was a statute prohibiting the loaning of public-school funds, except on mortgages on unincumbered lands, it was held that one who borrowed such funds, and gave a mortgage on incumbered land to secure the same, could not resist the enforcement of the contract as illegal, because the law was designed for the protection of the state, and not of the borrower [citing Indiana cases]. So, in Babcock v. Goodrich, 47 Cal. 509, where the law required that contracts made by the state or a municipal corporation for labor should contain a stipulation that eight hours a day should be a day's work, and a contract was made with a county in which no such provision was inserted, it was held that the county could not take advantage of the omission, because the law was meant for the protection of the laborer." In our opinion this case is within the well-recognized exceptions to the general rule and the court therefore properly sustained the demurrer to the second defense. We advise that the judgment be affirmed.

We concur: VANCLIEF, C.; TEMPLE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

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4 Cal. Unrep. 867

## WONG LANG v. ALASKA IMP. CO. (No. 15,575.)

(Supreme Court of California. Oct. 30, 1894.)

REVIEW ON APPEAL—CONFLICTING EVIDENCE.

In an action for labor in defendant's fish cannery, defendant's testimony was that the balance claimed by plaintiff was covered by a charge against him for defective canning, in accordance with the contract, and that plaintiff had signed a receipt in full, which was read to him before he signed it. Plaintiff's testimony was that the defective canning was due to defective machinery; that plaintiff could not read writing in the English language; that the receipt was not read to him at the time he signed it; that he supposed he was signing only for a payment whch he then received. *Held*, that a verdict for plaintiff will not be disturbed.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; Charles W. Slack, Judge.

Action by Wong Lang against Alaska Improvement Company on contract. From a judgment rendered on a verdict for plaintiff, and from an order denying a new trial, defendant appeals. Affirmed.

Daniel Titus, for appellant. Reddy, Campbell & Metson, for respondent.

VANCLIEF, C. The action is upon a written agreement between plaintiff and defendant, whereby the plaintiff, in consideration of certain specified payments to be made by the defendant, agreed to do and cause to be done, by himself and about 90 other Chinamen, to be employed by him, certain labor in and about the fish cannery of defendant during the fishing season of 1891; and thereupon it is alleged in the complaint "that plaintiff fully and faithfully performed each and every of the covenants on his part in said agreement contained, and that on the 23d day of November, 1891, there became due and payable to plaintiff, under and in accordance with the terms of said agreement, for and on account of said performance on his part, the sum of $23,775"; and it is further alleged that defendant has paid plaintiff only $21,155 on account, leaving still due, owing and unpaid, $2,620, for which plaintiff prays judgment. The defendant, by answer, denied that plaintiff had fully performed his contract, and denied that any sum was due, owing, or unpaid to plaintiff; alleged full payment of the amount found due according to the terms of the agreement upon an accounting and settlement between plaintiff and defendant, for which payment the plaintiff indorsed upon the agreement a receipt in full of all demands under the agreement. The jury returned a verdict in favor of plaintiff for the sum of $1,310, upon which judgment for this sum was rendered in favor of plaintiff. Defendant appeals from the judgment, and from an order denying its motion for a new trial.

The only point made by appellant is that the verdict of the jury is not justified by the evidence. Although the transcript of the evidence brought up in the bill of exceptions seems to show a considerable preponderance of evidence, in number of witnesses at least, in favor of the defendant, yet I think it clear that the evidence for plaintiff substantially tends to prove all the issues on his part, and is prima facie sufficient to justify the verdict. That the verdict of a jury will not be set aside by this court on the ground that it appears to be against a mere preponderance of evidence is too well settled to require citation of authorities. The defendant's ledger account with plaintiff was put in evidence, and shows that plaintiff was credited with $23,775, which was balanced by charges, the last item of which is as follows: "Nov., 1891, Dr., to reclamation as per settlement, $1,312.55." It is claimed by defendant that this charge was properly made under that clause of the agreement which provides that plaintiff "shall be allowed a percentage of four per cent. for all 'do-overs' and mended cans, but all do-overs in excess of four per cent. shall be charged" to him at the rate of ten cents per can. The term "do-overs" means the cans of fish which have been so imperfectly closed that they leak, and therefore must be recanned,—done over. The whole controversy relates to this item of $1,312.55 charged to plaintiff for "do-overs" in excess of 4 per cent. Another part of the agreement required the defendant "to furnish all materials necessary for the manufacturing of cans and packing of salmon, * * * to keep the machinery in running order, and to furnish the necessary and experienced and skillful men to look after the same on their part." Plaintiff contended and testified that the "do-overs" in excess of 4 per cent. were the effect of defective machinery, and the failure of defendant to keep the machinery in running order, or to furnish skillful men for that purpose, and were not caused by any negligence or want of skill on the part of the plaintiff; and as to this plaintiff's testimony was corroborated by that of Eugene Amiot, an apparently disinterested witness, and was undisputed, except by the testimony of Mr. Barling, a stockholder of defendant, and superintendent of the cannery, who admitted that the machinery was imperfect, and spoiled a great many cans, yet claimed that it worked ordinarily well. Nor is it distinctly contended by counsel for appellant that the evidence is not substantially conflicting upon this issue. The principal controversy relates to the alleged settlement, which is denied by the plaintiff. There is no question, however, that plaintiff signed the receipt in full, which is indorsed on the contract as alleged in the answer; but he testified at the trial that he could not read writing in the English language; that the receipt was not read nor explained to him; that at the time he signed it there had been no settlement to the effect that any charge should be made or allowed against him for "do-overs"; that he was told and understood that the receipt was for only the amount ($10,000) then paid him on account, to enable him to pay off the Chinamen who had worked for him in defendant's cannery, and who were clamoring for their pay; and that he would not have signed it had he known it was a receipt in full of all his demands under the contract. Four witnesses, who were stockholders of the defendant corporation, testified that the charge for the "do-overs" was the result of a settlement to which plaintiff assented, and that the receipt was read to plaintiff before he signed it. The plaintiff was subjected to a long and searching cross-examination, by which it is claimed that some inconsistencies in his testimony tending to impeach its credibility were shown. But the alleged inconsistencies relate principally to collateral matters, as to who were present, and what was said on two different occasions, and may be accounted for, I think, without prejudice to the credibility of his testimony, by his imperfect knowledge of the English language, in which he testified. As to the principal and only material matters—the alleged settlement and receipt—his testimony was self-consistent and positive, and was flatly contradicted by the witnesses for defendant. This, I think, constitutes a case of substantial conflict. The jury must have believed the testimony of the plaintiff, and the lower court was satisfied with the verdict; and, though counsel invite attention to the fact that the witnesses for defendant are white men, he does not claim that the jury was prejudiced against them on that account. I think the judgment and order should be affirmed.

We concur: HAYNES, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

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4 Cal. Unrep. 870

## SILVA v. SILVA. (No. 15,623.)

(Supreme Court of California. Oct. 31, 1894.)

NEW TRIAL—NEWLY-DISCOVERED EVIDENCE—DENIAL OF MOTION—AFFIRMANCE.

Where, on appeal, no affidavit to support a motion for a new trial on the ground of newly-discovered evidence is identified as used on the hearing of the motion, and the affidavits in the transcript show that the alleged new evidence is merely cumulative, and would not probably effect a different result on a new trial, the denial of such motion will be affirmed.

Commissioners' decision. Department 1. Appeal from superior court, Alameda county; John Ellsworth, Judge.

Action by Frank Silva against Maria C. Silva to establish a trust in land. From a judgment for defendant, and from an order denying his motion for a new trial, plaintiff appeals. Affirmed.

John F. Burris and Moses G. Cobb (Stephen G. Nye, of counsel), for appellant. R. B. Tappan, for respondent.

VANCLIEF, C. It is alleged in the complaint in this action that the defendant holds a certain lot of land in trust for the plaintiff, and prays that it be so adjudged by the court. The answer of the defendant is a denial of the alleged trust. Judgment passed for defendant. Plaintiff appeals from the judgment and from an order denying his motion for a new trial.

A careful reading of the transcript of 100 pages and 60 pages of briefs for appellant has led me to the conclusion that the appeal is totally destitute of merit. In limine, counsel for appellant complain that the court erred in substituting for their statement of the evidence an "epitome" of the stenographic report thereof, which does not fully nor truly represent it. But of this there is not the slightest evidence in the statement or bill of exceptions on which the motion for new trial was made. It does not appear, even, that appellant's original statement of the evidence was amended or changed in any respect. One of the grounds of the motion, as stated in the notice of the motion, was newly-discovered evidence, and it is contended that the court erred in not granting the motion on this ground. But, in the first place, no affidavit to prove this ground of the motion is properly indentified as having been used or read on the hearing of the motion; and, in the second place, the affidavits printed in the transcript show that the alleged newly-discovered evidence was merely cumulative to that introduced by plaintiff on the trial; and, furthermore, that it probably would not effect a different result on a new trial. It is contended that the findings of fact are not justified by the evidence. But the evidence appears to be amply sufficient to justify the findings in all particulars in which they are excepted to in appellant's brief. Nor does the statement contain any intelligible specification of any error in law committed at the trial. Yet all the points made under this head in appellant's brief have been considered, with the result that no such error is made to appear. I think the order and judgment should be affirmed.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

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104 Cal. 437

## COOPER v. MONTEREY COUNTY. (No. 15,538.)

(Supreme Court of California. Oct. 31, 1894.)

HIGHWAY—DEDICATION—ESTABLISHMENT BY USER—EVIDENCE—REPEAL OF STATUTE.

1. The fact that a strip of land has been continuously traveled and used by the general public as a highway for 20 years, with the knowledge of the owner of the fee, and without objection by him, does not justify a finding that the strip "is a public highway," since such facts are consistent with an absence of intention to dedicate, and may indicate merely a license.

2. Pol. Code, § 2619, providing that all roads used as such for a period of five years are highways, was repealed by Act March 30, 1874.

3. In an action against a county to quiet title to a strip of land, it appeared that a strip 10 feet wide was used 30 years by the public under license from plaintiff's tenants, unauthorized by him, and that no work was done on the road, except what was done by such tenants, who were in exclusive possession during the whole period of user, for their own use and convenience. *Held*, that the fact that such user was with plaintiff's knowledge, and without objection by him, did not support a judgment quieting title in the county to a strip 20 feet wide for the use of the public as a road.

Commissioners' decision. Department 1. Appeal from superior court, Monterey county; N. A. Dorn, Judge.

Action by John B. H. Cooper against Monterey county, Cal., to quiet title to certain land. From a judgment for defendant for part of the land claimed, and from an order denying his motion for a new trial, plaintiff appeals. Reversed.

S. F. Geil, for appellant. Zabala & Kearney, for respondent.

VANCLIEF, C. Action to quiet plaintiff's title to a tract of land containing about 2,000 acres situate in the county of Monterey. The defendant, by its answer, disclaimed any title or interest in the land, except to a defined strip thereof, 40 feet in width, extending across the tract, which it alleged was a public highway, and as such was under the supervision and control of the defendant for the use of the general public, and that it had been traveled and used as a public road by the general public during a period of 30 years next before the commencement of the action. The court found that a part of said strip, 20 feet in width, extending across the tract, "has been continuously and uninterruptedly traveled and used by the general public as and for a public road or highway ever since 1872," and that "the same is a public highway," and "that such use of said portion of said land as a road or highway by the general public has been with the knowledge of plaintiff, and without objection on his part." Thereupon, to that extent, and for the use of the public as a road, the court adjudged that defendant's title be quieted. From this judgment, and from an order denying his motion for a new trial, the plaintiff appeals.

Counsel for appellant contend that the findings of the court above stated are not justified by the evidence. The finding that the strip of land in question was traveled and used by the public ever since 1872, with the knowledge of plaintiff, and without objection on his part, is only the finding of probative facts tending to prove a dedication; but the fact of dedication (which, by the way, is neither alleged nor found, does not necessarily follow from these probative facts, since they are not necessarily inconsistent with a total absence of intention to dedicate, and may indicate merely a license. The finding that the strip of land "is a public highway," whether deemed an ultimate fact or a conclusion of law, is not justified. As an ultimate fact, it is not justified by the probative facts found, nor by the evidence, since the evidence tended to prove only those probative facts; there being no evidence tending to prove that the strip of land ever became a public highway otherwise than by dedication, and no allegation or claim of adverse user, or of title by prescription. Considered as a conclusion of law this finding is unwarranted by the findings of fact, which fail to show that the alleged road ever became a public highway in any mode provided by law.

The theory upon which respondent's counsel endeavor to support the judgment is based upon that part of section 2619 of the Political Code as it took effect January 1, 1873, which reads as follows: "All roads used as such for a period of five years are highways." And they contend, on the authority of Gloster v. Wade, 78 Cal. 407, 21 Pac. 6, that this provision was not amended nor repealed until 1883, and that, since the road in question was found to have been used continuously as a public road more than five years before this provision of the Code was repealed, the conclusion of law that it "is a public highway" is correct. But, unfortunately for this theory, the case of Gloster v. Wade has been overruled since this appeal was taken, in the case of Huffman v. Hall (Cal.) 36 Pac. 417, in which it was decided that section 2619 of the Political Code was repealed March 30, 1874,—less than three years after the commencement of the user of the road in question by the public.

Thus far the case has been considered without regard to the evidence on behalf of the plaintiff, which tends to show that the road was used by the public only by a license from plaintiff's tenants, which was unauthorized by him, and that the width of the strip used by the public did not exceed 10 feet. It was also proved that no work was ever done on the road for the purpose of opening, improving, or repairing it, except what may have been done by plaintiff's tenants, who were in exclusive possession during the whole period of user by the public, for their own use and convenience. The evidence on the part of the defendant was sufficient to justify the finding as to the user by the public with the knowledge of plaintiff, and without objection from him, but nothing more in favor of defendant. As this finding is obviously insufficient to support the judgment, I think the order and judgment appealed from should be reversed, and the cause remanded for a new trial.

We concur: BELCHER, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, and the cause remanded for a new trial.

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104 Cal. 468

## YOCCO v. CONROY. (No. 15,650.)

(Supreme Court of California. Nov. 2, 1894.)

DEED OF WATER RIGHTS—CONSTRUCTION.

One who conveys land through which a stream flows by a deed which provides that it is intended to and does convey the right to lay a one-inch pipe so as to carry the running water from the stream to certain land of the grantee perpetually and forever, cannot afterwards, as the owner of adjoining land through which the stream flows, lay a pipe in the stream which will so divert the water as not to leave sufficient to fill the one-inch pipe of the grantee.

Commissioners' decision. Department 2. Appeal from superior court, Santa Clara county; John Reynolds, Judge.

Action by Clemente Yocco against John Conroy to enjoin the diversion of water and for damages for its diversion. Judgment was rendered for defendant, and plaintiff appeals. Reversed.

Wm. P. Veuve, for appellant. J. C. Black, for respondent.

VANCLIEF, C. Action to recover damages for alleged wrongful diversion of water by defendant from plaintiff's water pipe through which he conducted water to his land for the purpose of irrigation, and also to enjoin the defendant from diverting such water perpetually. The cause was tried by the court without a jury, and the judgment was in favor of the defendant. The plaintiff brings this appeal from the judgment on the judgment roll, and contends that, upon the facts found by the court, the judgment should have been in his favor. The material substance of the facts found is as follows: In February, 1881, the defendant owned and resided upon a tract of land through which ran a living stream of water called a "gulch"; and at the same time plaintiff owned an adjoining tract of land, no part of which adjoined or included any part of the stream or gulch. On February 12, 1881, the defendant, by a grant, bargain, and sale deed, conveyed to plaintiff one square rod of land at a certain point in said gulch, through the center of which square rod said stream ran; and by the same deed granted to plaintiff a defined right of way for a water pipe of one inch diameter from said square rod of land to plaintiff's nonriparian land. After the description of the land and the right of way, the deed contains the following: "This deed is intended and does hereby grant and convey to the said party of the second part [plaintiff] the right to lay a one-inch pipe along the above-described piece of land [the way] so as to convey the running water from said gulch to and over the land of the said party of the second part perpetually and forever." In the month of February, 1881, the plaintiff laid his pipe on the granted way, and connected it with a box at a point in the stream within the boundaries of said square rod of land; and thence, until the summer of 1889, without interruption or objection, conducted water from the stream to his land, to the full capacity of the pipe, except during such times as there was not sufficient water in the stream to supply the full capacity of the pipe, when he took all the water running in the stream above the head of his pipe.

The findings of the court as to the use of the water by plaintiff, and the diversion thereof by defendant, are as follows: "(4) The plaintiff has maintained said box and pipe as aforesaid continuously ever since said 12th day of February, 1881, and has continuously conducted and used as much of the water of said gulch as flowed into said box and through said pipe, which was, during nine months of the year, the full capacity of said pipe. During the other three months of the year some water would flow into said box and through said pipe each day, when none of the water in said gulch was diverted for the use of the defendant as an upper riparian owner; but when so diverted no water would flow into said box except what came into the stream below the diversion. (5) That defendant, some time in the summer of the year 1889, without the consent of plaintiff, laid a three-fourths inch pipe from a point in said gulch one hundred feet above said box of plaintiff, and by means thereof has ever since diverted from said gulch all the water that said three-fourths inch pipe would carry, when sufficient water flowed in said gulch at that point to fill the same. Defendant has ever since maintained, and still maintains, said pipe as aforesaid, and by means thereof has ever since diverted, and still diverts, all the water of said gulch which said three-fourths inch pipe would carry. (6) That said acts of defendant and his diversion of the waters of said gulch as aforesaid have diminished the quantity of water flowing down said gulch to said box of plaintiff, which is the natural course of said water, and in the summer and fall months, by reason of said acts of defendant, the quantity of water which has flowed and flows down said gulch to plaintiff's said box is not sufficient to fill his said one-inch pipe if allowed to flow without any obstruction or diversion. I further find that the defendant owns the land in and on both sides of said gulch, from the place where he diverts the water by means of his pipe to the place where the plaintiff's said box and pipe are located, and that the defendant has not at any time diverted any more of the water flowing in and through said gulch than was reasonably required for domestic purposes. (7) That all the water that said one-inch pipe can carry is, and has always been, necessary for the irrigation of plaintiff's said trees."

1. The principal ground upon which counsel for respondent endeavor to uphold the judgment is that defendant is riparian owner of all land over which the stream runs, except the square rod conveyed to plaintiff, and by reason thereof was entitled to divert the water as he did for domestic use, etc. The ready answer to this is that to whatever extent defendant granted to plaintiff the use of the water of the stream, to the same extent he parted with his riparian right to divert or use that water to the detriment of his grantee (Gould v. Stafford, 91 Cal. 155, 27 Pac. 543, and authorities there cited; Lux v. Haggin, 69 Cal. 392, 10 Pac. 674); and, since plaintiff claims the use of the water solely under the grant from the defendant, his alleged rights depend upon that grant alone.

2. The only other ground upon which the respondent endeavors to support the judgment is that the deed does not expressly grant the right to divert water to the full capacity of plaintiff's pipe at all times, nor to divert all the water at any time; and that, under the circumstances, it should not be so construed as to deprive defendant of the use of sufficient water for domestic purposes, etc. But the principal circumstance urged as a reason why it should not be so construed is that defendant is riparian owner, and therefore has a preferred right to the use of so much water as is necessary for household purposes and for watering cattle, etc. The effect of this circumstance has already been considered, and, besides, it is not found, and does not appear, that defendant had no other source of supply of water sufficient for all these purposes. If the deed is open to construction as to the extent of the grant, the most reliable circumstance in aid of such construction is the practical construction given it by the acts of the parties during the first eight years immediately following its execution, during which period plaintiff diverted water to the full capacity of his pipe, except while there was not sufficient water in the stream for that purpose, when he diverted all until interrupted by defendant in the summer of 1889. See findings 4 and 5. Yet I think the diversion and use of the water by plaintiff during the first eight years was in accordance with the intention of the parties as expressed or clearly implied in the deed. It appears by the findings that the diversion of the water by the defendant was a detriment to plaintiff, for which the latter was entitled to nominal damages at least. I think the judgment should be reversed, and the cause remanded, with instructions to the trial court to render judgment on the findings in favor of plaintiff for nominal damages; and also to grant an injunction against the defendant, perpetually restraining him from diverting any water from any point in the gulch above the head of plaintiff's pipe, except the surplus thereof over what may be necessary to supply plaintiff's pipe to its full capacity.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed and the court below is instructed to render judgment in favor of plaintiff for one dollar as damages, and to grant a perpetual injunction against the defendant, restraining him from diverting any water from the gulch or stream from any point therein above the head of plaintiff's pipe, except the surplus thereof over and above so much as may be necessary to supply said pipe to the full capacity thereof.

(104 Cal. 302)

### CHAPMAN et al. v. HUGHES. (No. 18,246.)

(Supreme Court of California. Nov. 2, 1894.)

In bank.

Dissenting opinion. For prior report, see 37 Pac. 1048.

BEATTY, C. J. I concur in the order denying a rehearing in this case, but, if the opinion of the department is to be understood as holding that the lands belonging to the several parties to the syndicate agreement became, by virtue of that agreement, partnership property, I desire to state that I do not concur in that view.

### ROBINSON v. SOUTHERN PAC. CO. (No. 15,283.)

(Supreme Court of California. Nov. 7, 1894.)

On rehearing. Granted. For former report, see 38 Pac. 94.

McFARLAND and VAN FLEET, JJ. The judgment heretofore entered herein is vacated and set aside, and the cause ordered to a rehearing before the court in bank.

BEATTY, C. J. I concur in the foregoing order, but would desire to limit the reargument to a single point, viz. the first point discussed in the dissenting opinion of Mr. Justice McFARLAND, or, in other words, to the question whether a ticket conferring the right to ride to either Oakland or Alameda gives the holder a right to stop off at one place, and afterwards resume his journey to the other place.

FITZGERALD, J. I concur in the foregoing order granting a rehearing, but desire to state that my opinion remains unchanged upon the three principal points heretofore decided. I am satisfied that section 490 of the Civil Code is still in force, that it applies to the Southern Pacific Company, and that it gives stop-over privileges. But upon a point which was not touched in the oral argument, and but slightly and inadequately discussed in the briefs, I am in serious doubt. I refer to the question whether the ticket purchased by the plaintiff, and which, by its terms, entitled him to go to either Oakland or Alameda, gave him the right, after electing to stop at Oakland, to afterwards go to Alameda. Upon this point only I think the court should have further argument.

DE HAVEN, HARRISON, and GAROUTTE, JJ. We dissent from the order granting a rehearing in this case.

(104 Cal. 443)

### TUTTLE v. BLOCK. (No. 15,544.)

(Supreme Court of California. Nov. 1, 1894.)

CONSTITUTIONAL LAW—IMPAIRING OBLIGATION OF CONTRACTS—CHANGING STATUTE OF LIMITATIONS.

The amendment of February 13, 1885, to Pol. Code, § 3788, providing that, "where land has been heretofore sold for delinquent taxes, the deed therefor must be made within one year and three months after this act takes effect, and, unless so made, the purchaser shall be deemed to have relinquished all his rights," does not impair the obligation of contracts.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; Eugene R. Garber, Judge.

Application by B. F. Tuttle for a writ of mandamus, commanding James N. Block, as tax collector of the city and county of San Francisco, to execute to him a tax deed. A demurrer to the petition was sustained, and petitioner appeals. Affirmed.

Frank Shay, for appellant. Henry T. Creswell, for respondent.

VANCLIEF, C. On the petition of plaintiff, an alternative writ of mandate was issued to defendant in his official character as tax collector of the city and county of San Francisco, commanding him to execute to plaintiff a deed of a certain lot of land which had been sold by defendant's predecessor in office to plaintiff's assignor for delinquent taxes, or to show cause why he had not done so. The court sustained defendant's demurrer to the petition, on the ground that it does not state facts sufficient to entitle plaintiff to the writ, and thereupon dismissed the proceeding. From this judgment the plaintiff appeals. The petition and affidavit of plaintiff show that the lot in question was on March 31, 1875, regularly sold to William Bosworth for delinquent taxes theretofore properly assessed to W. W. Lapham, as owner, and that a certificate of such sale in due form was then issued by the tax collector to Bosworth; that the lot has never been redeemed from said sale; that after the time for such redemption had expired, to wit, December 1, 1875, Bosworth assigned the certificate of sale, with all his rights incidental thereto, to the plaintiff; that plaintiff thereupon entered into possession of the lot, and has ever since had sole possession thereof, and that the same has ever since been assessed to him for taxes, all of which taxes he has paid; that on March 20, 1893, the petitioner presented said certificate of purchase to defendant, and demanded that he, as tax collector, etc., officially execute to petitioner a deed for said lot, and at the same time tendered to defendant three dollars as and for his lawful fee for making such deed; but that defendant then refused, and ever since has refused, to execute such deed.

The specific and only ground upon which the demurrer was sustained is that the petition shows that petitioner's right to the writ is barred by section 3788 of the Political Code, as amended February 13, 1885, which, among other things, provides: "In all cases where land has been heretofore sold for delinquent taxes the deed therefor must be made within one year and three months after this act takes effect, and, unless so made, the purchaser shall be deemed to have relinquished all his rights under such sale." Neither at the time of the tax sale to Bosworth, nor at any time prior to the enactment of this amendment (February 15, 1885) of section 3788 of the Political Code, was there any statutory limitation upon the time within which the deed must have been made by the tax collector, except that it could not have been made until after the expiration of the period allowed for redemption, which period expired in this case in 1875, more than nine years before the passage of the amendment. Appellant contends that, by virtue of the contract of sale, he was entitled to a deed from the defendant, not only at the time the amendment was passed, but indefinitely thereafter, including the time when this proceeding was commenced, eight years after the passage of the amendment, and more than six years after the expiration of the period of limitation prescribed by the amendment; and, therefore, that the limitation of his right of action to compel the defendant to execute such deed to the period of one year and three months after the amendment took effect impairs the obligation of the contract of sale, and for this reason is repugnant to section 16 of article 1 of the constitution of this state, which prohibits the passage of any law "impairing the obligation of contracts." The amendment in question is clearly a prospective statute of limitation of the time within which the tax deed must have been made, and consequently a like limitation of the time within which an action must have been commenced to enforce the making of such deed, and, as such, does not impair nor purport to impair the obligation to make the deed, but merely prescribes a reasonable period of time, after the passage thereof, within which an action for a breach of such obligation must have been commenced.

It is claimed, however, that, under the contract of sale, the obligation to make the deed was without any limitation by law as to the time within which the deed must be made or the obligation enforced; and, therefore, that it was an essential part of the obligation of the contract that the time within which it might be enforced should be unlimited; and that the passage of a law, after the maturity of the obligation, limiting the time within which it could be enforced, impairs this essential part of the obligation of the contract. This argument, though often made heretofore, has been answered and almost uniformly overruled by the highest authorities. It is well settled that a reasonable limitation of the time within which a matured contractual obligation may be enforced by suit does not impair the obligation of the contract in the sense of the constitutional prohibition cited; and it has been often held that a limitation to one year, and even to six months, is not unreasonable, and does not impair the obligation of the contract, nor deprive the obligee of an adequate remedy. Of the great number of authorities to this effect, only the following, deemed specifically in point, need be cited: Terry v. Anderson, 95 U. S. 628; Vance v. Vance, 108 U. S. 514, 2 Sup. Ct. 854; Wheeler v. Jackson, 137 U. S. 245, 11 Sup. Ct. 76; Lumber Co. v. Olmstead, 85 Cal. 80, 24 Pac. 648; Korn v. Browne, 64 Pa. St. 55.

Upon the question under consideration the authority of the supreme court of the United States is paramount, since the federal constitution also prohibits the passage of a law by any state impairing the obligation of contracts; and that court, upon writ of error, may review and reverse the final judgment of the highest court of law or equity of any state upon this question. The appellant relies principally upon the cases of Robinson v. Magee, 9 Cal. 81, and Rollins v. Wright, 93 Cal. 395, 29 Pac. 58; but I think those cases distinguishable from the case at bar. The law which was held to impair the obligation in each of those cases required the obligee to perform an onerous act, not required by the contract, nor by any law in force at the time the obligation matured, as a condition precedent to any remedy for a breach of the obligation; whereas in this case the law in question requires no such condition, but, on the contrary, assumes the right of the obligee to an immediate unconditional remedy, and merely limits the time, prospectively, within which such remedy must be sought or prosecuted to one year and three months. If this is not a substantial distinction, available to exempt this case from the rule announced in those cases, neither is there any such distinction between those cases and that of Lumber Co. v. Olmstead, 85 Cal. 80, 24 Pac. 648, nor between them and the decisions of the supreme court of the United States above cited; and the consequence must be that the legislature is prohibited from reducing the period of limitation of actions ex contractu from that prescribed by law at the time the obligation matured, even though the remedy is not thereby impaired, nor the period of limitation so much reduced as not to afford a reasonable time within which to apply for the remedy. In view of the authorities, it seems clear that such a consequence is not admissible. If, as I understand counsel to claim, the amendment of section 3788 of the Political Code purports to deprive appellant of vested rights other than the alleged right to unlimited time within which to commence this proceeding, no question as to any such other right is involved in this appeal, and therefore need not be considered. I think the judgment appealed from should be affirmed.

We concur: TEMPLE, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

104 Cal. 497

## GAROUTTE v. HALEY, County Clerk. (No. 15,892.)

(Supreme Court of California. Nov. 5, 1894.)

AMENDMENT OF RECORD—CONCLUSIVENESS—NEW TRIAL—CONDITIONS—MANDAMUS.

1. An order by the court amending a former order granting a new trial is conclusively presumed to be correct, when used in evidence or questioned collaterally.

2. The court may, in its discretion, grant a new trial on condition that the party in whose favor it is granted shall pay costs.

3. Where a new trial was granted to defendant provided he pays the costs within a certain time, if he fails to so pay them the order granting the new trial is inoperative, and mandamus lies to compel the clerk to issue execution on the judgment.

In bank.

Petition by one Garoutte against Haley, county clerk, for a writ of mandate to compel defendant to issue execution on a judgment. Granted.

R. Y. Hayne, for petitioner. Goodfellow & Taylor, for respondent.

HARRISON, J. Application for a writ of mandate. In an action brought by the petitioner against Stephen Williamson et al. in the superior court for the city and county of San Francisco, judgment was entered January 31, 1894, in favor of the petitioner for the sum of $3,891.21, and $366 costs of suit. A motion for a new trial was made by the defendants, and after argument thereon an order was entered in the minutes of the court, July 31, 1894, granting said motion. August 13, 1894, the court made, and caused to be entered in its minutes, the following order: "The plaintiff's motion to amend the order granting a new trial having been continued until Monday, the 13th of August, 1894, and having come on regularly to be heard on that day, R. Y. Hayne, Esq., appearing for the plaintiff, and no one appearing for the defendants, and it appearing to the court that the order granting a new trial, heretofore entered in said cause, does not correctly set forth the grounds upon which the court acted in making said order: Now, therefore, it is ordered, upon plaintiff's said motion, that said order granting a new trial be, and the same is, hereby amended so as to read as follows [title of court and cause]: In this action, the motion for a new trial on file herein having been heretofore submitted to the court for consideration and decision, and taken under advisement, and now the court having fully considered the same, and being fully advised therein, it is ordered by the court that said motion be, and the same is, hereby granted, upon the grounds * * * [stating them]; and it is further ordered, as a condition of the order granting a new trial, that the defendants herein pay to plaintiff herein, within twenty-five days from July 31, 1894, the plaintiff's costs of suit, amounting to the sum of two hundred and twenty-six ($226) dollars: provided the plaintiff file within twenty days from said July 31, 1894, a written consent not to prosecute any appeal from the said order granting a new trial, but to either take a new trial of said action, or to dismiss the same." Within the time designated therefor in this order, the plaintiff filed a waiver of his appeal and right to appeal from said order, but the defendants did not pay the sum of $226 named in the order. September 17, 1894, the petitioner applied to the respondent, as clerk of said court, to issue an execution upon the judgment, and upon his refusal the present application was made for a writ of mandate requiring him to issue such execution.

Upon the application and return herein, we can consider only the order of August 13th. That order purports, upon its face, to be amendatory of the order of July 31st, and to be made for the purpose of correcting the former order. Its effect, therefore, was to supersede the original order, and to render it the only order of the court upon the motion for a new trial. It must therefore receive the same consideration as if the original order had been entered in the terms in which it is now found. The right of a court of general jurisdiction to amend or correct its records so that they shall speak the truth is too well recognized to need any argument. Crim v. Kessing, 89 Cal. 486, 26 Pac. 1074. And any correction or amendment of its records is conclusively presumed to have been properly made, when such record is collaterally drawn in question, or is used as evidence or relied upon in support of any other proceeding. Paige v. Roeding, 96 Cal. 391, 31 Pac. 264; Cockrill v. Clyma, 98 Cal. 123, 32 Pac. 888.

The order of August 13th is not framed in as simple and direct language as it might have been, but we are of the opinion that, upon a consideration of all its terms, the proper construction to be given to it is that the court required of the defendants, as a condition upon which their motion should be granted, the payment of the plaintiff's costs: provided the plaintiff should, at least five days before the expiration of the time within which such payment was to be made, waive his right to appeal from such order; that, if the plaintiff should not file such waiver, the defendants need not pay the costs, and the order for a new trial would then become absolute. If the plaintiff should file the waiver, and the defendants should not pay the costs within the time limited, the condition upon which the new trial was ordered would remain unperformed, and consequently the order would become inoperative. The order does not state in express terms that in such case the new trial would be denied, but we think that is a necessary inference to be drawn from all its provisions; otherwise, the motion for a new trial must be regarded as still pending, since a new trial was granted only upon a compliance with the condition. This appears to be the construction given to the order by the defendants themselves, for on the 19th of September they appealed therefrom, stating in their notice that they appeal from said order "in so far as the same denies the motion of the defendants for a new trial in said action, and also in so far as the same grants such motion of defendants upon conditions as therein expressed."

The authority of the court to make its order granting or refusing a new trial dependent upon the performance of a condition by the party in whose favor the order is made must be regarded as a settled rule of procedure in this state. Davis v. Southern Pac. Co., 98 Cal. 13, 32 Pac. 646. And it is within the discretion of the court to make the payment by the defendant of costs to the plaintiff the condition upon which it will grant a new trial. Rice v. Gashirie, 13 Cal. 53; Cordor v. Morse, 57 Cal. 301. Whether, in the present case, the condition was a proper one, or whether the court failed to exercise a proper discretion in making the condition, is not open to consideration here, but can be reviewed only upon a direct appeal from the order itself. As the motion for a new trial must be regarded as having been denied, and no undertaking to stay execution upon the judgment has been filed, it was the duty of the respondent to issue the execution, when requested by the plaintiff. The application for the writ is granted.

We concur: DE HAVEN, J.; McFARLAND, J.; VAN FLEET, J.

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104 Cal. 440

## PEOPLE v. TUCKER. (No. 21,141.)

(Supreme Court of California. Nov. 1, 1894.)

CRIMINAL LAW—EVIDENCE OF ANOTHER CRIME.

On a trial for larceny, testimony of a theft other than the one charged, and shortly before it, is not admissible.

Commissioners' decision. Department 2. Appeal from superior court, San Joaquin county; Ansel Smith, Judge.

Richard Tucker was convicted of grand larceny, and appeals from the judgment and the order denying a new trial. Reversed.

A. V. Scanlan, for appellant. Wm. H. H. Hart and W. H. Layson, for the People.

TEMPLE, C. The defendant was convicted of grand larceny, and appeals from the judgment and from an order refusing a new trial. The defendant was informed against for the crime of grand larceny in stealing $35 from the person of William Laughlin, on the 18th day of January, 1894. At the trial, Laughlin testified that he and defendant occupied the same room on Wednesday night, January 16, 1894; that witness had in a purse when he went to bed $45 in gold, and loose in his pocket $2 in silver. When he went to bed, he put his purse and watch under his pillow. In the morning, when he was half awake, he felt a hand go under his pillow, but thought Tucker wanted to see what time it was. Tucker then shook him, and told him it was time to get up. Tucker then said: "You spent a good deal of money last night." Witness then looked at his purse, and found $20 gone, and said to Tucker: "Dick, this won't do. You must have taken twenty dollars out of there." Tucker denied taking it, but finally, when witness promised to give him $2, Tucker handed him the $20. The witness further testified that he and Tucker were about town together all that day and night. He had a $20 piece changed, and at about 1 o'clock the next morning sat down in a saloon, and fell asleep. When he went to sleep, he had $35 in his purse. During his sleep his purse was taken from his pocket, and the money abstracted, and the purse put in his coat pocket, with the key to his room, which he did not have when he fell asleep. F. Doutre testified that he saw defendant take from Laughlin's pocket his purse, and that he showed him two five-dollar pieces which he had taken from it, offering him one not to speak of the matter. The defendant testified for himself that he did not take the money, and knew nothing of the matter. The testimony in regard to the abstraction of the $20 piece on the morning of the 17th was put in against the objection of the defendant, who excepted to the ruling of the court admitting it, and afterwards moved to strike it out, and excepted to the ruling of the court denying the motion. Whether these rulings were correct is the only question presented on this appeal.

The fact that testimony offered tends to prove another offense is never a valid objection to its introduction. On the other hand, testimony is not relevant simply because it tends to show that the defendant at some other time was guilty of a similar offense. Guilt cannot be shown, nor can the weight of evidence be increased, by showing that the defendant has committed other offenses. When such evidence is offered, the same considerations arise as upon the offer of other testimony. Is the evidence relevant and competent? Does it tend to prove any fact material to the issues? The only suggestion made here in justification of the ruling is that but for this proof the defendant might have claimed that he took the money from a sleeping friend to preserve it for him. There was no such issue in the case. The defendant did not claim that he took the money for such purpose. He denied that he took it at all. Mere proximity of time and place do not render this evidence admissible. People v. Lane, 100 Cal. 379, 34 Pac. 856. I think the ruling was erroneous, and that for that reason the judgment and order should be reversed.

We concur: BELCHER, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed.

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4 Cal. Unrep. 872

## WHITMORE et al. v. AINSWORTH et al.

(No. 15,547.)

(Supreme Court of California. Nov. 2, 1894.)

PURCHASER OF LAND—NOTICE OF EQUITIES—POSSESSION—EVIDENCE—CONCLUSIONS.

1. Where, in an action by a grantor against the grantee to set aside a deed for fraud, the findings are for the defendant, the question whether possession by the grantor operated as notice to subsequent purchasers is immaterial.

2. A question whether defendant wanted plaintiff "to do anything" at a certain time was rightly excluded as calling for a conclusion.

3. A paper executed by defendant, authorizing his agent to take possession of certain premises, is admissible to prove defendant's attempt to take possession thereof.

Commissioners' decision. Department 1. Appeal from superior court, Alameda county; F. W. Henshaw, Judge.

Action by Charlotte S. Jones against A. G. Ainsworth and others to set aside and annul a deed for fraud and want of consideration. Plaintiff having died before the trial, her executors, Welles Whitmore and Cary Howard, were substituted as plaintiffs. Judgment for defendants. From an order denying their motion for a new trial, plaintiffs appeal. Affirmed.

Whitmore & Stoddart, Welles Whitmore, Cary Howard, and M. C. Chapman, for appellants. C. L. Calvin and T. F. Graber, for respondents.

SEARLS, C. This is an action brought to set aside and annul a deed executed on or about July 26, 1890, by Charlotte S. Jones to the defendant A. G. Ainsworth, upon the grounds that the same was without consideration, fraudulent, and void. Defendants had judgment, from which, and from an order denying their motion for a new trial, plaintiffs appeal.

The action was commenced in the name of Charlotte S. Jones as plaintiff, who departed this life before the trial, and the present plaintiffs, the executors of her last will, were thereupon substituted as plaintiffs in the cause. A synopsis of the complaint may be thus stated: (1) On the 22d day of July, 1890, Charlotte S. Jones, the plaintiff, acquired a legal title to the lot of land described in the complaint by deed from Welles Whitmore. (2) Plaintiff was at the time a servant of defendant, who went with her, on the 26th day of July, to the office of Whitmore, for the purpose of receiving said deed, and thence to the office of the county recorder, where defendant represented to plaintiff that, in order to have said deed recorded, it was necessary for her to acknowledge it; and plaintiff, believing this statement to be true, made, as she supposed, such acknowledgment, but in fact acknowledged a fraudulent deed, which defendant had prepared from her to himself of the property. (3) That there was no consideration therefor. (4) That plaintiff was able to write, but said deed to the defendant was signed with plaintiff's mark. (5) That the deed was not made, signed, executed, or acknowledged by plaintiff, and if her name is signed thereto it is a forgery. (6) Plaintiff was old, feeble, and unacquainted with business, and defendant, well knowing that fact, took advantage of her incapacity, fraudulently procured her to acknowledge said deed, which he recorded, and now claims to be the owner of said lot of land. There are also allegations to the effect that defendant afterwards executed a mortgage upon the lot to the Oakland Bank of Savings to secure the payment of $400, which mortgage was duly recorded. That the said bank took with notice and knowledge of the ownership and possession of plaintiff in and to said land, etc. Defendant's answer denies that the deed from plaintiff to him was without consideration, and denies all fraud in its procurement. It further sets out that in July, 1890, Welles Whitmore had title and possession of the lot of land in question under a deed of conveyance from plaintiff, claiming to hold it as security for $175 asserted to be due him from plaintiff; that plaintiff was desirous of redeeming the same from Whitmore, but was unable to procure the means so to do; that plaintiff and defendant thereupon entered into an agreement whereby the latter agreed to and did advance the money to pay Whitmore, and to support, maintain, and care for plaintiff, and to furnish her all the necessaries of life, including board, lodging, clothing, medical attendance, etc., during the full period of her natural life, to pay her lodge, insurance, and society dues and assessments, in return for which plaintiff agreed to convey to him by deed absolute the title in fee to the lot of land in question; that in pursuance of said agreement defendant advanced the money, paid Whitmore, who conveyed to plaintiff, and the latter then conveyed to defendant the said lot, and placed him in possession; that defendant complied with all the conditions of the agreement to be by him kept and performed, etc. Defendant also incorporates in his answer, and makes a part thereof, an affidavit, made and duly certified before a notary public by the plaintiff, in which she states that she is old, feeble, and without near relatives; that defendant and his family have been her friends; that defendant advanced the money to pay Whitmore, and that she then knowingly and voluntarily executed and acknowledged the conveyance to defendant, who has faithfully kept his agreement with her; that the allegations of fraud in her complaint are untrue; that she never authorized this action, never read or heard the complaint read, and was not aware of its contents, and knew nothing of its being filed, paid no costs or fees, and directs that the same be dismissed at once.

At the trial Rachel C. Quinn was called as a witness on behalf of plaintiff, and had testified as to a conversation which occurred between plaintiff and defendant, when the following question was propounded to the witness: "Q. State whether or not he [defendant] wanted her [plaintiff] to do anything or not at that time." To which counsel for defendant objected "upon the ground that it called for the conclusion of the witness." The objection was sustained, an exception noted, and the ruling is assigned as error. The record shows that the court permitted the witness to testify, and she did testify at length, to the conversation between the parties, and, finally, that defendant had a paper he wanted plaintiff to sign. No doubt this was precisely what plaintiff desired to prove in answer to his question. Whether it was or not, the action of the court in confining the witness to a statement of facts as they occurred, rather than to an expression of her opinion of what was wanted, was proper.

Thomas T. Jones was called by the plaintiff as a witness, and, after testifying that plaintiff was his wife, said he went to the house where his wife died, on the day of the funeral, to take possession of the place; that he had a paper with him, which he produced, and which he said he tried to show to Mrs. Rachel C. Quinn, but she would not look at it. On cross-examination the paper was offered in evidence, and proved to be an authorization to witness from defendant as owner to take possession of the premises in which his wife had died, and to hold the same until further arrangements. To this document objections were made, and the ruling admitting it is assigned as error. The evident object of the plaintiff in introducing the witness was to prove by him that he was seeking to take possession of the property in dispute, where plaintiff had died, for and on behalf of the defendant. The paper in question was the authority under which witness acted, and as such was competent evidence.

The other errors assigned upon the admission of evidence are not more important, and are as destitute of foundation as those noticed, and, as they relate to the testimony of defendant, they need not be noticed. The fact is, the testimony on the part of the plaintiff failed most signally to sustain the allegations of fraud set up in the complaint. Treated liberally, and the most that can be said of it is that it raised a suspicion as to the good faith of the defendant in some of the transactions. Had the court granted a nonsuit as asked for by defendant, its action could have been sustained. The findings are supported by the evidence. The only one upon which any doubt should be predicated is that in relation to the possession by defendant of the land in dispute; and of this it may be said: (1) There was a conflict in the evidence. (2) The question of possession, in view of the findings that there was no fraud on the part of defendant, became wholly unimportant. If he purchased the land in good faith for a valuable consideration, and received a deed of conveyance thereof in due form from plaintiff, he was entitled to the possession; and, whether he had such possession or not, he could execute a valid mortgage thereon to the Oakland Bank of Savings. It is only where the title is defective, or where equities exist in favor of the grantor or others, that possession by the grantor is notice to subsequent purchasers. In other words, possession by the grantor after a conveyance is notice to subsequent purchasers of any defects which may exist in the title, sufficient to put a subsequent purchaser upon inquiry; but, if such inquiry results in showing a perfect title in the grantee, the subsequent purchaser cannot be made to suffer by reason of his immediate grantor not having been in possession. The judgment and order appealed from should be affirmed.

We concur: TEMPLE, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

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104 Cal. 482

## PEOPLE v. HITCHCOCK. (No. 21,139.)

(Supreme Court of California. Nov. 2, 1894.)

CRIMINAL LAW—OBJECTIONS TO INDICTMENT—WAIVER—PERJURY—INSTRUCTIONS.

1. The fact that in an information for perjury the words "manner material to the issue" were used, instead of "matter," etc., is not ground for reversing a conviction, under Pen. Code, § 1258, the error being without prejudice.

2. The fact that the issue concerning which a witness testifies falsely is afterwards admitted does not render it immaterial, so as to prevent a conviction of perjury therefor.

3. An instruction that if defendant testified in a certain manner after being sworn, etc., and in fact did not see or hear the occurrences to which he testified, and was not at that time in E., where the occurrences took place, but was in F., and his testimony was knowingly and willfully false, then defendant was guilty of perjury, does not violate Const. art. 6, § 19, providing that judges shall not instruct with respect to matters of fact, but may state the testimony and declare the law.

4. The fact that Pen. Code, § 1321, providing that an accused may testify in his own behalf, does not expressly authorize the court to instruct as to the credit to be given his testimony, does not deprive it of the power to do so.

5. An instruction that "defendant has been examined in his own behalf. This it is his right to be, and the jury will consider his testimony as they would that of any other witness examined before you. It is proper for the jury, however, to bear in mind the situation of defendant, the manner in which he may be affected by your verdict, and the very grave interest he must feel in it; and it is proper for the jury to consider whether his position and interest may not affect his credibility or color his testimony. But it is your duty to consider it fairly, and give it such credit and weight as you think it is entitled to receive,"—is not ground for reversal.

Commissioners' decision. Department 1. Appeal from superior court, Humboldt county; G. W. Hunter, Judge.

Albert Hitchcock was convicted of perjury, and appeals. Affirmed.

Ford & Burnell and Ernest Sevier, for appellant. T. H. Selvage, for the People.

HAYNES, C. The defendant was indicted for perjury. The indictment appears to have been copied in part from the case of People v. Ah Bean, 77 Cal. 13, 18 Pac. 815. The opinion in that case set out the material part of the indictment, and in it occurs the expression "did in a manner material to the issue." The word "manner" is evidently a misprint, in that case, for the word "matter." Here the word "manner" is used in the indictment. The indictment was not demurred to. At the close of the evidence on behalf of the people, the defendant moved the court to instruct the jury to acquit the defendant, upon the ground that the information did not state facts sufficient to constitute a public offense; and then first raised the question as to the use of the word "manner" instead of "matter." The indictment was in other respects sufficient, and in some particulars less open to criticism than that against Ah Bean. If the district attorney had read the opinion of the learned chief justice in that case he would have seen that it was an error of the printer, as he afterwards used the word "matter" in precisely the same connection. We do not think appellant or his counsel could have been misled or prejudiced by the error, as it was clearly alleged that the false testimony was given upon the preliminary examination of George B. Hall on a charge of murder, and set out the evidence given by appellant on such examination, showing on its face that the evidence so given was material to the issue, and, that appearing, it appeared upon the face of the indictment that the testimony so given was in a matter material to the issue. We do not intend to encourage carelessness in criminal pleading; but where a defect in an indictment or information is merely technical, and does not affect the substantial rights of the parties, we are not at liberty to reverse the judgment. Pen. Code, § 1258.

The testimony of appellant given upon the examination of Hall, as set out in the indictment, was clearly material. The issue there was whether Hall was probably guilty of the murder of Anderson. The killing of Anderson was therefore in issue. The record here does not show that Hall admittted the killing, but, if it did, it would not affect the question, since an admission of a fact does not tend to show that it was not in issue. It was not only alleged to have been material, but was proven to be so upon the trial.

Appellant's contention that the court erred in its third instruction cannot be sustained. This instruction stated: "The matter which the prosecution alleges the defendant swore to, and which is alleged to be false, is as follows." The court then quoted the allegations of the indictment, and added: "The prosecution claims this testimony to have been false, and that the defendant knew it to be false, in this: that the defendant, Albert Hitchcock, was at that time at Freshwater, a distance of ten miles from the city of Eureka, and that, so far as he was concerned, the whole testimony was false, for the reason that, if it did occur, he did not see or hear it." This was a clear and correct statement of the issues; and the remainder of the instruction was an application of the law to the effect that, if the jury found beyond a reasonable doubt that the defendant did so testify after being duly sworn, etc., and in fact did not see or hear the occurrences to which he testified, and was not at that time in Eureka, but was in Freshwater, some 10 miles distant, and that his said testimony was knowingly and willfully false, then the defendant was guilty, and they should so find. This instruction did not violate section 19, art. 6, of the constitution, which provides that "judges shall not charge juries with respect to matters of fact, but may state the testimony and declare the law." See People v. Flynn, 73 Cal. 516, 15 Pac. 102; People v. Casey, 65 Cal. 260, 3 Pac. 874.

Appellant excepted to the seventh instruction given at the request of the people, which is as follows: "The defendant has been examined as a witness on his own behalf. This it is his right to be, and the jury will consider his testimony as they would that of any other witness examined before you. It is proper for the jury, however, to bear in mind the situation of the defendant, the manner in which he may be affected by your verdict, and the very grave interest he must feel in it; and it is proper for the jury to consider whether this position and interest may not affect his credibility or color his testimony. But it is your duty to consider it fairly, and give it such credit and weight as you think it is entitled to receive." Appellant contends that the change in the statute since the case of People v. Cronin, 34 Cal. 204, was decided, has destroyed the authority of that case upon this point. That case was decided in 1867. The constitution of 1849, art. 6, § 17, and section 19 of the same article in the present constitution, are identical. If neither the constitution nor the statute prohibits an instruction as to the credibility of witnesses, the power to so instruct must be conceded. That the constitution does not has been frequently decided, from the case of People v. Cronin, supra, down to People v. O'Brien, 96 Cal. 181, 31 Pac. 45. The act of 1866 (St. 1865–66, p. 865) permitted the defendant to be examined as a witness at his own request, "the credit to be given to his testimony being left solely to the jury, under the instructions of the court." This act was amended in 1872 (St. 1871–72, p. 319), but was not changed in this respect. The Codes omit the clause above quoted relating to the instructions of the court, and the right of a defendant in a criminal case to testify in his own behalf is found in a general provision relating to the competency of witnesses. Code Civ. Proc. § 1879; Pen. Code, § 1321. These provisions, counsel contend, effect such a change in the law that the court can no longer give the jury any instruction upon the subject of the defendant's testimony. But these changes do not affect the constitutional provision; and if that provision permits it, and if the statute does not prohibit it, it must still exist. The charge in this case is certainly not more objectionable than many others which have been sustained on appeal; but we would again call attention to the suggestions given in People v. O'Brien, 96 Cal. 180, 31 Pac. 45; People v. Curry (No. 21,110; filed Aug. 16, 1894) 37 Pac. 503; and People v. Lang (No. 21,119) 37 Pac. 1031. Sections 1102 and 1323, Pen. Code, cited by counsel, do not affect the question.

No other points are made by appellant in his brief, but we have examined the whole record, and find no ground upon which the motion for a new trial should have been granted. The judgment and order appealed from should be affirmed.

We concur: VANCLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from should be affirmed.

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104 Cal. 464

## FARWELL et al. v. MURRAY. (No. 15,598.)

(Supreme Court of California. Nov. 2, 1894.)

ASSUMPSIT—PLEADING—WAIVER OF JURY TRIAL.

1. In a complaint for labor performed, and goods furnished, it is not necessary to segregate the items of the account.

2. A case was continued on account of the absence of defendant's attorney, and afterwards called, when defendant appeared with a new attorney, and demanded a jury. *Held* that, by his failure to demand a jury on the first call defendant did not waive his right to it, under Code Civ. Proc. § 631, providing for such waiver (1) by failing to appear at the trial; (2) by written consent; and (3) by oral consent in open court.

Commissioners' decision. Department 1. Appeal from superior court, Alameda county; John Ellsworth, Judge.

Action by Farwell & Hutchinson against Robert M. Murray for labor performed and goods furnished. Judgment for plaintiffs, and defendant appeals. Reversed.

Welles Whitmore, for appellant. Dodge & Fry, for respondents.

BELCHER, C. The plaintiffs brought this action to recover the sum of $556.42 for and on account of work done and labor performed by plaintiffs for defendant, and for and on account of goods, wares, and merchandise sold and delivered by plaintiffs to defendant. The defendant demurred to the complaint upon the grounds that it did not state facts sufficient to constitute a cause of action, and that it was uncertain and unintelligible, for the reason that it could not be determined therefrom how much of the sum alleged to be due was for work and labor, and how much for goods, wares, and merchandise. The demurrer was overruled, and the defendant then answered, denying the allegations of the complaint. The case was tried by the court without a jury, and the judgment entered was in favor of the plaintiffs, for the sum of $490.57, from which, and from an order denying his motion for a new trial, the defendant appeals.

There was no prejudicial error in the order overruling the demurrer. The complaint stated a cause of action, and it was not necessary to set forth the items of the account. If the defendant desired more particular information as to the items, he might have demanded a bill of particulars. Code Civ. Proc. § 454.

It appears from the bill of exceptions that the case came on regularly to be heard at 10 o'clock a. m. on August 22, 1893, at which time the attorneys for plaintiffs and the defendant appeared, but the attorney for defendant was not present. It was stated to the court that defendant's attorney was engaged in the trial of another case in the superior court of the city and county of San Francisco, and for that reason could not then be present to try this case. At the request of the defendant the trial of the case was thereupon continued until 2 o'clock p. m. of the same day, at which time the plaintiffs and their attorneys appeared, and announced that they were ready to proceed with the trial; and the defendant appeared with a new attorney, who was, by an order of the court, authorized to be and appear as the attorney for the defendant in said action. "Thereupon, the defendant demanded a trial by jury, which demand the court refused, and denied the right of the defendant to a jury trial." The defendant duly excepted to this ruling of the court, and now assigns it as error. The constitution, in article 1, § 7, provides: "The right of trial by jury shall be secured to all, and remain inviolate. * * * A trial by jury may be waived * * * in civil actions by the consent of the parties, signified in such manner as may be prescribed by law." And section 631 of the Code of Civil Procedure provides that a trial by jury may be waived in manner following: "(1) By failing to appear at the trial. (2) By written consent, in person or by attorney, filed with the clerk. (3) By oral consent, in open court, entered in the minutes." It is claimed for respondent that the trial of the case was actually commenced in the morning, when it "came on regularly to be heard," and that appellant waived his right to a trial by jury by not demanding it at that time. We fail to see any valid ground on which this claim can be sustained. The trial of the case was not commenced in the morning, but was continued until the afternoon, when appellant promptly demanded a trial by jury. He was certainly entitled to such a trial, unless he had waived his right in one of the ways prescribed by the law. We see nothing in the record showing such waiver, and therefore conclude that the court erred in its ruling. See Biggs v. Lloyd, 70 Cal. 447, 11 Pac. 831.

The other matters discussed by counsel need not be considered. The judgment and order appealed from should be reversed, and the cause remanded for a new trial.

We concur: SEARLS, C.; TEMPLE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are reversed, and the cause remanded for a new trial.

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(4 Cal. Unrep. 876)

## PEOPLE v. BUTTON.[1] (No. 21,127.)

(Supreme Court of California. Nov. 2, 1894.)

JUSTIFIABLE HOMICIDE.

1. Pen. Code, § 197, provides that to constitute justifiable homicide, if defendant was the assailant in a mortal combat, he must in good faith have endeavored to decline any further struggle before the homicide was committed. *Held*, that where one accused of murder commenced the combat, but in good faith tried to withdraw before the homicide, and was followed by deceased, who continued the combat, the fact that deceased, by reason of injuries sustained at defendant's hands, was unable to realize that defendant sought to withdraw, does not limit the right of defendant to claim that the killing was done in self-defense.

2. If it was defendant's purpose in good faith to withdraw from the combat, and he endeavored to do so, it is not necessary to his justification that the conflict should have actually ceased, or that there should have been such an interval as would divide it into two different combats.

Commissioners' decision. Department 1. Appeal from superior court, San Bernardino county; George E. Otis, Judge.

Charles Button was convicted of manslaughter, and appeals. Reversed.

Byron Waters and Wm. A. Harris, for appellant. W. H. H. Hart and Frank F. Oster, for the People.

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[1] Reversed in banc. See 39 Pac. 1073, 106 Cal. 628.

HAYNES, C. An information was filed against Button, charging him with the murder of Gustav Bohm, and upon the trial he was found guilty of manslaughter. His motion for a new trial was denied, and this appeal is from the judgment and the order denying a new trial.

Some exceptions were reserved to evidence, but the principal questions arise upon the instructions to the jury and the sufficiency of the evidence as matter of law to sustain the verdict. The deceased died from a gunshot wound inflicted by the defendant. Very shortly before the shooting, angry words had passed between the parties, and at that time the defendant stamped or kicked the deceased in the face. The injury inflicted by defendant upon Bohm's face when he stamped upon it was fully described by the physicians, and doubtless was of a very serious character, breaking down the left cheek bone and injuring the left eye, so that, in the opinion of the physician, the possibility of sight in that eye was excluded, and that the tendency would be to affect the other eye, both in co-ordination of movement and vision. The doctor was then asked by the district attorney: "What faculties would it affect, in your opinion?" Defendant's objection that it was incompetent, irrelevant, and immaterial was overruled, and the witness answered: "It would affect more particularly his brain, and his mental faculties, and his vision, and sense of smell, and the guidance and direction of his eyes or eye to a particular spot, or for any particular purpose." The same witness was asked the further question: "Would that, in your opinion, affect a man's impressions of things around him?" An objection to this question was also overruled, and the witness answered, "Yes, sir." Other questions were permitted, and answers received, of like character. In this connection one of the instructions given to the jury may properly be considered, inasmuch as it is based on this evidence of the mental condition of Bohm. The defendant requested the court to give the following instruction: "One who has sought a combat for the purpose of taking advantage of another may afterwards endeavor to decline any further struggle, and if he really and in good faith does so before killing the person with whom he sought the combat for such purpose, he may justify the killing on the same ground as he might if he had not originally sought such combat for such purpose." The court modified said instruction, and gave it as modified by the addition of the following: "Provided, that you also believe that his endeavor was of such a character, and so indicated, as to have reasonably assured a reasonable man that he was endeavoring in good faith to decline further combat, unless you further believe that in the same combat in which the fatal shot was fired, and prior to the defendant endeavoring to cease further attack or quarrel, the deceased received at the hands of the defendant such injuries as deprived him of his reason or his capacity to receive impressions regarding defendant's design and endeavor to cease further combat." The court also gave the following instructions: "But, even though the jury should be satisfied that the defendant, after such assault, and before firing the fatal shot, did really and in good faith endeavor to decline any further struggle, and to abandon the conflict, and that the defendant, at the time he fired the fatal shot, had reason to fear and did fear that the deceased meant to take his life, and acted under the influence of such fears alone, yet if you also believe that in such assault the defendant, by his own act, had put the deceased into such a condition that the defendant could not make the deceased understand that the defendant desired to withdraw from the conflict, you must not acquit the defendant." The modification of the first of these instructions and the qualification in the second commencing with the word "yet" were erroneous. If, under the circumstances existing at the moment of the homicide, the deceased had killed the defendant, and he had been on trial for murder, there might have been some pertinency to these instructions. If the defendant, being the first aggressor, had declined further combat, as stated in the first part of the instruction, he is placed, so far as the law of self-defense is concerned, in the same position as though there had been no prior combat; and, that being true, the mental or other condition of the deceased could not affect his right of self-defense, even though such condition, if the deceased had slain the defendant, would have excused the homicide. If a confirmed lunatic, so completely bereft of reason as to make him wholly irresponsible for his acts, is about to take my life, may I not, when it is necessary for the preservation of my own life, take his? Must I be placed where I have no alternative but to accept death at his hands, or be hanged for murder? Section 197 of the Penal Code defines justifiable homicide. So much of subdivision 3 of that section as is pertinent is as follows: "But such person or the person in whose behalf the defense was made, if he was the assailant or engaged in mortal combat, must really and in good faith have endeavored to decline any further struggle before the homicide was committed." This section makes the justification to depend wholly upon the endeavor of the defendant in good faith to decline any further struggle, and not upon the mental or other condition of the deceased; nor, if such condition was not normal, upon whether it was caused by the defendant. It follows from these considerations that the evidence of the physician as to the effect of the injury upon the mental or other condition of the deceased was improperly admitted.

Another instruction requested by the defendant was modified by the court, and, given as modified is as follows (the modification being in italics): "If you believe from the testimony in this case that the defendant committed an assault upon the deceased by kicking him, and then left him with the intention of doing him no further harm; that after committing such assault he went after his horse, and saddled him, with the purpose of leaving the party, to avoid further trouble, and that other members of the party endeavored to persuade him to remain, and that while he and they were so engaged the deceased picked up his own gun, pointed and snapped it at defendant, and then pumped or attempted to pump a cartridge into it, and that he again pointed it at defendant, and that then defendant fired the fatal shot; *and you further believe that the first assault and the second were substantially distinct transactions,*—you must acquit the defendant, whether you think the assault by kicking was justifiable or not." In another instruction upon the same subject the following qualification was inserted: "And that after the first assault had ceased, and there had an interval elapsed between said first assault and the final assault, making said assaults respectively, although in some degree related to each other, yet substantially distinct transactions, each attended with its own separate circumstances, and the deceased procured his gun, and made such an attempt to shoot the defendant," etc., stating circumstances which would justify the homicide). Each of these modifications imposes upon the defendant conditions not required by the statute. They required the jury to find as matter of fact, in order to justify the homicide, that there were two substantially distinct transactions; that is, that the transaction immediately connected with the shooting of the deceased, though if considered by itself it would have justified the defendant, could not justify him unless it was substantially distinct from the assault made by defendant before he went for his horse. The interval between the two occurrences is not important simply as it may serve to mark two occurrences or transactions instead of one, but also because what occurred in the interval, as well as the interval itself, when shown to be voluntary, marks a withdrawal from the conflict, and furnishes evidence tending to show the purpose and intent of the defendant not to renew it. If there was such purpose and intent on the part of defendant in good faith to withdraw from the conflict, and in like good faith he endeavored to do so, it is not necessary to his justification that the conflict should have actually ceased, or that there should be an interval sufficient to divide it into two substantially distinct transactions. It was impossible for the jury to acquit under these instructions, unless they concluded that there were two transactions instead of one.

In People v. Gonzales, 71 Cal. 577, 12 Pac. 783, it is said: "The tenth instruction does not enunciate a correct proposition of law where it declares that one 'cannot in any case justify killing another by a pretense of necessity, unless he was wholly without fault in bringing that necessity on himself'; for cases may, and frequently do, occur in which the aggressor, although primarily in fault, has really and in good faith sought to avoid further conflict before the mortal blow was given, and when this is apparent, and he slay his antagonist in the necessary defense of his own life, he is not guilty of any crime." See, also, People v. Bush, 65 Cal. 129, 3 Pac. 590; People v. Robertson, 67 Cal. 649, 8 Pac. 600; People v. Simons, 60 Cal. 72.

In the seventh instruction given at the request of the prosecution it was said: "That, in order to determine whether any such attempted withdrawal was in good faith, the jury are to take into consideration all the surrounding circumstances, the situation and relation of the parties; and the conduct of the party intending to thus withdraw must be unequivocal, and so marked in the matter of time, place, and circumstance as to clearly evince the withdrawal of the accused from the combat." It is argued by appellant that, the evidence on the part of the prosecution having tended to show that the homicide was justifiable, the burden of proof was not upon the defendant to prove his justification, and cites Pen. Code, § 1105. The court did not refer in this instruction to the question as to where the burden of proof rested. An instruction substantially in the language of that section had before been given without comment. This instruction said: "The conduct of the party must be unequivocal and clearly evince the withdrawal." The first part of the instruction is unobjectionable, but it may be questioned whether the latter part does not conflict with People v. Bushton, 80 Cal. 160, 22 Pac. 127, 549, and other cases following that, down to People v. Hawes, 98 Cal. 653, 33 Pac. 791. People v. Bushton, supra, overruled People v. Ah Duck, 61 Cal. 395, and People v. Raten, 63 Cal. 422,—which held that the burden was upon the defendant to show by a preponderance of evidence circumstances of mitigation or justification. In People v. Bushton, supra, it was said of section 1105, Pen. Code: "This does not mean that he must prove such circumstances by a preponderance of evidence, but that the presumption that the killing was felonious arises from the mere proof by the prosecution of the homicide, and the burden of proving circumstances of mitigation, etc., is thereby cast upon him. He is only bound, under this rule, to produce such evidence as will create in the minds of the jury a reasonable doubt of his guilt of the offense charged. * * * The well-settled rule that a defendant shall not be convicted unless the evidence proves his guilt beyond a reasonable doubt applies to the whole and every material part of the case, no matter whether it is as to the act of killing, or the reason for or manner of its commission. * * * The jury should have been instructed that the burden of proving circumstances of mitigation, or that justified or excused the killing, devolved upon the defendant, but that if, upon the whole case, they entertained a reasonable doubt from the evidence as to his guilt, he should be acquitted. Any other rule as to the weight of the evidence makes one measure applicable to one part of the case and a different one to another part, and leads to confusion." See, also, People v. Elliott, 80 Cal. 305, 22 Pac. 207; People v. Lanagan, 81 Cal. 143, 22 Pac. 482; People v. Carroll, 92 Cal. 572, 28 Pac. 600; People v. Hawes, 98 Cal. 653, 33 Pac. 791.

Appellant's contention that a new trial should have been granted because of the insufficiency of the evidence, and that the judgment should be reversed with a direction to the court below to discharge the defendant, need not be considered. There is no doubt of the power of the appellate court to decide, as matter of law, that a given state of facts does not show that an offense has been committed; but it is a power that should be cautiously exercised, inasmuch as even in an apparently clear case this court cannot know but that upon another trial additional evidence tending to show guilt may be obtained. Except in rare cases, the question whether the defendant should be discharged is properly left to the trial court unprejudiced by any expression of opinion by this court. For the other reasons hereinbefore stated, the judgment and order appealed from should be reversed, and a new trial granted.

We concur: SEARLS, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, and a new trial granted.

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104 Cal. 487

## PEOPLE v. DODGE. (No. 15,065.)

(Supreme Court of California. Nov. 3, 1894.)

VOIDABLE JUDGMENT — MOTION TO SET ASIDE — TIME FOR MAKING—SUFFICIENCY OF SUMMONS —STATEMENT OF CAUSE OF ACTION.

1. The affidavit of a judgment defendant, made after 12 years, that he has no recollection of service, is insufficient, as against the sheriff's return of personal service, and the court's finding that "the defendant, having been regularly served with process as required by law," etc., to justify the vacation of the judgment.

2. The description of land in the summons as "the land described in the complaint" makes the description in the complaint a portion of the summons.

3. Where, under Code Civ. Proc. § 407, providing that the summons shall contain "(2) the cause and general nature of the action," a summons stated that "the said action is brought to annul a certain certificate of purchase, resulting from location No. 248, and to foreclose and bar defendant, and those claiming under him, of all right and interest in the land described in the complaint (filed in this action), and for such other relief as is consistent with equity," when the action was brought to foreclose the defendant's interest in certain land purchased by him of the state, and to annul the certificate of purchase issued therefor for delinquency in the payment of interest, the entry of judgment by default in said action was voidable, but not void.

4. Where a judgment is voidable, and not void on its face, the error can be corrected only by an appeal, or by motion within six months to set it aside.

5. After the expiration of six months from its rendition, a judgment can be set aside upon motion only where it is absolutely void upon its face for want of jurisdiction of the subject-matter or of the person.

Commissioners' decision. Department 1. Appeal from superior court, Humboldt county; G. W. Hunter, Judge.

Action by the people of the state of California against W. W. Dodge to foreclose a certain interest and annul a certificate of purchase. From an order denying a motion to vacate a judgment in favor of plaintiff, defendant appeals. Affirmed.

Geo. D. Murray and Mastick, Belcher & Mastick, for appellant. Buck & Wheeler, for the People.

SEARLS, C. This is an appeal from an order denying a motion to vacate and set aside a default and judgment, and to permit defendant to plead to the complaint in the cause. The action was brought in the district court of Humboldt county, July 8, 1876, to foreclose the interest of the defendant in certain land purchased by him of the state, and to annul the certificate of purchase issued to him therefor, on the ground of delinquency in the payment of interest. A summons was issued July 10, 1876, which on March 24, 1877, was returned with a certificate of the sheriff of San Francisco, in due form, showing that, on the day last mentioned, he personally served said summons upon the defendant, W. W. Dodge, in the city and county of San Francisco, by delivering to said defendant a copy thereof, attached to a certified copy of the complaint in said action therein named. Defendant failed to answer the complaint, and in due time his default for want of an answer was duly entered; and on the 12th day of July, 1877, a decree was entered, foreclosing all his right, title, and interest in and to the land described in the complaint, and annulling the certificate of purchase, etc. On the 20th day of November, 1889, the defendant served and filed a notice of a motion to vacate the default and judgment, on the grounds: (1) That said judgment is void upon its face; (2) that no summons in said action was ever issued or served upon said defendant; and (3) that said district court never acquired jurisdiction of the person of the defendant. The motion was heard upon the judgment roll and upon an affidavit made by defendant, in which he denied all recollection of having been served with the summons, or that he knew or heard of the pendency of the case until 1889; that he had a meritorious defense upon the merits, etc.

The point that there was in fact no service of the summons and complaint upon defendant may be dismissed, with the remark that the affidavit of defendant, made after the lapse of more than 12 years, showing that he had no recollection of service, is entitled to but little weight as against the official return of the sheriff of personal service and the finding of the court showing that "the defendant, W. W. Dodge, having been regularly served with process as required by law," etc. It will therefore be taken as established here, as it was in the court below, that defendant was personally served with the summons and a certified copy of the complaint.

The leading point made by appellant relates to the sufficiency of the summons to support a default. The contention of his counsel is that the summons did not substantially comply with the material requirements of the statute and hence was inoperative to sustain a judgment by default. Under the Code of Civil Procedure, as it existed when this action was commenced, the summons was required to contain, among other things: "(2) The cause and general nature of the action." Code Civ. Proc. § 407. The clause of the summons to which objection is made is in the following language: "The said action is brought to annul a certain certificate of purchase, resulting from location No. 248, and to foreclose and bar defendant, and those claiming under him, of all right and interest in the land described in the complaint [filed in this action] and for such other relief as is consistent with equity, together with costs of suit." The clause quoted from section 407 of the Code of Civil Procedure has since been amended, and now reads as follows: "(2) A statement of the nature of the action in general terms." As will be observed, the main feature of the amendment was to eliminate the word "cause" from the sentence. The term "cause of action" is defined as "the right which a party has to institute and carry through a proceeding." And. Law Dict., citing, in support of the definition, Meyer v. Van Collem, 28 Barb. 231. Black defines it as "matter for which an action may be brought; the ground on which an action may be sustained; the right to bring a suit." In Calderwood v. Brooks, 28 Cal. 153, "the cause and general nature of the action" was stated thus: "And said action is brought to recover possession of certain land and premises, more particularly described in the complaint herein,"—and it was held sufficient. The court said: "The complaint is thus by reference made a part of the summons, and it affords a proper description of the premises. The summons and affidavit [of service of summons] were sufficient to authorize the entry of the default." In King v. Blood, 41 Cal. 314, a similar doctrine was enunciated; the court holding that by the summons and copy of the complaint, which was served with it, "the defendants were fully and particularly notified of the cause, general nature, and object of the action," etc. Lyman v. Milton, 44 Cal. 630, was a case in which there were several defendants, only one of whom was named in the summons. The court, in holding the summons insufficient, said: "The summons is the process by which parties defendant are brought into court, so as to give the court jurisdiction of their persons. Its form is prescribed by law, and, whatever the form may be, it must be observed, at least substantially." In Ward v. Ward, 59 Cal. 139, a like doctrine was held with that enunciated in Lyman v. Milton, supra. People v. Greene, 52 Cal. 577, was an action, like the present, to foreclose the interest of the defendant in certain land purchased from the state, and to annul his certificate of purchase on account of the nonpayment of interest. The summons issued in the case required the defendant to appear in an action "brought to obtain a decree of this court foreclosing the interest of defendant in certificate of purchase No. 1,393, of grants 16 and 36 sections and lieu lands in the county of Santa Barbara," etc. This court held the summons fatally defective in failing to state "the cause and general nature of the action," and reversed a judgment by default rendered in the case. In Bewick v. Muir, 83 Cal. 368, 23 Pac. 389, decided since the amendment to the Code, the opinion indicates that a very general statement of the nature of the action in the summons is sufficient. In Clark v. Palmer, 90 Cal. 504, 27 Pac. 375, the summons notified the defendant that, upon failure to answer, "plaintiff will take judgment against you for the relief demanded in his complaint"; it being a case in which it should have been stated that he would apply to the court for the relief demanded in the complaint. On appeal, this court held that under section 4 of the Code of Civil Procedure, which requires that "its provisions and all proceedings under it are to be liberally construed with a view to effect its objects and to promote justice," the summons was sufficient. In Keybers v. McComber, 67 Cal. 395, 7 Pac. 838, a like error in a summons was held voidable, but not void, and hence good as against a collateral attack. The summons in the present case attempted to state the cause and general nature of the action, but it must be admitted made a lame effort so to do. To say that an action is brought to annul a certificate of purchase resulting from a given location, and to foreclose and bar the defendant, etc., of all right and interest in the land described in the complaint in the case, affords some light as to the cause and nature of the action, and would have been sufficient to warrant the court below in permitting an amendment had it been asked. There is a wide difference between a want of jurisdiction and a defect in obtaining jurisdiction. "From the moment of the service of process, the court has such control over the litigants that all its subsequent proceedings, however erroneous, are not void. If there is any irregularity in the process, or in the manner of its service, the defendant must take advantage of such irregularity by some motion or proceeding in the court where the action is pending." Freem. Judgm. § 126; Keybers v. McComber, 67 Cal. 396, 7 Pac. 838; Clark v. Palmer, 90 Cal. 504, 27 Pac. 375. That the description of the land by reference to the complaint had the effect to make that portion of the complaint a part of the summons, and obviated the necessity of repeating the description, is upheld in Calderwood v. Brooks, supra. The complaint stated a cause of action, and, in the absence of a special demurrer, cannot be successfully attacked.

From a review of the record and the authorities applicable, the following conclusions are reached: (1) The court had jurisdiction of the subject-matter of the suit, and, by the personal service of the summons, obtained jurisdiction of the person of the defendant. (2) Having such jurisdiction, the entry of judgment by default upon a summons regular in other respects than those indicated was voidable, but not void. (3) In all cases where a judgment is voidable, and not void, on its face, the error can only be corrected by an appeal, or by motion to set the same aside in the court where rendered, which motion must be made within six months after the rendition thereof, and, if denied, by an appeal from the order of denial. (4) After the expiration of six months from its rendition, a judgment can only be set aside upon motion in cases where it is upon its face absolutely void for want of jurisdiction of the subject-matter or of the person of the defendant. (5) In the present instance, a period of 12 years having elapsed between the entry of judgment and the motion to set the same aside, the court below did not err in refusing said motion. It follows that the order appealed from should be affirmed.

We concur: VANCLIEF, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

4 Cal. Unrep. 883

## MILLETT et al. v. LAGOMARSINO et al.[1]

(No. 15,586.)

(Supreme Court of California. Nov. 23, 1894.)

ADVERSE POSSESSION—NOTICE—SUIT TO QUIET TITLE—RES JUDICATA.

1. In 1873 plaintiffs' grantor entered into possession of a number of lots, including the one in controversy, under a three-years lease, and retained possession of them till 1892. In 1882 he received a deed to the lot in question from a tax-sale purchaser thereof, which was duly recorded, but he performed no act to change the character of his possession, and gave no notice that it was hostile. Before 1882 the lot was used by him as a cow pasture, in subor-

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[1] Rehearing granted.

dination to the owner's title. *Held,* that such possession did not constitute notice to the owner of said lot of the adverse character thereof.

2. A judgment rendered in an action for an unlawful entry of certain lands has no effect upon a subsequent action between the same parties to quiet title to said lands.

3. It is not necessary for plaintiff in an action to quiet title to certain lands to allege the source of such title, although his title was acquired by adverse possession.

4. The record of a deed from the owner of the tax title to one already in possession under permission of the owner does not affect the owner with notice that the possession of the grantee thereafter is adverse to his title.

Commissioners' decision. Department 1. Appeal from superior court, San Mateo county; George H. Buck, Judge.

Action by Martin M. Millett and others against Thomas Lagomarsino and others to quiet title to certain land. Judgment for plaintiffs, and defendants appeal. Reversed.

Nowlin & Fassett, for appellants. Nagle & Nagle, for respondents.

HAYNES, C. This action was brought by the plaintiffs to quiet title to lot 2 in block 22 of the "City Extension Homestead Association," at some place not named either in the pleadings or judgment otherwise than that it is in the county of San Mateo. The complaint is in the usual form, alleging that plaintiffs are the owners in fee, and entitled to the possession. The answer denies the ownership and title of the plaintiffs, and alleges title in John B. Cronan, one of the defendants, and that Lagomarsino is in possession under a contract of purchase upon which partial payments had been made, and that he had erected a dwelling house thereon. The court made the general finding that all the allegations of the complaint are true, and the allegations of the answer untrue, and entered a decree quieting plaintiffs' title, and awarding them possession. The defendants appeal from the judgment and an order denying a new trial.

The lot in question is 100 feet square, and is one of many lots comprising together about 10 acres, which, with other lands, were subdivided by said association (a corporation) prior to 1873. Plaintiffs claim title by adverse possession, and whether they have such title is the ultimate question. In November, 1873, Michael Millett, the grantor of plaintiffs, entered into possession of the ten acres above mentioned, under a lease for three years, executed by McNear and nine others, owners of lots, McNear being then president of the association. The whole ten acres were inclosed by a fence, none of the lots therein being separately fenced. The lot in question was sold and conveyed by the association in 1870 to John Tenney, under whom defendants claim, but Tenney did not sign the lease. Defendants claim that the possession so taken by Millett of the whole parcel was continued from that time until he conveyed to the plaintiffs in March, 1892. Tenney conveyed the lot in question to defendant Cronan in August, 1889, and Lagomarsino entered under him in the latter part of 1890, or early part of 1891, and built a house thereon; and Michael Millett conveyed by quitclaim to the plaintiffs March 14, 1892. On July 24, 1882, Jason Wight executed and delivered to Michael Millett a quitclaim deed of said lot, Wight claiming to have purchased it at a sale for delinquent taxes in February, 1878. The only evidence that a tax deed was ever issued to him was the assessment roll, showing the lot assessed to John Tierney (not Tenney), and the tax-sale book, in which was a memorandum that "deed issued March 6, 1879." That deed was not produced, and was not recorded, and Wight testified that he did not remember about the deed. Plaintiffs, however, do not claim that Wight's deed conveyed a title, but that the deed constituted color of title under which Millett held adverse possession. That Millett obtained possession of the lot in question under the lease as tenant of the whole parcel is clear from his own testimony, and that he was never out of possession until he conveyed to the plaintiffs is also clear. That the lease was void as to this lot makes no difference. "He who enters under a void lease is estopped equally with him who holds under a valid instrument." Mauldin v. Cox, 67 Cal. 393, 7 Pac. 804.

Appellants contend that Millett, having entered under a lease, or by permission of the owner, cannot initiate an adverse possession without first surrendering possession; and cite Tewksbury v. Magraff, 33 Cal. 244; Hussman v. Wilke, 50 Cal. 250; and Standley v. Stephens, 66 Cal. 541, 6 Pac. 420. In reply respondents contend that the lease expired in November, 1876, and that after five years from the expiration of the lease the presumption declared by section 326, Code Civ. Proc., that the possession of the tenant is the possession of the landlord, ceases, and that Millett had the right then to commence an adverse possession without first surrendering possession. The five years succeeding the termination of the lease ended in November, 1881, but Millett testified that he did not commence to hold adversely until he obtained the deed from Wight, in July, 1882. His possession prior to July, 1882, could not have affected the owner with notice of that which did not exist, viz. an adverse holding; and therefore it must appear that at or after that time Tenney had such notice of an adverse holding as would set the statute in motion. Respondents assert that the record of the deed from Wight was notice of the adverse claim. But it does not appear that Tenney had any knowledge that such deed was in existence, or had been recorded, and its record was not constructive notice to him. Section 1213 of the Civil Code is as follows: "Every conveyance of real property, * * * from the time it is filed with the recorder for record, is constructive notice of the contents thereof to subsequent purchasers and mortgagees." The owner is neither a subsequent purchaser nor mortgagee, and is not only not within the above Code provision, but is under no obligation or duty to watch the records for conveyances made by a stranger to the title.

The question, then, is whether the possession was of such character as to be notice to the owner that it was adverse. At some time, not definitely fixed, probably in 1883 or 1884, the ten acres seem to have been divided, and thereafter Millett remained in possession of one part, containing about five acres, including said lot No. 2. The principal use of the inclosed parcel, both before and after the division, was for a cow pasture, though it was sometimes cultivated. None of the lots were separately marked off, inclosed, or improved. No one lived upon any part of it. No change in the character of the possession or the use of the property took place. Millett owned some of the lots inclosed, De Forest owned at least one lot, and there were several streets within the five-acre inclosure. The plat of the subdivision with the lots, blocks, and streets had been duly recorded in 1870, prior to Tenney's purchase of the lot in question. The De Forest lot was not at any time claimed or held adversely, nor were the streets, so far as the record shows. No apparent distinction was made between the possession of the lot in question and that of the De Forest lot and the streets. If any distinction was made, it was a mental distinction, not communicated to Tenney. For nine years before receiving the quitclaim deed from Wight, Millett had been in possession of a large number of lots, owned by many different persons, holding in subordination to their title; and, without something to mark a change in the character of his possession, the possession itself could not be reasonably held to be notice that it was in fact hostile, and the possession must be hostile, or it cannot be adverse; and where its adverse character cannot be inferred from the fact of possession, notice of some kind that it is hostile must be given to the owner before the statute will begin to run against him. De Frieze v. Quint, 94 Cal. 662, 663, 30 Pac. 1. In Mauldin v. Cox, 67 Cal. 387, 7 Pac. 804, the defendants went into possession under a lease, and afterwards received a deed, and more than five years had elapsed after receipt of the deed before the action was commenced. At page 394, 67 Cal., and page 804, 7 Pac., the court said: "They [the defendants] had, it is true, a secret conveyance of the property, but having been in possession under the lease, the plaintiff, having no notice of the deed, was not bound thereby. An entry to set the statute of limitations in motion must be sufficiently open and notorious to give the owner notice of the hostile claim and possession begun thereunder, and it must be hostile. * * * The owner will not be condemned to lose his land because he has failed to sue for its recovery, when he had no notice that it was held or claimed adversely."

The judgment offered in evidence by the defendants was properly excluded. The answer sufficiently shows that the judgment was given against Martin Millett and wife (plaintiffs in this action) in proceedings against them for a forcible or unlawful entry upon the possession of Lagomarsino. Such action does not involve title, and the judgment could have no effect upon this action.

Defendants offered to prove that in a conveyance executed by Michael Millett to defendant Cronan it was intended to include the lot in question, and that it was omitted by inadvertence or mistake. No issue of that kind was made in the pleadings. If the facts were as claimed, it would have been a proper case for a bill in equity to reform the deed.

Under the repeated rulings of this court the general findings made in this case were sufficient. It is not necessary, as appellants contend, for the plaintiff, in actions to quiet title, to allege the source of his title; and this rule of pleading applies where his title is acquired by adverse possession. The judgment and order appealed from should be reversed.

We concur: SEARLS, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are reversed.

104 Cal. 462

## PEOPLE v. BAIRD. (No. 21,106.)

(Supreme Court of California. Nov. 1, 1894.)

FORGERY—EVIDENCE—CROSS-EXAMINATION.

1. In a prosecution for forgery, evidence of similar forgeries nine months after the one charged is not admissible.

2. Where, in a prosecution for forgery, defendant's direct examination is confined entirely to the document which he is charged with forging, it is error to permit him, against objection, to be cross-examined concerning a similar document, also claimed to have been forged.

Department 2. Appeal from superior court, Fresno county; S. A. Holmes, Judge.

W. F. Baird was convicted of forgery, and appeals. Reversed.

Harris & Vickrey, Goucher, Jacobs & Jones, Seth Mann, W. D. Hatton, R. B. Jerry, and L. L. Cory, for appellant. Atty. Gen. Hart, W. D. Tupper, Dist. Atty., and Frank H. Short, for the People.

McFARLAND, J. The appellant, Baird, and one John Brown, were jointly indicted for the crime of forgery, and the appellant, who was tried separately, was found guilty. He appeals from the judgment, and from an order denying his motion for a new trial.

There are only two points made by appellant which need to be noticed: First, that the court erred in admitting evidence of alleged forgeries by appellant other than the one charged in the indictment; and, second, that the court erred in allowing certain questions on the cross-examination of appellant when on the stand as a witness for himself.

1. It is charged in the indictment that appellant and said Brown did falsely, feloniously, etc., make, forge, utter, and pass a certain certificate of shares of stock of the Bank of Madera, a copy of said certificate being set forth in the indictment. It was introduced in evidence as Exhibit 1; and it appeared from the evidence of the prosecution that the said certificate was uttered and passed on the 8th day of October, 1890. The prosecution were permitted, over the objections and exceptions of appellant, to introduce three other documents marked Exhibits 3, 4, and 5,—two of which were certificates of stock, and the other a promissory note,—and to introduce evidence tending to show that they were also forged, and that they had been feloniously uttered and passed by appellant. But these latter instruments were not uttered until the latter part of June, 1891,—about nine months after the alleged commission of the crime charged in the complaint. Exhibits 3, 4, and 5 bore dates considerably more than a year subsequent to the date of Exhibit 1. We think that the court erred in allowing these exhibits in evidence. They were too remote,—too long subsequent to the time of the act charged in the complaint. This is a dangerous kind of evidence at best. It is an exception to the well-established rule that evidence of other crimes cannot be introduced to help along a conviction of the crime charged; and it should not be carried any further than courts have already carried it. No case has been cited which would justify the contention of respondent on this subject in the case at bar.

2. Appellant went on the stand as a witness for himself. His testimony was confined entirely to Exhibit 1, the certificate which he was charged with forging. On cross-examination he was asked by counsel for the people about said Exhibit 3. Objection was made by appellant's counsel on the ground that it was not cross-examination as to a matter about which appellant was examined in chief. The objection was overruled, and appellant excepted. This was error. People v. O'Brien, 66 Cal. 602, 6 Pac. 695; People v. Bishop, 81 Cal. 113, 22 Pac. 477; People v. Wong Ah Leong, 99 Cal. 440, 34 Pac. 105; People v. Crowley, 100 Cal. 478, 35 Pac. 84.

The judgment and order appealed from are reversed, and the cause remanded for a new trial.

We concur: DE HAVEN, J.; FITZGERALD, J.

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## COOPER v. MONTEREY COUNTY. (No. 15,539.)

(Supreme Court of California. Oct. 31, 1894.)

Department 1. Appeal from superior court, Monterey county; N. A. Dorn, Judge.

Action to quiet title by Maria G. E. V. Cooper against the county of Monterey. Defendant had judgment, and plaintiff appeals. Reversed.

S. F. Geil, for appellant. P. E. Zabala and W. A. Kearney, for respondent.

PER CURIAM. This action involves the same questions of fact and law as were involved in the case of Cooper v. Monterey Co. (No. 15,538, this day decided) 38 Pac. 106, was tried at the same time, and upon the same evidence. Upon the authority of that case the order and judgment in this are reversed, and a new trial granted.

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104 Cal. 451

## GATES v. LINDLEY et al. (No. 15,578.)

(Supreme Court of California. Nov. 1, 1894.)

TAX DEED—TITLE ACQUIRED.

Plaintiff's deed contained a reservation to defendant's predecessors in title of all timber on a certain described tract. The timber was taxed as part of the land, and the whole property was sold for taxes, and plaintiff bought the tax title from the purchaser at the tax sale. *Held*, that plaintiff did not acquire title to the timber by such purchase.

Commissioners' decision. Department 2. Appeal from superior court, Humboldt county; G. W. Hunter, Judge.

Action by M. L. Gates, by his guardian, against Mary Lindley and one Philips, to recover stumpage for timber sold to defendant Philips. Plaintiff had judgment for part of the claim, and appeals. Affirmed.

Ford & Burnell, for appellant. J. G. H. Weaver, for respondents.

HAYNES, C. This action was brought against defendant Philips to recover stumpage for shingle timber sold to Philips. Defendant Mary Lindley intervened, claiming stumpage for the timber taken off a portion of the land. Philips admitted the contract with plaintiff, and that there was due somebody $428.08, that he owed the plaintiff of this sum $333.44, and that the timber taken off the portion claimed by Mary Lindley amounted to $94.64, and that he was ready to pay the whole to whosoever the court found was entitled thereto. The cause was submitted to the court upon agreed findings covering all the facts, from which the court drew the conclusion of law that plaintiff was entitled to recover $333.44, and Mary Lindley $94.64, and entered judgment accordingly, from which the plaintiff appeals.

One Osborne filed his application to purchase this land from the state in 1858. He conveyed by quitclaim deed and assignment of his certificate to Whitmore and Dix, and in June, 1867, they in like manner conveyed to Elihu Lindley, then the husband of the intervener. In 1872, Lindley in like manner conveyed to Thorp, reserving in the deed, however, all the timber on a certain portion of the land particularly described therein. On January 27, 1873, Thorp's grantee conveyed to the plaintiff, and assigned the state certificate, the deed containing the same reservation expressed in Lindley's deed to Thorp; and on October 2, 1873, the state patented the lands to plaintiff. Mary Lindley is the widow of said Elihu Lindley, and to whom he gave all his property by will. On September 20, 1873, O. J. Gates and wife executed and delivered to J. B. Hamilton a grant deed to said lands, with the same reservation, and on September 24, 1878, Hamilton conveyed to Whitlow. From the year 1873 to and including the fiscal year ending June 1, 1879, the property was assessed to Hamilton, who paid all said taxes except for the year last mentioned. On March 3, 1879, the tax collector sold the whole of the property to J. O. Dinsmore, and on April 5, 1888, Dinsmore received a tax deed. No reservation of the timber was made either in the deed or certificate of sale. In January, 1879, prior to said tax sale, Whitlow mortgaged part of the property to Dinsmore, which mortgage has never been foreclosed or satisfied of record. For the years 1879–80, 1880–81, and 1881 the land was assessed to Whitlow. On February 8, 1889, Dinsmore conveyed to the plaintiff. Whitlow has never conveyed to any one. From 1881 to 1889, inclusive, the property was assessed to Dinsmore, and all the taxes were paid by him. Since that time it has been assessed to plaintiff, who has paid the taxes, but it was never assessed to him prior to that time. The timber has never been separately assessed, nor did Mary Lindley or her testator ever pay any taxes thereon. From April, 1881, to the time he conveyed to the plaintiff, Dinsmore was in possession. All the deeds herein mentioned were recorded. The record does not disclose that Gates and wife, who conveyed to Hamilton, ever had any title; and as the taxes for which the land was sold to Dinsmore were assessed to Hamilton, who did not acquire any title by the conveyance, and who does not appear to have been in possession, the court below concluded that plaintiff was not divested of his title by the tax sale, and, being a minor, that Dinsmore, the purchaser at tax sale, did not acquire title by adverse possession. Code Civ. Proc. § 328.

It is certainly not clear from the findings that the tax title was valid, nor do we think it necessary to decide that it was void; for if the plaintiff, by the purchase of the tax title, acquired a title to the timber reserved by his grantor, the burden is upon him to show that his title to the timber is good; in other words, that the tax title is valid. But even that is not sufficient. The plaintiff was the owner of the land, and it was his duty to pay the taxes. "He could not, by neglecting to pay them, and permitting the land to be sold in consequence of such neglect, add to or strengthen his title by purchasing at the tax sale himself, or by subsequently buying the tax title from a stranger who purchased at the tax sale; otherwise he would be allowed to gain an advantage from his own fraud or negligence in failing to pay the taxes. This the law does not permit, either directly or indirectly." Moss v. Shear, 25 Cal. 45; Christy v. Fisher, 58 Cal. 258; Bernard v. Wilson, 74 Cal. 518, 16 Pac. 307. Plaintiff did not, therefore, acquire a new title to the land by the purchase from Dinsmore. "His purchase is deemed one mode of paying the taxes." Christy v. Fisher, supra. Plaintiff's title is therefore the same as though he had each year paid the taxes, and he holds the same under his deed, in which the timber was reserved. If it be said that the timber did not belong to the plaintiff, and that he was under no duty or obligation to pay the taxes thereon, it may be replied that he could not permit it to be taxed as part of his property, and then permit his land upon which it grew to be sold for the entire tax, and thus get title to it; for, unless he got a new title to the land, the reservation of the timber in his deed was in full force, and he is in the same position as though he had paid the taxes each year. The judgment was right, and should be affirmed.

We concur: VANCLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

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104 Cal. 455

## BELSER v. HOFFSCHNEIDER. (No. 15,657.)

(Supreme Court of California. Nov. 1, 1894.)

ASSESSMENT FOR STREET WORK—APPEAL TO CITY COUNCIL—VACATION OF ASSESSMENT—EFFECT.

1. Under Act March 18, 1885, § 11, providing for appeals by property owners from assessments by the superintendent of streets to the city council by "briefly" stating their objections in writing and filing the same with the clerk of the council, a paper merely stating as the ground of objection that "the work is not done in a proper manner" is sufficient, without stating in what way the work fails to conform to the contract.

2. It is not necessary in such paper to specifically state that the signers "appeal," as the only object in filing such paper is that it may operate as an appeal.

3. In an action to foreclose a special assessment lien, an order of the city council setting aside the assessment cannot be reviewed on the ground that such relief was not based on the objection made to the assessment.

4. The action of the city council on appeal from an assessment by the superintendent of streets being judicial, they cannot at a subsequent meeting vacate a final order setting aside such assessment.

Commissioners' decision. Department 2. Appeal from superior court, Alameda county; F. W. Henshaw, Judge.

Action by J. H. Belser against William Hoffschneider. There was a judgment for defendant, and plaintiff appeals. Affirmed.

J. C. Bates, for appellant. Haven & Haven, for respondent.

TEMPLE, C. This action was brought to foreclose a lien for a street assessment upon a district made by the city council of Oakland, and declared to be benefited by the street work. The work consisted in the construction of certain sewers, which apparently were to constitute a sewerage system for the district defined. The court found that the contract for the work was duly let, entered into, and the work performed by the contractor according to the contract, and was approved and accepted by the street superintendent; that a diagram was made and approved as required, and that after the completion of the work the superintendent of streets made and issued an assessment, by which defendant's lot was assessed at $83.11; that a warrant was issued, and a demand made, etc. It was also found as follows: "(4) Within thirty days after the date of the warrant issued by the superintendent of streets of the city of Oakland to the plaintiff, as alleged in plaintiff's complaint, certain owners of property affected by the work described in plaintiff's complaint, and who were interested, and who had and made objections to the correctness and legality of the assessment made by said superintendent of streets, made their appeal to the city council of the city of Oakland, by briefly stating their objections, in writing, to the correctness and legality of the said assessment and the proceedings of the said superintendent of streets, and filed the same within the said period of thirty days with the clerk of said city council. Thereupon, notice was given by said clerk of the time and place of the hearing of said written objections, by publication for five days. At the time and place so appointed for the hearing of said written objections, the said city council of the city of Oakland proceeded to hear and consider the sufficiency and correctness of said objections and appeal; the said persons so making their appeal being present and represented thereat by counsel, and the plaintiff being represented thereat by counsel. And after such hearing the said city council unanimously passed the following resolution: 'Resolved, that the assessment made and issued for sewer in Commerce street, from 14th street to 32d street, be vacated and set aside, and the superintendent of streets be and he is hereby authorized to make and issue a new assessment, diagram, and warrant, according to law.' Thereafter, and at a subsequent meeting, and without notice to the protestants or appellants, or any of them, the said city council voted to reconsider this resolution, and to confirm and ratify the said assessment. This action was based upon the said assessment. (5) In the said assessment for said sewer, as made by the said superintendent of streets, the total cost of the entire work was assessed upon subdistricts, and the said assessment was apportioned in each subdivision by an uniform rate per square foot on all the land therein, and not separately upon the respective parcels or lots of land."

The bill of exceptions shows that on the 15th of June, 1891, the city council adopted the following resolution: "Resolution No. 16,187. Resolved, that each and all appeals and protests on Commerce street sewer assessment be overruled, and that the order of June 1, 1891, setting aside the assessment, and ordering a new assessment, be and the same is set aside, and that said assessment be and the same is confirmed."

As conclusions of law the court found: "(1) That the papers filed by the property owners with the clerk of the city council of Oakland within thirty (30) days from date of assessment and warrant were sufficient in form to constitute an appeal to the city council from said assessment. (2) That said city council had jurisdiction to make and pass the order of June 1, 1891, vacating the assessment set forth in the complaint. (3) That said city council, after June 1, 1891, lost jurisdiction to make or pass any further order or resolution in said matter, and that the order or resolution passed by said city council at its next meeting was without jurisdiction, and was void. (4) That the assessment sued on in this action, having been set aside June 1, 1891, became null and void from that date. (5) That plaintiff is not entitled to take anything by reason of the matters alleged in the complaint herein, and that defendant is entitled to judgment against the plaintiff for his costs. Let judgment be entered accordingly."

The points raised on this appeal are: First. That no valid appeal was taken from the assessment, and therefore the city council had no jurisdiction to make the order of June 1, 1891, by which the assessment was set aside and a new one ordered. The order, being void, was therefore properly vacated by the resolution of June 15th. Second. If the appeal was effectual, the city council, in reviewing the assessment, were acting in a legislative capacity, and could and did reverse its action at a subsequent meeting of the council. Both questions arise under section 11 of the act of March 18, 1885. St. 1885, p. 147. It provides that the owners and persons interested, "feeling aggrieved by any act or determination of the superintendent of streets in relation thereto, or who claim that the work has not been performed according to the contract in a good and substantial manner, or having or making any objection to the correctness or legality of the assessment or other act, determination or proceeding of the superintendent of streets, shall, within thirty days after the date of the warrant, appeal to the city council, as provided in this section, by briefly stating their objections in writing and filing the same with the clerk of said city council."

1. After the warrant was issued, nine dif-

ferent documents were filed with the clerk of the city council, signed in the aggregate by about thirty different persons, objecting to the assessment. There was no conceivable purpose in filing those objections, unless they were intended to operate as an appeal under section 11. Unless they effected an appeal, the council could not consider the matter at all. It matters not, then, that the "protestants," as appellant calls them, did not say in their protests that they thereby appealed from the assessment. Appellant contends that no objection is stated which the city council had jurisdiction to hear and determine. It will be at once admitted that some objections must be briefly stated, at least in general language, which the city council was authorized to consider under the provisions of law above quoted. I think such objection is stated, at least in two of the protests. In the document signed by White and others it is stated that "the work is not being done in a first-class manner, and we ask your honorable body to investigate the matter before we are assessed for its costs. In fact, we hereby protest against paying for so poor a job." In another, signed by J. J. North and 15 others, it is said: "The work is not being done in a proper manner, and we ask your honorable body to investigate the matter before we are assessed for its costs, and we hereby protest against paying for so poor a job."

Barber v. Supervisors, 42 Cal. 630, was a proceeding to review the action of the board upon an appeal from an assessment for grading a street. It was claimed that the board had no jurisdiction because of the insufficiency of the statement of the objections. The appeal was on the ground that the appellants had graded the street in front of their lots themselves. To make this fact available as a defense on the part of property holders, the law required them to procure a certificate from the city and county surveyor. The statement of the objectors did not show that the objectors had such certificate. In other words, they failed to show that they had any right to raise such objection. The court said: "All that the statute requires is that the objection be 'briefly' stated in writing. In other words, the nature of the objection may be stated in general terms, without specifying minutely all the particulars." One of the grounds upon which parties interested may appeal is that the work has not been performed according to the contract, in a good and substantial manner. If the appellants were not required to specify wherein the work failed to conform to the contract, as seems to have been held in the case cited, the statement was ample.

The council having jurisdiction, we cannot here review their action on the claim that the relief granted was not based upon the objection made. The court found a fact which would tend to show that the assessment was illegal, and not that the work was badly done. This does not show upon what ground the city council granted relief, and the fact so found is utterly immaterial.

2. The next question is whether the city council, having entertained the appeal and vacated the assessment, could, on a subsequent day, set aside their order and overrule the objections, and confirm the assessment they had previously vacated. Under the decisions of this court the action of the city council in the matter of the appeal was clearly judicial. People v. El Dorado Co., 8 Cal. 58; Waugh v. Chauncey, 13 Cal. 11; People v. Supervisors Marin Co., 10 Cal. 344; Robinson v. Supervisors, 16 Cal. 209; Emery v. Bradford, 29 Cal. 85; Keys v. Supervisors, 42 Cal. 252; Levee Dist. No. 9 v. Farmer, 101 Cal. 178, 35 Pac. 569. It is not contended that in providing for a system of sewers for the district, or in letting the contract, or in providing for such supervision as will insure proper performance, the council acted judicially. These were administrative acts. There was nothing of this kind in the question submitted to the council on the appeals provided for in this act. The council is, by the section quoted, made a special tribunal to determine the conflicting claims of individuals. They were not there as such tribunal to legislate, or even to use their judgment to promote public interests in the management of public affairs. They could not change the contract or the assessment district. They could simply determine the rights of the parties upon the facts. This is purely judicial. The act being judicial, it would necessarily follow that the final judgment entered by the council could not be vacated. The procedure does not provide for granting a new trial or a rehearing. Dorsey v. Barry, 24 Cal. 449. The general rule is that where special jurisdiction is conferred upon a court or board to determine certain specified controversies, and no provision is made for a review by such tribunal of its judgments, when it has once determined the matter its jurisdiction is exhausted. While the matter is still sub judice, no doubt the tribunal may reconsider its action, but when final judgment has been entered the board is functus officio. This matter is exhaustively considered, and the authorities upon the subject cited, in People v. Supervisors Schenectady Co., 35 Barb. 408.

It is unnecessary to pursue the matter further here, for the learned counsel for appellant does not contend that the council had power to make the second order if in making it the council acted judicially. I think the judgment should be affirmed.

We concur: VANCLIEF, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

(106 Cal. 113)

## INGRAM v. COLGAN, Controller.[1] (No. 18,372.)

(Supreme Court of California. Oct. 30, 1894.)

BOUNTIES—KILLING COYOTES—CONSTITUTIONAL LAW.

1. Act March 31, 1891, providing that any person who shall kill any coyote in any county in the state shall be paid a bounty of five dollars out of the general fund of the state treasury, and for taking the proof thereof and issuing a certificate therefor by the county supervisors, and that "such certificate may be presented to the controller of the state, who may draw his warrant on the general fund in the state treasury," does not abrogate the necessity of presenting the claim for audit before the state board of examiners, as required by Pol. Code, § 660, nor section 672, forbidding the controller to draw his warrant for any claim unless it has been approved by such board.

2. There being a consideration for such bounty, the statute is not inhibited by Const. art. 4, § 31, which provides that the legislature shall have no power to give, or to authorize the making of any gift of, public money to any individual.

3. Such statute is within the police powers of the state.

Commissioners' decision. In bank. Appeal from superior court, Sacramento county; A. P. Catlin, Judge.

Application by J. W. Ingram for a writ of mandamus compelling E. P. Colgan, as state controller, to pay a bounty to petitioner for killing coyotes. The writ was granted, and defendant appeals. Reversed.

Atty. Gen. Hart, for appellant. Freeman & Bates, for respondent.

SEARLS, C. The act of the legislature of the state of California, approved March 31, 1891, entitled "An act fixing a bounty on coyote scalps" (St. 1891, p. 280), provides in its first section that "any person who shall kill and destroy any coyote or coyotes, in any county of this state, after the passage of this act, shall be paid a bounty of five dollars out of the general fund in the state treasury for each coyote so destroyed." The second section of the act provides that the person killing any coyote, as provided in section 1, shall present the scalp containing the nose and ears of the coyote destroyed to any officer authorized to administer oaths, and make and subscribe to an affidavit showing time and place that such animal was killed, which scalp and affidavit may be deposited with the clerk of the board of supervisors of the county in which such coyote was killed. Section 3 provides that the board of supervisors shall quarterly determine the number of scalps deposited with the clerk, and by whom, and shall give to each person who may have deposited scalps a certificate certified by the clerk, showing the number of scalps deposited by such person, and the sum due him at the rate of five dollars per scalp, and then proceeds as follows: "Such certificate may be presented to the controller of the state, who may draw his warrant on the general fund in the state treasury for the sum named therein, in favor of the person entitled thereto." The remaining sections provide for the destruction of the scalps, and that no bounty shall be paid for scalps unless presented within three months after the coyote is killed. The respondent, J. W. Ingram, in 1893, killed 73 coyotes in the county of Kern, state of California, in due time presented the scalps, and made affidavit as by law provided, and in due and proper form received, after an examination, etc., a certificate of the clerk, under seal of the board, showing that he had killed 73 coyotes, and that there was due said Ingram the sum of $365 from the state of California. The certificate was presented to appellant as controller of state April 26, 1894, and a demand made that he, the said controller, draw his warrant on the general fund in the state treasury in favor of said J. W. Ingram for said sum of $365, which was refused. Respondent thereupon filed an affidavit in the superior court in and for the county of Sacramento, setting out the foregoing facts, and showing a compliance with the terms of the statute, and averring that "after allowing and paying all warrants drawn by the state controller against the general fund, and all claims allowed by the state board of examiners for the forty-fifth fiscal year, there remains more than sufficient in said fund to meet the said warrant demanded by the said Ingram." The sworn affidavit or petition admitted "that said claim of said Ingram has never been presented to nor acted upon by the state board of examiners." An alternative writ of mandate issued to appellant, as per the prayer of the sworn petition therefor. Appellant appeared, and demurred to the affidavit and petition upon various grounds, among which were that it did not state facts sufficient to constitute a cause of action; (2) that it fails to show that the claim was presented to the board of examiners before being presented to the state controller; (3) it does not show that said claim is exempt from the provisions of section 672, Pol. Code; (4) it fails to show that there is an appropriation or available fund for the payment of the claim; (5) that said act is unconstitutional and void, in that it seeks to create an obligation on the part of the state which would be a gift, and without sufficient consideration. The demurrer was overruled, and, appellant refusing to answer, such proceedings were thereupon had that a peremptory writ issued to appellant, commanding him to draw his warrant upon the treasury, etc. Defendant appeals.

The statute in question comes within the purview of the police power of the state. This power is said to extend to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the state. It is a power inherent in the state by virtue of, and one of the attributes of, its sovereignty. Under the exercise of this general police power, persons and property are subjected to restraints and burdens in order to secure the general comfort, health, and prosperity of the state, of the perfect right in the legislature to do which, as was said by Redfield, C. J., in Thorpe v. Railroad Co., 27 Vt. 140, "no question ever was, or upon acknowledged general principles ever can be, made, so far as natural persons are concerned." It is coextensive with self-protection, and is often referred to as "the law of overruling necessity." It is that inherent and plenary power in the state which enables it to prohibit all things hurtful to the comfort and welfare of society. Lake View v. Cemetery Co., 70 Ill. 192. How far the provisions of the legislature can extend is always submitted (subject to constitutional limitations) to its discretion, provided its acts do not go beyond the great principle of securing the public safety; and its duty to provide for the public safety, within well-defined limits and with discretion, is imperative. "All laws for the protection of lives, limbs, health, and quiet of the person, and for the security of all property within the state, fall within this general power of government." State v. Noyes, 47 Me. 189. "Any law which goes beyond that principle, which undertakes to abolish rights, the exercise of which does not involve an infringement of the rights of others, or to limit the exercise of rights beyond what is necessary to provide for the public welfare and the general security, cannot be included in the police power of the government. It is a government usurpation, and violates the principles of abstract justice, as they have been developed under our republican institutions." Tied. Lim. pp. 4, 5. The statute of March 31, 1891, is not within the limitation to the exercise of the police power. That coyotes are a pest and scourge to the breeders of sheep and other small domestic animals is matter of common knowledge. To provide adequate means of defense against this common enemy to those engaged in an important industrial pursuit is clearly within the general police powers of the legislative branch of the government, through which all police power is exercised. The statute is not then void in the sense that it violates the fundamental principles of free government, and infringes upon the original rights of the citizen. This remark is indulged for the reason that it has been said by some of the most eminent jurists of our country that the state legislature, in the absence of constitutional limitations, is not so far omnipotent that it can pass valid laws violative of the fundamental theories upon which enlightened government is constructed. Calder v. Bull, 3 Dall. 386; Wilkinson v. Leland, 2 Pet. 657; Taylor v. Porter, 4 Hill, 145; Goshen v. Stonington, 4 Conn. 209; Varick v. Smith, 5 Paige, 137; Griffith v. Com'rs, 20 Ohio, 609; Ross' Case, 2 Pick. 169.

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[1] Rehearing granted. See 38 Pac. 366.

There is no suggestion that the statute infringes the federal constitution. It remains then to inquire, does it violate any provision of the constitution of this state? The contention of appellant is that the bounty provided to be paid by the statute is a gift, and inhibited by the thirty-first section of article 4 of the constitution of California, which, so far as applicable, is as follows: "The legislature shall have no power to give or to lend. * * * Nor shall it have power to make any gift or authorize the making any gift of any public money or thing of value to any individual, municipal or other corporation whatever." A "gift" has been judicially defined as "a voluntary transfer of his property by one to another, without any consideration or compensation therefor." Gray v. Barton, 55 N. Y. 72. To the same effect is 2 Bl. Comm. 440; 2 Steph. Comm. 102; 2 Kent, Comm. 437. A "bounty" signifies moneys paid or a premium offered to encourage or promote an object, or procure a particular act or thing to be done. Fowler v. Danvers, 8 Allen, 84. A sum of money or other things given, generally by the government, to certain persons, for some service they have done or are about to do to the public. Abbe v. Allen, 39 How. Pr. 484. The terms "bounty" and "reward" are nearly allied in meaning, the distinction being the former is said to be the appropriate term where the services or action of many persons are desired, and each who acts upon the offer may entitle himself to the promised gratuity without prejudice from or to the claims of others, while a reward applies to the case of a single service, which can be only once performed, and therefore will be earned only by the person or co-operating persons who succeed while others fail. Black, Law Dict. tit. "Bounty." A primary meaning of "bounty" is goodness, kindness, virtue, worth; (2) liberality in bestowing gifts or favors, gracious or liberal giving, generosity, munificence; (3) a premium offered or given to induce men to enlist in the public service, or to encourage any branch of industry, as husbandry or manufactures. Webster. As applied to bounties given by statute, there is a consideration implied; so long as the consideration is not rendered, it remains a mere offer or privilege, which may be taken away by a repeal of the statute; but when earned, by complying with the conditions of the statute, the right to the bounty becomes vested. Cooley, Const. Lim. (6th Ed.) pp. 471, 472; East Saginaw Manuf'g Co. v. East Saginaw, 19 Mich. 259, 13 Wall. 373; People v. Board of State Auditors, 9 Mich. 327. There being a consideration for the claim of respondent, rendered by him under the offer of the statute, the money claimed is not a gift, and is not, therefore, obnoxious to the provision of the constitution quoted supra. Ryer v. Stockwell, 14 Cal. 134. Our attention is not called to any other constitutional provision, either state or federal, with which the statute in question is claimed to conflict; hence, we conclude that as the statute comes within the general welfare, for which the legislature is authorized to provide under its police powers, and not being violative of the fundamental law, it must be upheld as a valid and subsisting law.

Should the claim have been presented to the state board of examiners? The trial court evidently proceeded upon the theory that, as the act of March 31, 1891, provided that any person who shall kill and destroy any coyote or coyotes in any county of the state shall be paid a bounty of five dollars for each coyote so killed, out of the general fund of the state treasury, and provided for taking the proof thereof and issuing a certificate therefor by the board of supervisors of the proper county, and provided that "such certificate may be presented to the controller of state, who may draw his warrant on the general fund in the state treasury," etc., it dispensed with the necessity of a presentation of the claim to the state board of examiners. Section 660 of the Political Code provides that any person having a claim against the state, for which an appropriation has been made, may present the same to the board (of examiners); if the board approves the same, they must, under section 661, indorse their approval thereon, and transmit the same to the controller, who must thereupon draw his warrant, etc. If no appropriation has been made for the payment of a claim provided for by law, or if an appropriation made has been exhausted, the board must, upon approving it, transmit it to the legislature, with a statement of their approval. Section 672 is as follows: "The controller must not draw his warrant for any claim unless it has been approved by the board, and, when hereafter the controller is directed to draw his warrant for any purpose, this direction must be construed as subject to the provisions of this section, unless the direction is accompanied by a special provision exempting it from its operation." Section 673 exempts official salaries and claims upon the contingent fund of either house of the legislature from the operation of the foregoing sections. It will be perceived that by section 672 a direction to the controller to draw his warrant in payment of a claim which has not been approved by the board of examiners is not sufficient, unless it is accompanied by a special provision exempting it from the operation of that chapter. We find nothing in the provision of the statute in question exempting the claims therein provided for from the section.

Respondent contends that there was no necessity for presenting the claim to the board of examiners; that it had been audited and made certain by the action of the board of supervisors, so that no duty remained, except to make payment; and in support of this view we are referred to Meyer v. Porter, 65 Cal. 67, 2 Pac. 884; Freehill v. Chamberlain, 65 Cal. 603, 4 Pac. 646; County of Greene v. Daniel, 102 U. S. 187; Lincoln Co. v. Luning, 133 U. S. 532, 10 Sup. Ct. 363. Meyer v. Porter was a case in which a mandate was sought against the treasurer of Sacramento to compel him to pay out of funds in the city treasury certain past-due and payable coupons belonging to bonds issued by the city under a statute passed in 1858, and which provided an interest and sinking fund for the payment of the interest annually, and the bonds at maturity. It was claimed on behalf of the city, among other things, that the coupons should have been presented for examination, audit, and allowance to the board of trustees and auditor, pursuant to a statute in 1863. This court held, however, that, as the law under which the bonds issued made it the duty of the treasurer to pay the coupons in the manner and out of the fund provided for that purpose, no warrant was necessary to authorize their payment. In Freehill v. Chamberlain the same question was raised, and the court held that the statute under which the bonds were issued established them as debts to be paid, and hence that neither the auditor nor the board of trustees had any discretion or authority to reject them, or prevent payment. It will be observed that these cases involved contracts entered into by the city under and pursuant to a statute authorizing them so to do, and providing the time, place, and manner of payment, and that the act of 1863 (St. 1863, p. 415) was a law passed long subsequently, and imposing new burdens upon the holders of city bonds. In County of Greene v. Daniel, where a like question was raised, it was held that the issuing of the bonds by the county court, signed by its presiding officer, was the equivalent of auditing by the same body, as required by a statute in case of claims against the county, and that the amount and validity of the liability were definitely fixed when the warrants issued. In Lincoln Co. v. Luning, it was held that a similar clause, requiring claims to be presented to the county commissioners, etc., applied only to unliquidated claims and accounts, and did not apply to bonds and coupons. Sawyer v. Colgan (decided April 24, 1894) 36 Pac. 580, related to the duty of the controller to issue his warrant in payment of coupons upon bonds issued under an act passed in 1857, known as "Indian War Bonds"; and it was held that, in view of the provisions for their payment under the law, it was not necessary to present such coupons to the examiners. The board of examiners was not provided for until 1858 (St. 1858, p. 212). Since that date it has been in force, and section 672 of the Political Code embodies substantially the same provision as section 5 of the original act. A "claim" is a demand of some matter, as of right, made by one person upon another, to do or forbear to do some act or thing, as a matter of duty. The controller must not draw his warrant for any claim unless it has been approved by the board, and, if directed so to do, it must be subject to section 672, supra, unless the direction is accompanied by a special provision exempting it from the provision of said section 672. The statute in regard to bounties for killing coyotes may be construed to direct the controller to draw his warrant, but it does not in any way exempt it from the operation of such section. Whatever the rule may be in cases which do not come within the technical definition of the term "claim," we are of opinion that, if any force is to be given to this section in any case, it applies to the present one. The controller can never draw his warrant upon the treasurer except when directed so to do by some law; and, if such direction alone is sufficient to require it, then we at once do away with the force and effect of a salutary provision of the statute, enacted as a safeguard of the treasury. It will not do to say that the supervisors have audited the claim, and that that is sufficient. The statute has designated the board of examiners as the body by which the audit must be made, and either such audit of a claim must be had, or a special provision exempting the claim from such audit must be contained in the direction to the controller, before it becomes his duty to issue his warrant. For this reason we are of opinion the court below erred in awarding the writ of mandate against the controller, and the judgment should be reversed, and the court below directed to dismiss the writ.

I concur: BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed, and the court below directed to dismiss the writ.

I concur in the judgment: FITZGERALD, J.

BEATTY, C. J., and VAN FLEET, J., did not participate in the foregoing decision.

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104 Cal. 502

## KNOX v. MOSES et al. (No. 15,507.)

(Supreme Court of California. Nov. 22, 1894.)

APPEAL—REVIEW — FRAUDULENT CONVEYANCE—QUESTION OF FACT—FINDING—SUFFICIENCY OF EVIDENCE.

1. Where an action is tried on testimony taken in other cases, the evidence will not be examined and gauged by the supreme court as though the question of fact presented arose in an original proceeding in such court. Reay v. Butler, 30 Pac. 208, 95 Cal. 215; Brown v. Campbell, 35 Pac. 433, 100 Cal. 635,—followed.

2. Whether or not a gift by an insolvent was made by the donor with a fraudulent intent is a question of fact, and not a question of law. Bull v. Bray, 26 Pac. 873, 89 Cal. 286, followed.

3. A husband gave and deeded to his wife land worth about $6,000. At the time, he was engaged in many enterprises, and his assets and liabilities each approximated $700,000. He filed no homestead on his residence property, also worth about $6,000. and it finally passed to his creditors. He continued his vast enterprises about 3½ years after the transfer. *Held*, that the facts supported a finding that the transfer was not made with intent to defraud his creditors.

Department 1. Appeal from superior court, Contra Costa county; Joseph P. Jones, Judge.

Action of ejectment by Charles C. Knox against Fred Moses, Watson A. Bray, Julia A. Bray, and John Doe. From a judgment for defendants, plaintiff appeals. Affirmed.

Wm. B. Sharp and S. C. Denson, for appellant. Chickering, Thomas & Gregory and Garber, Boalt & Bishop, for respondents.

GAROUTTE, J. This is an action of ejectment, and as a defense it is claimed that the realty involved is the separate property of respondent Julia A. Bray. Her title rests upon the validity of a deed given to her by Watson A. Bray, her husband and co-respondent, August 3, 1881. It is here claimed that this transfer of the realty was void upon the ground that it was made with intent to defraud Watson A. Bray's creditors, and the determination of the court as to the validity of this deed points the judgment in the case. The trial court, by its findings of fact, declared in favor of the deed, and those findings of fact are now assailed as unsupported by the evidence. This action was tried and submitted upon testimony taken in two other cases, and it is now insisted that for such reason this court should take a first and original view of the evidence introduced, and weigh and measure it by the same standard and test that the trial court was required to apply. In other words, it is contended that the evidence should be examined and gauged the same as though the question here presented arose by an original proceeding pending in this court. This position of appellant is unsound. The court has declared the rule contrary to the principle sought to be invoked. Reay v. Butler, 95 Cal. 215, 30 Pac. 208; Brown v. Campbell, 100 Cal. 635, 35 Pac. 433.

The question still remains, is there a substantial conflict in the evidence as to whether or not W. A. Bray made this conveyance to his wife with intent to defraud his creditors? Appellant's counsel say: "Assuming, then, that Bray was insolvent, and the deed was a gift, the question arises, does not the law pronounce the gift fraudulent and void even as against Bray's denial of a fraudulent intent? We say it does, notwithstanding the provisions of the Code that the fraudulent intent is a question of fact." It was held in Bull v. Bray, 89 Cal. 286, 26 Pac. 873, in language plain and positive, that in this state there are no conditions under which the law will or can pronounce a gift void, as having been made with intent to defraud creditors. Courts and juries may so declare as matter of fact, but it cannot be so declared as a matter of law. It is further stated in appellant's brief that the case of Bull v. Bray "simply decides a question of practice in regard to findings." It is evident that the scope and effect of that decision are entirely misunderstood by counsel, for a most important principle of law is laid down in that decision; a principle which will certainly maintain in this state as long as the present legislation upon this question remains upon the statute books. Threlkel v. Scott (Cal.) 34 Pac. 851, does not limit the effect of the principles declared in Bull v. Bray, and in no way militates against anything there decided.

Did Watson A. Bray transfer this real estate to his wife for the purpose of preventing his creditors from applying the same to the payment of his debts? The court found that the transfer was made with no such purpose, and with that finding of fact we entirely concur. Probably a finding to the contrary could not be supported by this record. Let us note the salient facts. At the time Bray made the deed to his wife, he was a man of large affairs, and engaged in many business enterprises. His assets and liabilities each approximated $700,000. He had numerous tracts of real estate in various localities, and personal property of almost every kind and character. His credit was good, as conclusively evidenced by the fact that he continued to carry on these vast business enterprises for 3½ years subsequent to the transfer of this land to his wife. The land so transferred was of the value of about $6,000, a trifling value as compared to his vast assets. At this time he was the owner of, and residing with his family upon, residence property of equal value with the property transferred, and upon this property he filed no homestead, but it finally passed to his creditors. To our minds, these circumstances are amply sufficient to sustain the findings of fact bearing upon the honesty of Bray's intention in conveying this tract of land to his wife. For the foregoing reasons, it is ordered that the judgment and order be affirmed.

We concur: HARRISON, J.; VAN FLEET, J.

4 Cal. Unrep. 888

### LUTZ et al. v. ROTHSCHILD. (No. 15,516.)

(Supreme Court of California. Nov. 27, 1894.)

Payment to Attorney—Recovery.

Money received by an attorney from his client under a misapprehension on the part of the latter as to the purposes for which it is being paid, and under circumstances which require the attorney in good conscience to refund the same, may be recovered back.

Department 1. Appeal from superior court, city and county of San Francisco; John Hunt, Judge.

Action by August and Katie Lutz against Joseph Rothschild. There was a judgment for plaintiffs, and defendant appeals. Affirmed.

Pierson & Mitchell, for appellant. John Flournoy, for respondents.

VAN FLEET, J. This is an action in form for money had and received, to recover from defendant and appellant, an attorney at law, the sum of $500, alleged to have been received by him from the plaintiffs and respondents as their attorney, and to and for their use, and which defendant refused to repay after demand. The answer was a denial of the allegations of the complaint, except as to nonpayment. The case was tried by a jury. Verdict and judgment were for plaintiffs for the sum demanded, and from the judgment and an order denying his motion for a new trial defendant appeals.

The only question involved in the appeal is as to the sufficiency of the evidence to justify the verdict. It is objected by respondents that there is no sufficient specification of insufficiency to enable the court to look into the evidence, but we find it unnecessary to determine that objection, since we have seen fit, under the circumstances, to examine the evidence in the record, notwithstanding the objection, and entertain no doubt of its sufficiency. Without stating the facts in detail, the evidence for plaintiffs tended to show that defendant had received the money in dispute under a misapprehension on the part of plaintiffs as to the purposes for which it was being paid, and under circumstances which, if true, required the defendant in law and good conscience to refund it; while that of defendant went to establish that the money was voluntarily paid to him as a part of an entire fee for legal services performed, upon a distinct and perfect understanding of the parties. The jury found for plaintiffs upon evidence not only substantially conflicting, but which, it seems to us, fully sustains their verdict; and, of course, this finding cannot be disturbed.

It is urged by appellant that an action will not lie to recover money paid voluntarily and without compulsion where the party receiving the money is not guilty of fraud, and where both parties are equally cognizant of the facts upon which their rights depend. Conceding this to be true, the existence of the very facts upon which this principle is predicated were involved in the finding of the jury, which, as we have seen, was against appellant's contention. Judgment and order affirmed.

We concur: GAROUTTE, J.; HARRISON, J.

104 Cal. 551

### HERRLICH et al. v. McDONALD. (No. 15,562.)

(Supreme Court of California. Nov. 27, 1894.)

Action on Judgment—Limitations.

The statute of limitations does not begin to run against a judgment until it is entered and recorded.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; Eugene R. Garber, Judge.

Action by Julie Herrlich and another against Maggie McDonald. There was a judgment for plaintiffs, and defendant appeals. Affirmed.

James G. Maguire, for appellant. Charles F. Hanlon, for respondents.

SEARLS, C. This action was commenced June 20, 1891, and is based upon a judgment averred to have been duly given and made by the superior court in and for the city and county of San Francisco, in favor of Julie Herrlich and against Maggie McDonald, the defendant herein, on the 24th day of June, 1886. It is further averred that an appeal was taken by said defendant from said original judgment to the supreme court of the state of California, where the same was on the 7th day of September, 1889, affirmed with 15 per cent. damages. The complaint further avers that the original action was brought to recover for money had and received by defendant from Julie Herrlich, the plaintiff therein, in a fiduciary capacity, etc., and that plaintiff John F. Hanlon is the assignee of an interest in said original judgment. The answer of defendant, among other things, denies that the original judgment was entered after November 28, 1881, or that the action was brought to recover money had or received by the defendant in a fiduciary capacity, and pleads the statute of limitations and a discharge from said judgment under the insolvent law of the state of California by a decree duly entered on the 29th day of January, 1883, etc. The cause was tried by the court without a jury, written findings filed, and a judgment rendered in favor of plaintiffs, from which judgment, and from an order denying her motion for a new trial, defendant appeals.

Upon the plea of the statute of limitations interposed by defendant, the court below found in favor of plaintiffs. This plea involved the question as to the date of the entry of the judgment upon which the action was brought. The judgment roll was introduced in evidence, and showed it to have been entered and recorded in the judgment book on the 24th day of June, 1886, on which last-mentioned day the judgment roll was made up, filed, and certified by the clerk, as required by sections 668 and 670 of the Code of Civil Procedure. On behalf of defendant, testimony was introduced showing that the findings of the court in the original cause were filed in the superior court November 28, 1881, and that, pursuant to the conclusion of law therein contained that plaintiff was entitled to judgment, the clerk of the court on the same day made in his minute book the following entry: "This cause having been submitted to the court for consideration and decision, and due consideration being had, it is ordered that judgment be and the same is hereby entered for plaintiff for $4,705 and costs, without interest."

In Crim v. Kessing, 89 Cal., at page 491, 26 Pac. 1074, it was said, in discussing the question of the statute of limitations in a somewhat similar case: "This, however, we think, cannot be considered an open question in this state. In Trenouth v. Farrington, 54 Cal. 273, it was expressly held that the statute of limitations does not begin to run until the entry of the judgment, and in Condee v. Barton, 62 Cal. 1, it was held that a judgment is not final until it is recorded." It follows from the rule enunciated in the foregoing cases that the statute of limitations in the present case did not begin to run until June 24, 1886, and, as the action was commenced within five years next thereafter, the bar of the statute cannot be maintained.

The findings of the court are also against defendant upon her defense of a discharge in insolvency.

The judgment roll which was in evidence is the same one passed upon by this court in Herrlich v. McDonald, 80 Cal. 472, 22 Pac. 299, where it was held that it appeared defendant acted in a fiduciary capacity, as an agent of plaintiff, and was not discharged from the judgment therein by the decree in insolvency. The judgment and order appealed from should be affirmed.

We concur: TEMPLE, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

104 Cal. 547

## VON SCHMIDT v. VON SCHMIDT. (No. 15,574.)

(Supreme Court of California. Nov. 27, 1894.)

APPEAL—PRESUMPTIONS.

Where an appeal from a judgment in favor of defendant is based on the judgment roll alone, it will be presumed, in support of the judgment, that a judgment by default rendered in the action in favor of plaintiff was for good cause set aside.

Department 1. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

Action by Julius H. Von Schmidt against Alexey W. Von Schmidt to establish the interest of plaintiff in certain patented inventions. Judgment was rendered for defendant, and plaintiff appeals. Affirmed.

J. D. Sullivan and Moses G. Cobb, for appellant. Pierson & Mitchell, for respondent.

SEARLS, C. This is an action to establish the interest of plaintiff in certain patented inventions, the patents for which inventions issued to the defendant; to have defendant decreed to be a trustee of plaintiff, and to have him account to plaintiff for the profits arising therefrom. A final judgment was rendered in favor of defendant September 10, 1892, from which plaintiff appeals. The cause comes up on the judgment roll without any statement or bill of exceptions.

The point made on behalf of appellant is that there are two judgments in the case, the latter of which (being the one from which this appeal is taken) is void. The record shows that the amended complaint was filed May 6, 1890. Defendant answered September 29, 1890, denying all the material allegations of the complaint, and setting up the statute of limitations. There is in the record what purports to be a decree in the cause, and to have been entered and recorded July 18, 1892, which recites that in February, 1892, defendant, pursuant to notice, was subpoenaed to appear before John P. Poole, a notary public, to be sworn and to testify as a witness in said cause; that he appeared before the notary at the time and place named, and that he then and there refused to be sworn as a witness in said cause, or to testify as a witness therein, without any reason for such refusal, whereby the plaintiff was deprived of the benefit of his testimony, whereupon it was, on motion of the plaintiff, ordered that the answer of the defendant be stricken out; and no leave to answer having been applied for, and the default of defendant for want of an answer having been entered, etc. The decree then proceeds in the usual form to adjudge plaintiff and defendant joint inventors of certain patents, and equally interested therein, etc.; it then proceeds to decree the defendant to be a trustee of plaintiff of an undivided one-half of the profits, etc., recites that the examination of a long account is necessary to a complete determination of the rights of the parties, and refers the cause to a referee to take and report an account, etc. The record further shows that thereafter, and on the 17th day of August, 1892, the cause came on regularly to be heard before the court sitting with a jury, to try special issues submitted by the court, and to render a verdict advisory to said court; that counsel appeared for the respective parties, evidence was introduced by the parties, the cause argued by counsel, and submitted to the jury upon certain special issues; that the jury rendered a verdict upon each of the special issues in favor of the defendant and against the plaintiff, which verdict was received and recorded, and the cause submitted to the court for decision. Then follow the facts as found by the court, which are full and explicit in favor of the defendant, and negativing all the material allegations of the complaint. Whereupon, on the 10th day of September, judgment was entered in favor of defendant and against plaintiff, dismissing the action.

The appeal, as before stated, is from this judgment. Upon an appeal from a judgment upon the judgment roll alone, all intendments will be made in support of the judgment, and all proceedings necessary to its validity will be presumed to have been regularly taken, and any matters which might have been presented to the court below which would have authorized the judgment will be presumed to have been thus presented, if the record shows nothing to the contrary. Caruthers v. Hensley, 90 Cal. 559, 27 Pac. 411; Brown v. Johnson, 45 Cal. 76; Parker v. Altschul, 60 Cal. 380; Paige v. Roeding, 96 Cal. 388, 31 Pac. 264. Under the doctrine enunciated in these cases, it may well be presumed, in favor of the judgment appealed from, that the former judgment striking out defendant's answer and giving judgment against him was for good cause set aside, as it might well have been done, and as such order setting aside defendant's default and the judgment against him, and restoring his answer to the files, forms no part of the judgment roll, under section 670 of the Code of Civil Procedure, it would not appear in this record. It is true there cannot be two final judgments by the same court in the same case existing at one and the same time; but if, by some error, such a state of facts actually existed, it would have been quite easy for the appellant by a bill of exceptions to have established the fact, to the exclusion of the presumption that the first judgment was annulled and set aside before the entry of the second. Having failed to do so, the presumption in favor of the regularity of the proceedings of the court below must prevail. The judgment appealed from should be affirmed.

We concur: TEMPLE, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

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(104 Cal. 595)

## KULLMANN et al. v. SIMMENS. (No. 15,098.)

(Supreme Court of California. Dec. 1, 1894.)

STOCK SALES ON MARGIN — CONSTITUTIONAL PROHIBITION—CHARACTER OF TRANSACTION—EVIDENCE.

1. Whether transactions between broker and customer for the purchase of stocks not immediately delivered, or of which an immediate delivery was not contemplated, were in contravention of Const. art. 4, § 26, prohibiting the sale of stocks on margin, is a question of fact to be determined in each particular case.

2. A finding of the court that the transactions between the plaintiff brokers and their defendant customer were in violation of Const. art. 4, § 26, prohibiting the sale of stocks on margin, will not be disturbed where there was any evidence to authorize it.

3. A written agreement between a broker and his customer regarding dealings in stocks is not necessarily determinative of the legality of their transactions.

Department 1. Appeal from superior court, city and county of San Francisco; John F. Finn, Judge.

Action by one Kullmann and others against one Simmens for brokers' commissions. Judgment for defendant, and plaintiffs appeal. Affirmed.

Wal J. Tuska, for appellants. Cobb & Loefler and Scrivner & Schell, for respondent.

HARRISON, J. The questions involved in this appeal have been determined adversely to the contention of the appellants in the cases of Cashman v. Root, 89 Cal. 373, 26 Pac. 883; Wetmore v. Barrett (Cal.) 37 Pac. 393; and Sheehy v. Shinn, Id. 393; and upon the authority of those cases the judgment and order appealed from must be affirmed. There is nothing in Kutz v. Fleisher, 67 Cal. 93, 7 Pac. 195, inconsistent with the above cases. That action involved a series of transactions extending over several years, most of which were had prior to January 1, 1880, and the provisions of the present constitution were, of course, inapplicable to them. In the account upon which the action was brought there were two purchases of stocks by the plaintiff for the defendant after that date, and the trial court was requested to hold as a matter of law that the mere fact that the plaintiff had purchased and paid for these stocks at the request of the defendant, and, instead of immediately delivering them, had retained them until he should be repaid the advances, was in violation of the statute of frauds, and in contravention of the provisions of article 4, § 26, of the constitution. The trial court refused so to hold or rule, and this court affirmed its action, and held that the statute of frauds and the above provision of the constitution had no application. Whether a transaction or a series of transactions between a broker and his customer for the purchase of stocks that are not immediately delivered, or of which an immediate delivery is not contemplated, is in contravention of this provision of the constitution, is a question of fact to be determined in each particular case; and the circumstances under which the transaction is had, and the conduct of the parties in refence thereto, will naturally have great influence in determining this fact. Whether the transaction is a legitimate one, or one which is within the inhibition of the constitution, is to be determined by the actual course of dealing, and the evident purpose of the parties to such transaction, rather than by what they may have termed it, or by the form in which it may have been entered in their books, and is to be determined by the trial court from the evidence before it; and the finding of the court upon this question of fact is entitled to the same consideration upon an appeal as is any other finding of fact, and must be accepted here as conclusive if there was any evidence in support of it. If the stocks purchased are of a rapidly fluctuating character, and the money therefor is wholly advanced by the broker with whom the stocks are left, either with or without an agreement that they shall be held as security for his advances, and while in his hands are sold under the directions of the customer, and within a short time repurchased and again sold while their market value is fluctuating, and the only connection that the customer may have with them is to pay or receive the balance that the broker's account may show, there would be more reason for finding that such transactions were "on margin," within the meaning of the constitution, than in a case in which there was a single purchase of a stock of a fixed value yielding a regular income, and where the customer was seeking to find a suitable investment for his money. It is not the purpose of this provision of the constitution to interfere with legitimate business, or to make void all time contracts for the purchase of shares in incorporated companies. It was held in Cashman v. Root, supra, that this court will take judicial knowledge that the object with which this provision was inserted in the constitution was to strike down a species of gambling in mining stocks which had been rife in this state, wherein individuals were wont to contract for the purchase of stocks to be delivered at a future day, upon the speculation that they would advance in price sufficiently to meet their agreements or purchases; and in Sheehy v. Shinn, supra, it was said: "To give effect to the constitution, it is as much the duty of the courts to see that it is not evaded as that it is not directly violated." The court has found in the present case "that the object of the transactions and of the agreement between the plaintiffs and the defendant was that the defendant might realize a profit by speculating in the fluctuations of the market in such stock"; and, as a conclusion therefrom, that the said transactions were within the prohibition of the constitution, and therefore void. As there was evidence before the court from which it was authorized to make this finding, its conclusion thereon must be accepted as determinative of the point. The written agreement between the parties, under which it is contended the transactions were had, was not all of the evidence before the court, and cannot be invoked as determinative of their character. The transactions themselves are challenged as illegal, and they are to be judged by their intrinsic character, rather than from the designation which the parties have given them. If they are within the prohibition of the constitution, it is immaterial that the parties thereto have signed an agreement that they shall bear a different name, or be differently classified from what they were in fact and in legal contemplation, or from what a jury may determine them to be. The judgment and order are affirmed.

We concur: VAN FLEET, J.; GAROUTTE, J.

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104 Cal. 594

**BALDWIN v. ZADIG et al.**[1] (No. 15,652.)

(Supreme Court of California. Dec. 1, 1894.)

ILLEGAL STOCK SALES—INTEREST.

Interest cannot be recovered on money voluntarily placed in the hands of another for illegal speculation in stocks.

Department 1. Appeal from superior court, city and county of San Francisco; Eugene R. Garber, Judge.

Action by one Baldwin against one Zadig and another. Judgment for plaintiff, and defendants appeal. Modified.

Edmund Tauszky, for appellants. T. C. Van Ness, for respondent.

HARRISON, J. This cause involves similar questions to those presented in Kullmann v. Simmens (No. 15,098, this day decided) 38 Pac. 362, and the other cases therein referred to. The agreement between the parties in Wetmore v. Barrett (Cal.) 37 Pac. 140, included all the terms of the agreement under which the transactions between the plaintiff and defendants herein were had, and nearly all the points presented on this appeal were presented and considered in that case. The court, however, erred in the present case in allowing interest to the plaintiff upon the several sums of money which she paid to the defendants. This money was not loaned by her to the defendants, but was voluntarily placed by her in their hands for an illegal purpose. As the money was applied by the defendants to the express purpose for which the plaintiff placed it in their hands, she cannot claim that it was detained by them from her until after she had made a demand for its return. Both of the parties to the transaction were in pari delicto, and, except for the provision of the constitution, there would be no right of recovery in the plaintiff, and we think that this right of recovery must be measured by the terms of the constitution in which it is given. The court below is directed to modify the judgment by deducting therefrom the amount allowed for interest on the sums deposited by the plaintiff with the defendants, and, as so modified, the judgment and order will stand affirmed.

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[1] Rehearing denied. See 38 Pac. 722.

We concur: GAROUTTE, J.; VAN FLEET, J.

104 Cal. 524

### Ex parte COHEN. (No. 21,180.)

(Supreme Court of California. Nov. 24, 1894.)

PRIVILEGE OF WITNESS—CRIMINATING TESTIMONY—"PURITY OF ELECTION LAW"—EVIDENCE OF OFFENDER.

1. Const. art. 1, § 13, providing that "no person shall be compelled in any criminal case to be a witness against himself," relieves such witness from giving any evidence which in a criminal prosecution against himself might tend to establish the offense with which he may be charged.

2. Unless he is at the same time liable to prosecution and punishment for such violation, a witness in a proceeding in which he is not the defendant, whose testimony tends to show that he has violated the laws of the state, cannot refuse to testify under Const. art. 1, § 13, providing that "no person shall be compelled in any criminal case to be a witness against himself."

3. The "Purity of Election Law," § 32 (St. 1893, p. 26), making a person offending against the act a competent witness against another person so offending, and providing that he may be compelled to attend and testify against the latter, but that such testimony shall not be used in any prosecution against said witness, and that said witness shall not thereafter be liable to indictment or presentment by information, nor to prosecution or punishment for the offense with reference to which he so testified, is not in violation of Const. art. 1, § 13, which provides that "no person shall be compelled in any criminal case to be a witness against himself."

Department 1.

On the application of Louis Cohen in habeas corpus. Writ discharged.

Carroll Cook and H. I. Kowalsky, for petitioner. J. N. Nougues, for respondent.

HARRISON, J. At the close of the argument herein time was given the attorneys in which to hand in a memorandum of the authorities upon which they relied in support of their respective arguments; but, although such memorandum has not been received, inasmuch as the matter presented is of public interest we have determined to render our decision without any further delay. While Louis Steinberger was under examination before the Honorable W. T. Wallace, one of the judges of the superior court of San Francisco, sitting as a committing magistrate, in which said Steinberger was charged with a felony in "having willfully caused, procured, and allowed one Louis Cohen to be registered upon the precinct register of the 1st precinct of the 43d assembly district of the state of California, in the city and county of San Francisco, state of California, knowing said Louis Cohen not to be entitled to such registration," the petitioner was called as a witness on the part of the people, and, having been sworn as such witness, was asked the following questions, viz.: "Q. Mr. Cohen, where do you reside? Q. On the 3d day of October, 1894, where did you reside? Q. Do you know the defendant, Louis Steinberger? Q. Did you have any conversation with Mr. Steinberger on the 3d day of last October respecting your going and procuring yourself to be placed upon the great register of this county? Q. Or the precinct register of this city and county? Q. Did you register or procure your name to be placed upon the precinct register of the 1st precinct of the 43d assembly district on the 3d of last October? Q. Were you present at the Baldwin Hotel with Mr. Steinberger on the 3d day of October? Q. At Mr. Steinberger's direction, did the clerk of the Baldwin Hotel furnish you with a key to a certain room in the hotel?" The witness refused to answer each of these questions as they were propounded to him, on the ground that his answer might incriminate him, whereupon the judge stated to him: "It is a legal impossibility in this case to expose yourself by your testimony here. I instruct you that you are bound to answer. You must answer." But, notwithstanding such direction, the witness still refused to answer, and was thereupon adjudged guilty of contempt, and ordered to be imprisoned in the common jail of the city and county of San Francisco until he answer said questions, and each of them, before said judge.

The right of the legislature to determine who shall be competent witnesses to establish any fact under judicial examination, and to compel the attendance of such witnesses, cannot be disputed. Every person is subject to the power of the legislature to compel him in any judicial proceeding to give testimony of any fact within his knowledge and material to the issue, except in so far as the constitution restrains the legislature from exercising this power, or protects the individual from a compulsory compliance with its attempted exercise. The constitution of this state has limited the extent to which the legislature may exercise this power, and has given to the individual a protection against its exercise by providing in article 1, § 13, that "no person shall be compelled in any criminal case to be a witness against himself." It is needless to review the history and development of this provision. It is an outgrowth of the common law of England, and almost at the commencement of our present government was incorporated into the national constitution, and is found in the constitution of every state in the country. The object of the provision is the immunity of the individual from compulsory self-accusation. This immunity is, however, to be limited to the purpose for which it is given, viz. the protection of the witness from being compelled to furnish any evidence from which he may be subjected to prosecution or punishment, and is not to be extended so as to include an exemption from being compelled to give evidence that could not under any circumstances tend to his conviction of an offense against the laws of the state. The provision that a person shall not be compelled "in a criminal case" to be a witness "against himself" is to be construed as protecting him from being compelled to give any evidence which in a criminal prosecution against himself might in any degree tend to establish the offense with which he may be charged. It is only when his evidence may tend to establish an offense for which he may be punished under the laws of the state that he is a witness "against himself" in a criminal case. The "criminal case" in which he is a witness need not be against himself, but his immunity from compulsion extends to all evidence which may be used in any criminal case against himself, under whatever circumstances such evidence may be sought; but the fact that in a proceeding in which he is not the defendant his testimony may tend to show that he has violated the laws of the state is not sufficient to entitle him to claim this protection of the constitution, unless he is at the same time liable to prosecution and punishment for such violation. If, at the time of the transactions respecting which his testimony is sought, the acts themselves did not constitute an offense; or if, at the time of giving the testimony, the acts are no longer punishable; if the statute creating the offense has been repealed; if the witness has been tried for the offense and acquitted, or, if convicted, has satisfied the sentence of the law; if the offense is barred by the statute of limitations, and there is no pending prosecution against the witness,—he cannot claim any privilege under this provision of the constitution, since his testimony could not be used against him in any criminal case against himself, and consequently he is not compelled to be a witness "against himself." Equally is he deprived of claiming this exemption from giving evidence if the legislature has declared that he shall not be prosecuted or punished for any offense of which he gives evidence. Any evidence that he may give under such a statutory direction will not be "against himself," for the reason that, by the very act of giving the evidence, he becomes exempted from any prosecution or punishment for the offense respecting which his evidence is given. In such a case he is not compelled to give evidence which may be used against himself in any criminal case, for the reason that the legislature has declared that there can be no criminal case against him which the evidence which he gives may tend to establish.

Section 32 of the "Purity of Election Law" (St. 1893, p. 26), under which the examination of Steinberger was had, provides: "A person offending against any provision of sections * * * [enumerating certain sections of the act] is a competent witness against another person so offending, and may be compelled to attend and testify upon any trial, hearing, proceeding, or lawful investigation or judicial proceeding, in the same manner as any other person. But the testimony so given shall not be used in any prosecution or proceeding, civil or criminal, against the person so testifying. A person so testifying shall not thereafter be liable to indictment or presentment by information, nor to prosecution or punishment for the offense with reference to which his testimony was given, and may plead or prove the giving of testimony accordingly in bar of such indictment, information or prosecution." This section is taken from the statute of New York known as the "Corrupt Practices Prevention Act," and is also found in the English statute upon the same subject; and the closing paragraph of the section is also found in the statutes of New York passed in 1869 for the punishment of bribery, and subsequently incorporated in section 79 of the Penal Code of that state. Statutes containing similar provisions have been passed in many of the states of this country for the purpose of securing conviction for offenses in which two or more persons are required to participate in order to constitute the offense, such as bribery, gambling, usury, selling intoxicating liquors, and others; the legislatures doubtless considering that the offense would be effectually suppressed if one of the offenders only could be punished, and for that purpose making his participant in the offense a competent witness by exempting him from punishment. In the greater number of these statutes the provision of exemption was that the testimony should not be used against the witness; and prior to the decision in Counselman v. Hitchcock, 142 U. S. 547, 12 Sup. Ct. 195, in 1891, the decisions under these statutes were nearly uniform that this was a sufficient immunity; but, under the rule laid down in that case, such a provision does not meet the requirements of the constitution, and, unless there be an absolute immunity from all punishment for any offense respecting which the witness may be called upon to testify, he may claim the protection of the constitution against being compelled to give evidence against himself. Rulings similar to that in Counselman v. Hitchcock had been previously made in Emery's Case, 107 Mass. 172, and in Cullen's Case, 24 Grat. 624; and in Ex parte Clarke, 37 Pac. 230, the same principle was established in this state.

In State v. Nowell, 58 N. H. 314, it was held, under the provisions of a statute that the evidence given by a witness should not be used against him, and that he should not be thereafter prosecuted for any offense so disclosed by him, that this exemption gave him all the protection which was guarantied by the constitution, upon the ground that his legal immunity from prosecution was equivalent to his legal innocence of the crime disclosed by his testimony. A statute is to be construed with reference to its manifest object, except as such object may be defeated by the language of the statue itself. The language used is not to be enlarged beyond its ordinary construction for the purpose of effecting such object, nor, on the other hand, is the language to receive such a technical or limited construction as will defeat the manifest purpose of the statute. If the language is susceptible of two constructions, one of which will carry out and the other will defeat such manifest object, it should receive the former construction. So, too, if a statute is susceptible of two constructions, one of which is consistent with the constitution and the other repugnant thereto, it should be so construed as to be effective rather than void. Any statute involving a personal privilege or right conferred upon an individual by the constitution, is to be liberally construed in favor of the individual. The manifest object of section 32, aforesaid, is to secure evidence for the conviction of offenders against the provisions of the other sections of the statute which are enumerated therein; but it is only upon a "trial, hearing, prosecution, lawful investigation or judicial proceeding" against another person for offending against the provisions of those enumerated sections that a witness who has himself offended against these provisions of the sections can be compelled to testify. The offenses referred to in the enumerated sections are those against the purity of election, which require the co-operation of two or more persons; and the provision that one of these parties offending may be compelled to give testimony would be nugatory, in view of his constitutional protection, unless the legislature had at the same time furnished him with a shield for any offense with reference to which he would be compelled to testify. By the provisions of this section, the petitioner has the full protection guarantied to him by the constitution against any self-accusation of crime. In addition to providing that his testimony shall not be used against him, it is declared that he shall not thereafter be liable to indictment or presentment by information, nor to prosecution or punishment, "for the offense with reference to which his testimony was given," and that he may plead or prove the giving of testimony in bar of such indictment, information, or prosecution. The immunity thus given includes not only the offense with which the defendant then under examination is charged, and in which the witness was a participant with such defendant, but also any other offense with which the witness may be charged, and to which such testimony may have reference, or which it may tend to establish. "The offense with reference to which his testimony was given" is broader in its terms, and has a wider scope, than "the offense with which the defendant is charged"; and the exemption from prosecution or punishment consequent upon his giving testimony in reference thereto, when considered in view of the personal privilege given by the constitution, must receive a liberal construction in his favor. The statute purports to compel him to testify "in the same manner as any other person," and, as the equivalent for his constitutional protection, gives him a legislative protection of equal scope and effect by exempting him from all liability to punishment for the offense with reference to which he testifies. The exemption is as broad as the compulsion, and the protection is equal to that given by the constitution. The testimony which he may be compelled to give is the same as that which could be required of any other witness, and includes any matter within his knowledge which is relevant to the offense under investigation and material to its determination. If, in giving such testimony, the testimony has reference to another offense committed by himself, he is within the protection of the statute, and, upon any prosecution for such offense, is authorized to plead or prove in bar thereof that, under the compulsion of this section, he gave testimony with reference to such offense. We hold, therefore, that the petitioner should have answered the questions propounded to him, and that he was rightly adjudged guilty of contempt in refusing to answer them. The writ is discharged, and the petitioner remanded.

We concur: GAROUTTE, J.; McFARLAND, J.

## INGRAM v. COLGAN. (No. 18,372.)

(Supreme Court of California. Nov. 28, 1894.)

In bank. On motion for rehearing. Motion granted.

For former report, see 38 Pac. 315.

PER CURIAM. The parties to this cause unite in asking the court to determine the question whether or not the act entitled the "Coyote Scalp Act" makes an appropriation for the payment of claims under it. In order to comply with this request the judgment herein is set aside and a rehearing granted, and it is ordered that the cause be forthwith resubmitted, and that either party may within 15 days from this date file additional points and authorities on the question of such appropriation if he so desires.

104 Cal. 532

## ALEXANDER v. CENTRAL LUMBER & MILL CO. (No. 15,489.)

(Supreme Court of California. Nov. 27, 1894.)

Master and Servant—Risks of Employment—Ambiguity in Pleading—Sufficiency of Evidence — Opinion Evidence — Discretion of Trial Court.

1. Abstract error in overruling a demurrer to the complaint for ambiguity is not cause for reversal, where the answer shows that defendant was not misled to his prejudice by such ambiguity, and the cause was tried on issues defined by the answer.

2. In an action for personal injuries it appeared that in unloading lumber for defendant, plaintiff was standing upon a platform consisting of two boards, only one of which was fastened, while the other could shift itself towards the rack from which he was taking the lumber, leaving a space of seven or eight inches between the two, and that in attempting to move a refractory piece of lumber this board, on which he was standing, did so shift, in consequence of which he fell, and was injured. The platform had been erected some time before, but plaintiff had only been upon it a few times, and was unaware of this defect. *Held*, that it was for the jury to determine whether plaintiff had assumed the risk of the defect in the platform.

3. In an action against a corporation by an employé to recover for personal injuries resulting from a defective platform on which he was working, it was not prejudicial error to refuse to allow defendant's president to answer the question, "Did you notice at any time any defect in this platform?" on the ground that it called for his opinion, where he was allowed to testify as to all the facts from which his conclusion could have been drawn.

Department 1. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Action by Julius Alexander against the Central Lumber & Mill Company, a corporation, to recover for personal injuries received while in defendant's employ. Plaintiff had judgment, from which defendant appeals. Affirmed.

H. A. Powell, for appellant. H. H. Davis and Dunne & McPike, for respondent.

GAROUTTE, J. Respondent was in the employ of appellant at its lumber yard in the city of San Francisco. He was standing upon a high platform engaged in removing lumber from a rack, and while so engaged he fell therefrom, and received serious injury. He recovered a judgment of $5,000 for such injuries, and this appeal is prosecuted from that judgment, and from an order denying a motion for a new trial.

Appellant's demurrer to the complaint was overruled, and such ruling of the court is now insisted upon as error. That portion of the complaint attacked by demurrer is as follows: "That said platform near said rack was carelessly and negligently constructed and built by defendants, who built and constructed said platform out of light lumber and scantling, the flooring of said platform not being nailed or fastened, and without a railing around said platform, instead of building said platform by nailing the flooring thereof, and placing a railing around said platform; and by reason of not nailing down the flooring of said platform the boards shifted, and plaintiff, in endeavoring to hold himself, caught hold of a piece of said gutter lumber piled on the said rack, which piece of gutter lumber broke, and plaintiff fell to the ground." It is claimed by demurrer that the foregoing allegations of the complaint are uncertain in this: "That it does not appear whether the alleged injury resulted from the weight and character of the lumber used in the construction of a certain platform therein mentioned, or whether it resulted from the absence of nails in the flooring of said platform, or whether it resulted from the absence of a railing around the same, or whether it resulted from the breaking of a certain piece of gutter lumber piled near said platform." This paragraph of the complaint does not comprise a perfect form of pleading. It does not contain that clear and concise statement of the facts constituting the cause of action contemplated by the Code. At the same time, upon a close inspection of it, we do not think the uncertainty of which appellant complains really exists. Useless and surplus matters are stated therein, yet it is fairly apparent therefrom that the fall of respondent was occasioned by the shifting of the boards of the platform, and that the cause of the shifting of the boards lay in the fact that they were not nailed. Aside from these reasons, if we concede the complaint defective in this regard by reason of uncertainty, yet that uncertainty is not such as demands a retrial of a case which has gone to judgment upon the facts. It is not in all cases where error has been committed by trial courts in overruling demurrers to complaints upon the grounds of ambiguity or uncertainty that this court will order a reversal of a judgment based upon a trial of the issues made by the complaint and answer. The same rule applies to errors of this character as is invoked as to all other errors of the court. It must not be mere abstract error, but it must be prejudicial and injurious error, in order to avail appellant, for otherwise he has no cause of complaint. It is apparent to the court from this record that no harm resulted to appellant by reason of the order of the court overruling the demurrer. The denials of the answer are full and complete as to the manner in which the platform was constructed, and especially upon the issue as to whether or not the boards were fastened by nails, and as to whether or not they shifted by reason of the fact that they were not so fastened. The case was tried upon these issues, and the form of the complaint in this regard could not have misled and injured appellant. As was said in Gassen v. Bower, 72 Cal. 555, 14 Pac. 206: "Where a pleading is demurred to for ambiguity, we think that if the party was not misled to his prejudice the ambiguity cannot be said to affect the substantial rights of the parties." See, also, Reynolds v. Lincoln, 71 Cal. 183, 9 Pac. 176, and 12 Pac. 449. In Stark v. Wellman, 96 Cal. 400, 31 Pac. 259; Mallory v. Thomas, 98 Cal. 644, 33 Pac. 757; and Thelin v. Stewart, 100 Cal. 372, 34 Pac. 861,—the complaints reviewed by this court presented facts entirely different from those here stated by the pleader. The remaining questions raised by the demurrer have no force.

It is claimed that the evidence is insufficient to support the verdict. The platform upon which respondent was standing at the time of his fall consisted of two boards about 10 inches wide and 2 inches thick, and about 12 feet long, stretched upon scantlings or wooden supports. Of these two boards the one nearer the rack may be called the "inside" board, and the one further from the rack the "outside" board. Between the outside and inside boards there was a space of one or two inches, and between the inside board and the rack there was a space of between four and six inches. The inside board was without nails, fastenings, or other attachments to keep it in place. Between this inside board and the rack there was this margin of from four to six inches for shifting, and upon the other side of this board, and between it and the outside board, a margin of one or two inches. While in the act of pulling a refractory piece of molding from the rack, the inside board, upon which respondent was standing, shifted or moved towards the rack, and in consequence thereof he was precipitated to the ground below. This scaffolding and platform had been erected by defendant some years prior to the accident, and was in the same condition upon that day as when first erected. Respondent had been upon the platform but a few times prior to the accident, and knew of no defect or infirmity existing therein. As to some of the foregoing facts there may be a slight conflict in the evidence, but prima facie they are all shown. It is now claimed that the evidence fails to support the verdict in this: that, conceding the platform to be defective in that the boards constituting the same were not nailed, still such defect was either known to respondent or should have been known by him, as he had equal means with his employer of possessing such knowledge; and for these reasons it is claimed that he assumed the danger and the risk. Conceding the principle of law contained in the statement of this position to be sound, still these things were matters of defense to respondent's right of recovery. Magee v. Railroad Co., 78 Cal. 437, 21 Pac. 114. The burden was upon appellant to show one or both of these conditions, and the evidence is not at all conclusive that he showed either. It is not shown that respondent was aware that these boards were not fastened; neither is it at all clear that he had equal means with his master of becoming acquainted with such fact. His master erected this scaffold and laid these boards, and by doing so must be held to have known that they were not nailed. Respondent had not been notified of this condition. He had seen the platform but a few times. The defect could hardly be said to be a patent defect; and by no principle of law was the servant required to make a minute inspection of this appliance as to its being entirely safe and free from defects before he was justified in assuming the risk of working upon it. It was the duty of the master to provide a scaffold and platform suitable to the purposes for which it was intended, and in so providing he was required to exercise reasonable care. And what constitutes reasonable or ordinary care must be determined in the light of the special facts and circumstances surrounding each particular case. Again, the master is required to use the same care in the inspection and supervision of the appliance, for the purpose of discerning defects that may subsequently occur therein, as is required of him originally in furnishing the appliance or instrument. To defeat the servant's right of recovery he must not only be aware of the defect in the appliance, but know and appreciate the risks and dangers resulting or likely to follow from such defects, although he is in no better position if he is ignorant of the defects and the risks and dangers by reason of his failure to exercise ordinary common sense and prudence in the examination of the instruments and appliances placed in his hands with which to labor. These questions are involved in the present case, and the true solution of them is entirely and solely dependent upon the evidence introduced at the trial. In almost every case they are issues of fact to be found upon by the jury, and not matters of law to be declared by the court. Upon an examination of the evidence contained within the lids of this record we have no hesitation in saying that the present case, as to its facts, was one preeminently for the jury, and not for the court.

The president of the corporation appellant when upon the witness stand was asked the following question by his counsel: "Did you notice at any time any defect in this platform?" Objection was sustained thereto upon the ground that it called for the conclusion of the witness, and the ruling of the court in this regard is insisted upon as prejudicial error; but for many reasons we think it furnishes no occasion for a reversal of the judgment. Conceding the ruling erroneous, the witness in effect subsequently testified to all the matters involved in the question. The respondent presented his case to the jury upon the theory that the boards of the platform were not fastened, and that while standing upon the inside board it shifted by reason of not being so fastened, and the fall and injury followed. This witness testified: "My attention had never been directed to any defect, by anybody, in this platform. * * * I can't say whether the inside board of the top platform was nailed or loose at the time." Again we are not prepared to say that the question was unobjectionable. It was very general, and if it had been answered in the negative we are unable to see how the answer would have enlightened the jury or aided appellant's cause. Defects in the construction of this platform, in the minds of the jury, may not have been defects in the mind of the witness. The failure to fasten the platform may have been a serious defect in its construction, viewed from the juror's standpoint, and no defect whatever viewed from the standpoint of the witness. Hence this answer, whatever it may have been, would point to no definite and certain conditions. The witness had the opportunity to testify as to the manner of the platform's construction in all its details, and there can be no question but that such would have been the better practice to have followed. The case was not one demanding the introduction of expert testimony, for the jurors, after they had been fully advised as to the manner of its construction, were just as competent to determine whether or not it was defectively constructed as was any expert that might be produced upon the witness stand. Again, looking at the matter from appellant's point of view, if we concede that the answer to the question called for a statement of fact, it certainly was near the border line of objectionableness, and the trial court, in the exercise of its discretion and the conduct of the examination of witnesses, had the legal right to sustain an objection thereto. The principle discussed in Kreuzberger v. Wingfield, 96 Cal. 251, 31 Pac. 109, is directly in point here; and, while the evidence was admitted in that case, it was held in effect that no material error would have been committed if it had been rejected, the court saying: "So in this case the trial judge might properly have required the plaintiff to ask questions touching all the details of the work of constructing the walk, its dimensions, and the grade upon which it was laid, and the quality of the materials used in its construction; but it was clearly a matter within the discretion of the trial judge to permit the general question, and the defendant could, if he had so desired, have called for more minute particulars upon the cross-examination of the witness." The court in that case also quote approvingly from Brink v. Insurance Co., 80 N. Y. 108, wherein it was said: "While it would not have been a legal error to have sustained the objection, I am of the opinion, under the circumstances of this case, that it was not a legal error to overrule it. The object of all examinations in judicial tribunals is to elicit truth, and there are many cases where the form of questions and the manner of examination must be left to the discretion of the trial judge."

There are no other questions raised by the record of sufficient importance to demand extended notice. For the foregoing reasons, it is ordered that the judgment and order be affirmed.

We concur: HARRISON, J.; VAN FLEET, J.

104 Cal. 542

## JAGER v. CALIFORNIA BRIDGE CO.

(No. 15,619.)

(Supreme Court of California. Nov. 27, 1894.)

INJURY TO EMPLOYE — DEFECTIVE PILE DRIVER— EVIDENCE—ACTION AGAINST CORPORATION—VENUE.

1. An action against a corporation for personal injuries may be begun in the county where the injuries were received, though defendant's principal place of business is in another county.

2. Error in overruling a demurrer to a complaint for uncertainty is not ground for reversal where it appears from the record that defendant was not injured thereby.

3. In an action for injuries due to defects in a pile driver, the evidence showed that the driver, as it was lifted preparatory to its descent, forced from the top of the machine a headblock or crossbeam, which fell on plaintiff, who was working at the foot of the machine. It appeared that the headblock had been originally secured by bolts, but that prior to the accident one side became loosened through the breaking or loosening of the bolt. *Held*, that the evidence justified a finding that the machine was defectively constructed.

Department 1. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Action by Julius Jager against the California Bridge Company for injuries. Judgment for plaintiff, and defendant appeals. Affirmed.

Davis & Hill, for appellant. A. P. Black (Martin Stevens, of counsel), for respondent.

GAROUTTE, J. Respondent was injured while employed by appellant in working upon and about a machine engaged in driving piles. He recovered a judgment for such injuries, and this appeal is taken from that judgment, and from the order denying the motion for a new trial.

In due time appellant moved for a change of venue of the action from the city and county of San Francisco to the county of Alameda, upon the ground that appellant's principal place of business was in Alameda county, and alleging that such fact was so declared in its articles of incorporation. This motion was denied, and complaint is now made of the action of the court. Appellant was not entitled to a change of place of trial upon the ground presented, for a corporation may be sued and trial had in the county where the injuries are received. It has no absolute right to have the action tried in the county where its principal place of business is located. Trezevant v. W. R. Strong Co., 102 Cal. 47, 36 Pac. 395.

It is insisted that a special demurrer to the complaint upon the ground of uncertainty was well taken. The complaint alleged "that the defendant so carelessly and negligently constructed said pile driver, and so carelessly and negligently provided unsafe and unsuitable machinery and appliances with which to do the work, that upon raising the hammer to drive the first pile the crossbeam on the top of the said pile driver was pulled off, and the said crossbeam fell upon the plaintiff while in the line of his employment and duty aforesaid." This allegation could have been made more definite and certain. At the same time it states the facts as to the manner and cause of the accident fairly well and sufficiently in detail to defeat a reversal of the judgment upon the ground of a technically defective pleading. It is not every error of the trial court committed in overruling a special demurrer to a pleading that will justify this court in sending the case back for a new trial. When the issues are fairly made by the answer, and the evidence bearing upon the issues is fairly presented to the court, there is no reason why a defective allegation in the complaint, even though it be unsuccessfully assailed by a special demurrer, should cause a reversal of the judgment and a retrial of the case. It is fully apparent by the record that no injury resulted to the appellant by the action of the court, even conceding it to be erroneous; and when there is no injury there is no ground for reversal. See Alexander v. Mill Co. (this day decided) 38 Pac. 410.

It is insisted that the evidence is insufficient to support the finding of fact made by the court as to the imperfect construction of the pile driver, and appellant states that he makes this contention fully realizing the force of the rule that this court will not disturb the findings of fact when a conflict of evidence is presented. When the accident occurred respondent was at the base of the pile driver, near the foot of the brace ladder, and he was struck down and injured by the crossbeam or headblock falling upon him from its proper position at the top of the pile driver, some 85 feet above. It is insisted by respondent that it fell by reason of the defective and unsubstantial manner in which it was fastened to the gins and the ladder, taken in connection with the way in which the rope or "runner" (as it is termed) that raises and lowers the hammer was connected thereto, it being claimed that this connection was of such a character as to deprive the hammer of sufficient space to allow it to be chocked at the top of the platform and below the crossbeam or headblock. Upon the part of appellant it is claimed that the headblock was knocked off by the hammer by reason of the negligence of the engineer—a fellow servant—in raising the hammer too rapidly, and in not stopping it sufficiently soon to avoid contact with the headblock. The headblock was fastened to the top of the driver by two bolts, but a short time before the accident occurred, in hoisting the pile, one end of the block became loosened and displaced from its proper position, and, while it was subsequently replaced, nothing was done to fasten it more securely, and the block was in this condition when the accident occurred. As to the contention of appellant that the engineer was guilty of negligence in raising the hammer too rapidly, it is sufficient to say that the evidence is squarely conflicting upon this point, and by its judgment the court found against the commission of negligence by the engineer in this regard. But upon the other hand we are satisfied that the evidence is entirely sufficient to support a finding of fact to the effect that the pile driver was defectively constructed in this: that the headblock thereof was insecurely placed and fastened in its position. A large amount of evidence was introduced bearing upon the question as to the proper manner of fastening the headblock upon a pile driver, some witnesses testifying that iron bands or straps should be used, while others declared that bolts, as used in this instance, were sufficient. The evidence is conflicting as to this point, but it is not necessary to rest the validity of this judgment upon such conditions. Even if the appliance was originally a proper and suitable one, tested by the requirements of the law, still at the time of the accident it was not in the same condition as when first constructed. The evidence plainly indicates that the headblock had become loosened at one end, and whatever efficacy may have arisen from the original bolting thereof was gone at the moment of the accident. Under these circumstances the original bolting goes for naught, and the case stands exactly as though one end of the appliance had never been fastened. If it had been constructed in this manner in the first instance, measured by the evidence in the record, there can be no question but that such construction would have been defective, and that the defendant would have been guilty of a lack in the exercise of the most ordinary care in such construction. It is not necessary to cite authorities to the point, for the rule is elementary that the same duty devolves upon the master in subsequently maintaining the appliance in a safe and suitable condition as rested upon him when it was originally furnished to his servant. Alexander v. Lumber Co., supra. There is nothing in the record to indicate that respondent knew the defective character of the appliance and assumed the risk of working with such an appliance. For the foregoing reasons, it is ordered that the judgment and order be affirmed.

We concur: HARRISON, J.; VAN FLEET, J.

104 Cal. 570

## In re GARCELON'S ESTATE.

Appeal of MERRITT. (No. 15,626.)

(Supreme Court of California. Dec. 1, 1894.)

APPEAL—REVIEW — OBJECTIONS NOT RAISED BELOW — CONTRACT BY HEIR RELINQUISHING INTEREST IN ANCESTOR'S ESTATE — RELEASE OF RIGHT TO CONTEST WILL—VALIDITY — PRIVITY OF EXECUTOR.

1. Where defendant moves to dismiss the petition, after an answer setting up an instrument as an affirmative defense, and failure of plaintiff to reply, the court may assume that the grounds urged in opposition to the motion are the only grounds on which plaintiff opposes it, and the latter cannot, on appeal, claim that under the pleadings he is entitled to show facts, not mentioned below, constituting an avoidance of such affirmative defense.

2. Civ. Code, § 700, provides that "a mere possibility, such as the expectancy of an heir apparent, is not to be deemed an interest of any kind." Section 1045 provides that "a mere possibility, not coupled with an interest, cannot be transferred." *Held*, that a contract between an heir and his ancestor, made in good faith and for a valuable consideration, whereby the heir relinquishes all interest in the estate of such ancestor which might in the future vest in him, is valid.

3. An heir agreed with his ancestor to relinquish all interest in the latter's estate which might otherwise in the future vest in him as such heir, and covenanted with her "her heirs, devisees, legatees, executors, and administrators," that he would "never in any manner or to any extent question, dispute, or contest any disposition of the property" named in the agreement "which she may have made, or may hereafter make, by either deed or by her last will and testament." *Held*, that the executor of the estate of such ancestor was in such privity with testatrix that he might invoke the benefit of such covenant, as against an attempted contest of the will by such heir.

4. Such agreement estops the heir from contesting an instrument, executed in due form of law as the will of such ancestor, disposing of the property referred to in such agreement, whether or not testatrix had the capacity, or was induced by undue influence, to make it.

5. A release by an heir apparent of his contingent right to contest the will of his ancestor is not void as against public policy, even though it estops the heir from contesting the will of an insane person, or a will executed under the influence of fraud or duress.

Department 2. Appeal from superior court, Alameda county.

Petition by one Merritt to revoke the probate of an instrument purporting to be the will of Catherine M. Garcelon, deceased, to which the executor and the administrator with the will annexed filed answers. From a judgment dismissing the petition, petitioner appeals. Affirmed.

The appellant is a nephew of Catherine M. Garcelon, deceased, and this appeal is taken from an order of the superior court of Alameda county dismissing his petition contesting the validity of a document theretofore admitted to probate in that court as the last will and testament of said decedent, and praying that the probate thereof be revoked. The petition avers that the document so admitted to probate is not the will of said decedent, by reason of the fact that she was of unsound mind and incompetent to make a will at the time she signed it, and upon the further ground that the execution of the same was procured by undue influence exerted upon the decedent by Stephen W. Purrington, one of the residuary legatees named therein, and by other persons unknown to the petitioner; and, in its statement of the facts constituting the alleged undue influence, the petition avers in substance that at the date of the said will, and long prior thereto, Catherine M. Garcelon was "a very aged woman, feeble and weak in body and mind, and mentally incompetent to manage, care for, or dispose of her property, and was unaware of the extent, amount, or nature of her property, or of its value, and was obliged to rely entirely upon other persons for the management of her property and affairs"; and that during all that time the said Purrington and other persons unknown to petitioner were in constant intercourse with her, and exercised an actual authority and dominion over her mind, and said persons, for the purpose of preventing the petitioner, as heir and next of kin, from coming into any portion of her estate by succession, or under her will, "had, prior to the making of said will, poisoned the mind of said Catherine M. Garcelon against the petitioner, and so induced her to dispose of almost all her property in trust, and to appoint the said Stephen W. Purrington and others as trustees thereof." Immediately following this statement the petition alleges: "The said Catherine M. Garcelon obtained all of her said property from the estate of her brother, Dr. Samuel Merritt, who died on or about the 14th day of August, 1890, and prior to that date she had not been, and was not, possessed of any property, real or personal, but was dependent upon the said Samuel Merritt for her support and subsistence." The petition then proceeds to state certain alleged false representations which were made to the decedent for the purpose of injuring the petitioner in her estimation, and to cause her to make the will in question, and alleges "that the said Catherine M. Garcelon, being thereby influenced and not otherwise, and not of her own voluntary act or will, made the said purported will." The petition further states that the said Purrington and others, for the purpose of securing a great benefit to themselves, "coerced and caused" the said decedent to subscribe her name to said will, and finally avers that she, at the time the "said purported last will and testament was made, was mentally unable to resist the said dominion and controlling influence of said persons, and was unable to understand the contents of said document, and never did understand or know the same." The petition also alleges that the petitioner and his brother, Frederick A. Merritt, are the nephews and the only next of kin of said Catherine M. Garcelon, and this averment is not denied.

The executor and the administrator with the will annexed answer separately, but both answers are in all respects the same, and deny that the said Catherine M. Garcelon was of unsound mind, or incompetent to make a will, or that the will probated as her last will and testament was executed under undue influence; and, in addition to these denials, state the following facts as a separate defense to the matters alleged in the petition: On or about August 17, 1890, one Samuel Merritt, a brother of Catherine M. Garcelon, died, leaving a large estate and a will by the terms of which the greater part of his estate was given to his said sister, and only a small portion thereof to his nephews, the petitioner here and his brother, Frederick A. Merritt. This will was duly admitted to probate on September 15, 1890. The petitioner and his brother were dissatisfied with its terms, and threatened to contest the probate thereof, and employed a lawyer for that purpose; but a compromise was effected, and said Catherine M. Garcelon and the petitioner and his brother entered into a written contract, by the terms of which the former was to pay to her said two nephews the sum of $125,000, and also to convey certain real property to a trustee upon a certain condition subsequent, the trustee to collect and pay over the income to the nephews, and in consideration of which the latter were to release to their said aunt their claims as heirs of her brother, Samuel Merritt, and for that purpose were to execute to her a proper deed of conveyance of their interest in said estate; and it was further agreed that this deed should "contain such apt words of warranty and covenant as may be prescribed and approved by the counsel of the parties of the first and second parts, respectively, to the end of securing to the party of the first part full right and ample power to dispose of all of the property derived by her from the said Samuel Merritt, or by the deed of conveyance and transfer herein provided for; also of all the income to be derived therefrom, and of all the property, real and personal, which the party of the first part now owns or hereafter may acquire, either by deed or last will and testament, without any right, power, or authority of the parties of the second part hereto, or either of them, or their respective heirs or assigns, to question, dispute, or contest the same in any manner or to any extent whatever." And it was further provided that said nephews should also execute any other separate agreements and covenants which might be deemed necessary to secure to the said Catherine M. Garcelon the right to dispose of the property mentioned in the deed, either by deed or will, free from any possibility of contest by them. On the same day the petitioner and his brother executed to the said Catherine M. Garcelon an agreement which, after referring to the death of Samuel Merritt, and the fact that he had left a large estate and a will by which the great bulk of it was devised and bequeathed to their aunt, and that they were dissatisfied with said will, and had threatened to contest the same, proceeded as follows: "And whereas, the undersigned and said Catherine M. Garcelon have mutually agreed upon a settlement and adjustment of their respective property rights and interests in the property and estate of which the said Samuel Merritt was seised or possessed, and in such settlement and adjustment the said Catherine M. Garcelon has made satisfactory provision for the undersigned; and, whereas, the said Catherine M. Garcelon has been induced to make such settlement and adjustment and such provision for the undersigned in reliance upon their respective promises and agreements that they, nor either of them, would never, at any time hereafter, in any manner, or to any extent, question, dispute, or contest, as her heirs at law or otherwise, any disposition which she may have made, or may hereafter make, by deed or will, of any or all of the property derived by her from the estate of the said Samuel Merritt: Now, therefore, for and in consideration of the premises, the undersigned do hereby promise, covenant, and agree to and with the said Catherine M. Garcelon, her devisees, legatees, and assigns, that they, nor either of them, nor their respective heirs, shall or will, at any time hereafter, assert any right, title, or interest, as the heir or heirs at law of the said Catherine M. Garcelon, to the property, real and personal, derived by her under the said last will and testament of the said Samuel Merritt." In addition to the foregoing agreement, the petitioner and his brother also executed to their aunt a deed purporting to convey and assign to her all their interest in the property of the estate of Samuel Merritt, real, personal or mixed, or in which they could have an interest as heirs at law of said Merritt. This deed also contained a covenant on their part whereby they agreed "with the said Catherine M. Garcelon, her heirs, devisees, legatees, executors, administrators, and assigns," not to question or contest any disposition of any of the property belonging to said estate which the said Catherine M. Garcelon "may have made, or may hereafter make, either by deed or by her last will and testament," and that neither of them would ever make any claim to any portion of the property derived by her under the will of Samuel Merritt, except such as he might be able to assert as a devisee or legatee under her last will and testament. The answers further aver that the said Catherine M. Garcelon fully complied with all the terms of the compromise agreement on her part to be kept and performed, and that all of the estate of which she died possessed was derived from her deceased brother, the said Samuel Merritt, and under the terms of his will. The genuineness and due execution of the several contracts and writings set out in the answer were not denied by the petitioner; but he moved to strike from the answers all the averments relating to the same as irrelevant and immaterial, and also demurred to the separate defense based upon the said alleged contracts. The motion to strike out was denied, and the demurrer overruled. The petitioner also filed in due time a written request that the issues of fact relating to the competency of the decedent and her freedom from undue influence be tried by a jury. This request was denied, and thereafter the case came on for trial before the court without a jury, and upon the hearing the defendants "offered in evidence" the original contracts and deeds referred to in their answers, and also offered to prove the truth of the recitals therein contained, and that said terms were fully performed by the said Catherine M. Garcelon. The court ruled that none of said evidence was necessary or proper, the genuineness and due execution of said contracts and deeds being admitted; and thereupon the defendants moved to dismiss the petition of the appellant upon the ground that he was estopped by said contracts and deeds from questioning the validity of the will of said Catherine M. Garcelon, and upon the further ground that it appeared that he had no interest in the estate of said decedent. This motion was opposed by the petitioner upon certain specific grounds, which will be hereafter stated. The objections of petitioner were overruled, and the court made an order dismissing the petition upon the grounds stated in the motion of defendants.

Horace W. Philbrook and Alfred H. Cohen (J. C. Martin and A. A. Moore, of counsel), for appellant. H. C. Campbell, Warren Olney, E. Nusbaumer, and John Garber, for respondents.

DE HAVEN, J. (after stating the facts). 1. Notwithstanding the genuineness and due execution of the compromise agreement, as contained in the several instruments set out in the answers, were admitted by the failure of petitioner to file an affidavit denying the same (Code Civ. Proc. § 448), he still insists that the court erred in dismissing the petition without giving him an opportunity to show that such agreement was in fact without consideration, or that his consent thereto was obtained by fraud, or that it had been extinguished by rescission, or that performance thereof had been waived by the deceased. It is true that by the terms of section 462 of the Code of Civil Procedure new matter in an answer is deemed to be controverted without any special replication, and under that section a plaintiff has the right, while not denying the genuineness and due execution of an instrument set out in an answer, to show other matters in confession or avoidance thereof. But, unless he brings to the attention of the trial court his purpose to offer such evidence, that court cannot assume that he desires to make any such defense; and in this case the motion of defendants for a dismissal of the petition was not opposed upon the ground that the petitioner desired to offer any proof tending to show that the contracts and deeds set out in the answers were not freely entered into by the parties thereto, and for an adequate consideration, or that the same were superseded by any subsequent agreement, or that the said Catherine M. Garcelon had ever waived performance of the agreements therein contained. On the contrary, the motion was opposed upon the grounds—First, that the instruments set out in the answer contained no matter sufficient to estop the petitioner from maintaining this proceeding, or from showing that he has an interest in the estate of Catherine M. Garcelon; and, second, that no trial of the issues of fact tendered by the petition had been had, and that petitioner had been denied a trial of such issues by a jury. The court below, therefore, properly assumed that these were the only grounds upon which the petitioner opposed the motion, and it is too late to suggest here for the first time that he was entitled to make proof of other facts showing his right to contest the will of deceased, and which would have been sufficient to avoid the estoppel which the trial court held resulted from the compromise agreement.

2. The main question arising upon this appeal relates to the construction and effect of the compromise agreement set out in the answers. That agreement seems to have been prepared with great care, and there is no ambiguity in any of its provisions. By its terms the appellant and his brother waived their right as heirs of Dr. Merritt to contest the will left by him, or to claim any portion of the estate bequeathed and devised by him to their aunt, other than the portion thereof which she gave and relinquished to them by that agreement; and in consideration of the property thus secured to them they further agreed "that they, nor either of them, nor their respective heirs, shall or will at any time hereafter assert any right, title, or interest, as heirs or heirs at law of the said Catherine M. Garcelon, to the property, real and personal, derived by her under the said last will and testament of the said Samuel Merritt"; and, doubtless for the purpose of making the foregoing agreement upon their part more effectual, the appellant and his brother, in the deed executed by them for the purpose of carrying out the compromise agreement, and which is to be construed as a part of such agreement, covenanted "to and with the said Catherine M. Garcelon, her heirs, devisees, legatees, executors, administrators, and assigns," that they would not "in any manner, or to any extent, question, dispute, or contest any disposition of the property above mentioned or referred to, or any part thereof, or of any property which may be acquired therefrom or thereby which the said Catherine M. Garcelon may have made or may hereafter make by either deed or by her last will and testament." There is not the slightest contention that the parties to this agreement were not fully competent to contract in relation to their property rights, and the agreement itself recites that it was entered into "after full examination into the facts, and full and deliberate consideration of the premises"; and there is nothing upon its face to suggest that the differences thereby compromised were not settled upon fair and equitable terms, nor was there any offer to prove extrinsic facts for the purpose of impeaching the agreement in this or any other respect. The questions for decision, therefore, are whether such an agreement, based upon a full and adequate consideration, and entered into with deliberation by parties in every way competent to contract, is valid and binding; and, if valid, is the petitioner thereby estopped from maintaining this proceeding to revoke the probate of the alleged will of his aunt? The agreement, as we have seen, in addition to his promise not to contest the will of his uncle, Dr. Merritt, contains two distinct covenants upon the part of the petitioner: First, that he would not thereafter, as an heir at law of his aunt, Mrs. Garcelon, assert any right to the property derived by her under the will of his said uncle; and, second, that he would never in any manner question or dispute any disposition which she might make of that property, by deed or will. The first of these covenants is in substance and effect an agreement upon the part of the petitioner to relinquish, as heir apparent, his expectancy in that portion of the estate of his aunt to which the agreement related. It is claimed by the petitioner that such an agreement is void under sections 700 and 1045 of the Civil Code of this state, the first of which provides that "a mere possibility, such as the expectancy of an heir apparent, is not to be deemed an interest of any kind," and the latter section declaring that "a mere possibility, not coupled with an interest, cannot be transferred."

These sections simply state the well-settled and well-understood rule of the common law upon the subject to which they relate. At common law, a mere possibility, such as the expectancy of an heir apparent, was not regarded as such an existing interest as to be the subject of a sale or capable of passing by assignment; but in equity the rule was different, and agreements for the sale or release of expectancies, if fairly made, and for an adequate consideration, were enforced upon the death of the ancestor; and it was not the intention of the legislature, in enacting the sections of the Code just referred to, to make any change in the rule by which courts of equity were theretofore governed in dealing with this class of contracts. This construction of these sections is in harmony with section 5 of the same Code, which declares that the provisions of that Code, "so far as they are substantially the same as existing statutes or the common law, must be construed as continuations thereof, and not as new enactments"; and also follows the presumption that the legislature, in the enactment of statutes, does not intend to overturn long-established principles of law unless such intention is made to clearly appear, either by express declaration or by necessary implication. Mr. Story, in section 1040c (volume 2) of his work on Equity Jurisprudence, states the equitable rule upon the subject of such agreements as the one before us as follows: "So, even the naked possibility or expectancy of an heir to his ancestor's estate may become the subject of a contract of sale or settlement; and in such a case, if made bona fide for a valuable consideration, it will be enforced in equity after the death of the ancestor; not, indeed, as a trust attaching to the estate, but as a right of contract." And see, also, as sustaining the same proposition, Pom. Eq. Jur. (2d Ed.) §§ 168, 953; Bacon v. Bonham, 33 N. J. Eq. 614. In accordance with this principle, it has been held in many cases in which the question has arisen that an heir may release to the ancestor his expected share in the ancestor's estate. Thus in Havens v. Thompson, 26 N. J. Eq. 383, it was held that a son, by such release to his father, estopped himself from claiming as heir any portion of the father's estate. In that case it appeared that the father gave to the son the sum of $600, upon the condition that it should be accepted in full satisfaction of his interest in the father's estate, the son executing a receipt stating that the money was received "in full in lieu of dowry." The chancellor construed the receipt in view of the facts surrounding its execution as a release, and said: "I regard this instrument as an agreement by which Benjamin, in consideration of the money paid to him by his father, agreed with the latter that he would make no claim to a share of his father's estate, should the latter die intestate, but therefrom would be debarred by that instrument, made upon what was a satisfactory compensating consideration. Such an agreement may be made between a father and his child in regard to the interest of the latter in the estate of the former, and effect will be given to it in equity according to the intention of the parties." And the rule thus declared was afterwards approved in Brands v. De Witt, 44 N. J. Eq. 545, 10 Atl. 181, and 14 Atl. 894. In Bishop v. Davenport, 58 Ill. 105, it was shown that the father in his lifetime gave to certain of his children property, and took from them an instrument in writing in which they acknowledged that such property was received by them as their full share of his estate. The father died intestate, and the court, in passing upon the question, held that the transaction was not an advancement, and that the instrument signed by the children operated as a release by them of their expectancies in their father's estate, and should be upheld as such. So, also, in Kershaw v. Kershaw, 102 Ill. 307, a son accepted from his father a deed, the deed reciting that "said land is deeded as an advancement to said John W. Kershaw out of the estate of said Joseph Kershaw, and the deed is accepted by said John as his full share of his father's estate." The court in that case held that the acceptance of the deed bound the son to the same extent as if he had signed it, and that the conveyance did not constitute an advancement, but operated as "an executed contract whereby an heir released his expectancy in his father's estate in consideration of a present grant of real estate." And it was further there decided that the son was estopped from making any further claim as heir at law to any portion of his father's estate. In Crum v. Sawyer, 132 Ill. 443, 24 N. E. 956, the court in a well-considered opinion held that a husband might for an adequate consideration enter into a valid contract with his wife releasing all his interest as her heir in her lands and personal estate, saying: "There can be no question, then, that the complainant's contingent interest or expectancy, as the heir of his wife, in her real and personal estate, was a proper subject of contract; and, the contract in question having been made upon a valuable consideration by parties capable of contracting with each other, and, so far as the evidence shows, with entire fairness, it should, as to such contingent interest or expectancy, be enforced according to its terms." And in Powers' Appeal, 63 Pa. St. 443, it was decided that a father might make a contract with his child which would bar the latter as his heir at law, and that when property had been received by the son from the father, the son giving a receipt reciting that the same was received in full of his share as heir at law, he was thereby estopped, upon the death of the father, from claiming any further part of his estate. Without multiplying authorities upon this point,—and many others might be cited to the same effect,—it is sufficient to say that we are entirely satisfied with the rule declared in the foregoing cases, and hold that it is competent for an heir, under the limitations stated in that rule, to relinquish to his ancestor all interest in the estate of the latter which might otherwise in the future vest in him as such heir. In Crum v. Sawyer, 132 Ill. 462, 24 N. E. 956, it was held that such a relinquishment would inure to the benefit of the other heirs, whether mentioned or not, and in all the cases we have cited the release so made to the ancestor was enforced in behalf of other heirs. In this case, however, it is claimed by the petitioner that the pleadings admit that he and his brother are the only heirs of Mrs. Garcelon; and it is thence argued—First, that, if in fact she died intestate, her property must, under the statutes of this state, be distributed to them, notwithstanding they may by the compromise agreement have relinquished to her their rights as such heirs; and, second, that the defendants are strangers, in no way in privity with that agreement, and therefore are not entitled to claim the benefits of its provisions. In the view we take of this case, it is not necessary to determine what force, if any, there might be in the first of these contentions, if Mrs. Garcelon had in fact died intestate, and the question arose upon the distribution of her estate as that of an intestate. It is admitted that Mrs. Garcelon executed, apparently in due form of law, a document which upon its face purports to be her will, and which, if valid, disposed of all her estate, consisting of all the property referred to in the compromise agreement of which she died possessed, and the same has been duly admitted to probate as her last will and testament. So long as this judgment stands, it cannot be said that the deceased died intestate, and, unless the petitioner succeeds by this proceeding in annulling the said judgment of probate, the question as to what would have been his rights as her heir at law if she had died intestate can never arise. The court below held that the petitioner was estopped by the compromise agreement from attacking the validity of the alleged will of the deceased, and this was one of the grounds upon which the court based its judgment dismissing the present proceeding.

3. This conclusion of the learned judge of that court was doubtless based upon a consideration of that part of the compromise agreement in which the petitioner covenanted with Mrs. Garcelon, "her heirs, devisees, legatees, executors, and administrators," that he would "never, in any manner or to any extent, question, dispute, or contest any disposition of the property" mentioned in that agreement "which she may have made, or may hereafter make, by either deed or by her last will and testament." If this covenant is valid, and is sufficiently broad to apply to and include the will in controversy here, it is clear that the defendants, as executors of the disputed will, are in such privity with the alleged testator that they have the right, as against the petitioner, to invoke the benefit of this covenant not to contest (Dakin v. Dakin, 97 Mich. 289, 56 N. W. 562); and it would follow that the court below was correct in its ruling upon this point. This particular covenant was evidently introduced for the purpose of supplementing the other part of the compromise agreement, in which the petitioner relinquished to his aunt his expectancy as her heir at law, and was intended by him as a complete relinquishment or release of all right to contest any will which his aunt might in fact sign, and purporting to be executed in due form, and which right of contest might otherwise, as a matter of possibility, come to him in the future as her heir at law; and the covenant is not to be construed as applying solely to such a will as the petitioner might deem valid, or which might be adjudged valid after a long and tedious litigation of the question of its validity. To place such a construction upon the agreement would deprive it of all practical meaning and effect. The agreement not to contest was made in view of the fact that under the law an heir is given the right to contest, upon various grounds, the validity of the document which may have been intended by the ancestor as his last will and testament, some of these grounds often involving doubtful questions of law and fact, the latter, perhaps, depending for their decision upon the conflicting evidence of witnesses, and also upon the verdict of a jury which may be more or less influenced by sympathy or caprice; and the covenant of the petitioner was that he would not bring such questions concerning any will made by his aunt into dispute or litigation. Such being its true construction, we are brought to the consideration of the question, is such an agreement upon the part of an heir binding upon him? The covenant not to sue for a breach or for the enforcement of an existing obligation operates as a release of such obligation; and, unless void as against public policy (a point to be hereafter noticed), this covenant not to contest the will of Mrs. Garcelon should be given effect as a release by the petitioner of his right to make such contest. It is true that at common law a mere possibility was not the subject of release, and that a release was held to operate only upon a present interest. Pierce v. Parker, 4 Metc. (Mass.) 80; Reed v. Tarbell, Id. 93. A covenant made by one person not to sue another for or in respect to any matter arising out of future contracts between them, or by reason of any future tort, would of course be utterly void, as the parties to such contract could not have in view any particular subject-matter, or have any conception of the amount which might be involved in the causes of action upon which the covenant was to operate. But in this case the subject-matter of the covenant was in the mind of the contracting parties, and was in its nature no more fleeting and unsubstantial than the assignment of an expectancy; and the same principle upon which courts of equity uphold such assignments will sustain the proposition that a release by an heir apparent of his contingent right to contest the will of his ancestor may also be enforced when fairly obtained, and for an adequate consideration. The two contracts stand upon the same basis. Both relate to possibilities, and both concern the same subject-matter,—the expectancy of the heir; the purpose of the latter agreement being to take away from the heir any right to assert any claim to such expectancy, in the face of a will bequeathing or devising it to another, —and both are equally entitled to enforcement.

4. It is argued, however, in behalf of petitioner, that such an agrement is void because against public policy; and in support of this contention the case of Insurance Co. v. Morse, 20 Wall. 451, is cited. In that case it was held that an agreement by an insurance company, in its contract of insurance, not to litigate in the federal courts any claim arising upon the contract, was void; and in Nute v. Insurance Co., 6 Gray, 174, a similar question was decided in the same way, and the reasons for such a conclusion were very

fully and carefully stated by Chief Justice Shaw in a clear and comprehensive opinion. But we can see no analogy between these cases and the one before us now.

5. The petitioner further contends that it is against the policy of the law that the will of an insane person or a will executed under the influence of fraud or duress should be established as a valid will, and that this particular covenant is void, because it attempts to bind the petitioner not to show such facts, and thereby to set aside the will in controversy. In passing upon this question, we start with the proposition laid down by Sir G. Jessell, M. R., in his opinion in the case of Registering Co. v. Sampson, L. R. 19 Eq. 465: "It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void, as being against public policy, because, if there is one thing which, more than another, public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contract, and that their contracts, when entered into freely and voluntarily, shall be held sacred, and shall be enforced by courts of justice. Therefore, you have this paramount public policy to consider: that you are not lightly to interfere with this freedom of contract." The sole object which the parties had in mind in entering into the covenant now under consideration was to secure to Mrs. Garcelon the right to make such disposition of her property as she might desire, free from the contingency that her right so to do, or the fact that in so disposing of it she acted freely or voluntarily, might after her death be disputed by the petitioner or his brother; and, as before stated, the agreement was made in contemplation of the fact that controversies concerning the validity of wills or deeds frequently involve doubtful questions of fact, and that, by reason of false testimony or the weakness of juries, their final decision may not always be in accordance with the actual justice and truth of the case; and we see no reason why persons whose rights of property would be affected by the decision of such questions may not in advance, for an adequate consideration, waive their right to engage in such litigation. The contract is one that concerns the parties alone, and does not appear to us to be against public policy. There never has been any doubt that parties actually engaged in contesting a will upon any of the grounds upon which such contests are permitted may compromise all matters in difference arising out of such contest, and allow the disputed will to be established, and such agreements, when fairly made, are always enforced. It is difficult to understand why such a compromise agreement is any less against public policy than an agreement made by an heir apparent with his ancestors not to contest a future will of the latter. In addition to this, we think the principle upon which the case of Cooke v. Turner, 14 Sim. 493, was decided, is sufficient to sustain the validity of this covenant, so far as relates to the question of public policy. The question in that case arose upon a condition in a will to the effect that, if a devisee should dispute the will, or the competency of the testator to make it, the devise thereby given to her should be revoked. It was argued in that case that such a condition was void, as against public policy, because having a tendency to set up the wills of insane persons by restraining heirs named therein as devisees from contesting such wills; but the court in that case said: "There appears to be no more reason why a person may not be restrained by a condition from disputing sanity than from disputing any other doubtful question, whether of fact or of law, on which the title to a devise or grant may depend." And the court then, after calling attention to certain conditions which are void as against public policy when appearing in a will, such as a condition in restraint of marriage or of lawful trade, proceeded to say: "But in the case of a condition such as that before us, the state has no interest whatever apart from the interest of the parties themselves. There is no duty, either perfect or imperfect, on the part of an heir, to contest his ancestor's sanity. It matters not to the state whether the land is enjoyed by the heir or by the devisee; and we conceive, therefore, that the law leaves parties to make just what contracts and engagements they may think expedient as to raising or not raising questions of law or of fact among themselves, the sole object of which is to give the enjoyment of the property to one claimant rather than to another." This reasoning is applicable to the case at bar, for it must be admitted that that which is valid by way of condition, whether in a will or deed, would also be valid as a covenant contained in a contract. See, also, as sustaining the decision in Cooke v. Turner, just cited, Bradford v. Bradford, 19 Ohio St. 546, 2 Jarm. Wills, *902, 2 Redf. Wills, 679.

We have given to the earnest and able argument of the attorneys for the petitioner careful consideration, and, while we have not noticed in detail all the points urged by them in support of this appeal, the views above set forth are really conclusive of every question discussed by them. Our conclusion upon the whole case is that the compromise agreement is valid in the particulars discussed in the foregoing opinion, and that the petitioner is thereby estopped from maintaining this proceeding; and it follows therefrom that the superior court did not err in refusing petitioner's demand for a trial of the issues relating to the sanity of the testator, or her freedom from undue influence. If the petitioner was not entitled to litigate these matters, the orderly course of procedure required that the court should dismiss his petition, as it did. The respondents have moved to dismiss the appeal, but, in view of our conclusion upon the merits, it is not necessary to discuss the grounds of such motion. We think the motion should be denied. Motion to dismiss appeal denied, and judgment affirmed.

We concur: FITZGERALD, J.; McFARLAND, J.

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104 Cal. 677

## FARNUM v. WARNER, County Treasurer.
(No. 19,504.)

(Supreme Court of California. Dec. 4, 1894.)

COUNTY AUDITOR—COMPENSATION — SPECIAL LEGISLATION.

1. County government act, § 182, as re-enacted March 31, 1891, providing that the salary of auditor in counties of the twentieth class shall be $1,800 per annum, "and one clerk at a monthly salary of not exceeding fifty dollars," authorizes a salary of $1,800 per annum, plus the salary, not exceeding $50 per month, of one clerk employed by the auditor.

2. A statute allowing a certain compensation to certain county officers in all counties of a certain class is not local or special legislation.

Commissioners' decision. Department 2. Appeal from superior court, San Luis Obispo county; V. A. Gregg, Judge.

Petition by Mattie A. Farnum against E. L. Warner, county treasurer, for a writ of mandate to compel defendant to issue a warrant for salary. From an order sustaining a demurrer to the complaint, plaintiff appeals. Reversed.

Knight & Heggerty, for appellant. Venable & Goodchild, for respondent.

VANCLIEF, C. This is a proceeding by writ of mandate to compel the defendant, as treasurer of San Luis Obispo county, to pay an auditor's warrant in favor of plaintiff for $50, alleged to be her salary as clerk of the auditor of said county for the month of July, 1893. The court sustained a general demurrer to the petition, and dismissed the proceeding; and whether or not the court erred in sustaining the demurrer is the only question involved in this appeal.

C. A. Farnum was elected auditor of said county in November, 1892, and on January 10, 1893, after having qualified and entered upon the duties of that office, appointed and employed the plaintiff as his official clerk, at a salary of $50 per month, which salary was paid by the treasurer, upon warrants of the auditor, for the first five months after her appointment; but payment of her warrant for July, 1893, was refused. Section 182 of the county government act, as re-enacted March 31, 1891, provides: "In counties of the twentieth class the officers shall receive as compensation for the services required of them by law or by virtue of their office, or as ex-officio officers, the following salaries, to wit: (1) County clerk, * * * (2) sheriff, * * * (3) recorder, * * * (4) auditor, one thousand eight hundred dollars per annum, and one clerk at a monthly salary of not exceeding fifty dollars." St. 1891, p. 374. And the county of San Luis Obispo belongs to the twentieth class. This, though not so explicit as it might have been, means that the salary of the auditor is to be $1,800 per annum, plus the salary of one clerk, employed by the auditor, not exceeding $50 per month. It does not compel the auditor to employ a clerk, but permits him to do so, limiting the salary, however, to $50 per month. So understood, the fourth subdivision of the section regulates the salary of the auditor in a manner not objectionable upon any constitutional ground, whatever may be said of its wisdom or policy; and it admits of no other rational construction than that above given. The auditor needed no express authority to employ a mere clerk; and if such authority had been requisite it was clearly implied in section 61 of the same act (St. 1891, p. 314), which authorizes the auditor to appoint deputies (whose services may be merely clerical); and the petition shows that plaintiff was appointed and qualified in the manner prescribed by said section 61 for the appointment of deputies. It is, therefore, clear that it was not the intention of the legislature merely to authorize the employment of a clerk to be paid by the auditor from a salary of $1,800. The language of the statute clearly expresses the intention to add something to the salary of $1,800. What was intended to be thus added? To say that merely a clerk was intended to be added to a specific salary would be nonsense, if not absurd. But to say that the salary of one clerk not exceeding $50 per month was intended to be added to $1,800 would be both sensible and rational. The evident reason why the legislature did not fix the salary of the auditor at a specified or lump sum, out of which he must pay his clerk or deputy, was that it could not be foreseen whether or not the auditor would appoint a clerk or deputy, nor whether he would pay a salary of $50 or less. Yet the compensation of the auditor is so regulated that in no event can he receive for his services more than the net sum of $1,800 per annum; and, if he employ more assistants than one clerk, he must pay them out of the $1,800 per annum allowed him. Such a regulation of the compensation of a county officer is complete obedience to the behest of the constitution in this respect. Nor has it been otherwise decided by this court. Nor is this regulation of the compensation of the auditor open to the objection that it is local or special legislation, since it applies uniformly to all counties of the twentieth class. Welsh v. Bramlet, 98 Cal. 220, 33 Pac. 66; Cody v. Murphey, 89 Cal. 522, 26 Pac. 1081. So much in answer to the arguments of counsel for respondent in support of the demurrer.

I think the court erred in sustaining the demurrer, and that for this reason the judgment should be reversed, and cause remanded.

We concur: SEARLS, C.; TEMPLE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is reversed, and the cause remanded.

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104 Cal. 631

## PEOPLE v. LEHMANN. (No. 21,133.)

(Supreme Court of California. Dec. 3, 1894.)

MARRIAGE—WHAT CONSTITUTES—CONSENT AND COHABITATION.

On trial for seduction under promise of marriage, evidence that prior to a day which was set for the marriage, and while no marriage previous to such day was contemplated, defendant, without objection from plaintiff, introduced her as his wife, and subsequently registered her name as his wife, and occupied the same room with her, at a hotel, where the alleged offense was committed, does not show the "mutual assumption of marital rights, duties or obligations" which, in addition to consent, is necessary, under Civ. Code, § 55, to constitute a valid marriage.

Commissioners' decision. Department 2. Appeal from superior court, San Joaquin county; Joseph H. Budd, Judge.

E. Lehmann was convicted of seduction under promise of marriage, and appeals. Affirmed.

F. H. Gould and W. R. Jacobs, for appellant. Atty. Gen. Hart, for the People.

HAYNES, C. Appellant was found guilty of the seduction of Rosa Hunzeker under promise of marriage, and was sentenced to pay a fine of $500. He now appeals from said judgment and an order denying his motion for a new trial. Appellant contends that at the time of the commission of the alleged offense he and Rosa were husband and wife; and whether such relation existed is the sole question made upon this appeal.

The defendant, a man 43 years of age, lived near Lemoore, in Tulare county. In August, 1893, he visited a marriage bureau in San Francisco, where he was introduced to Rosa Hunzeker. During this visit of defendant to the city, mutual promises to marry were made between them. Defendant then returned to his ranch in Tulare county, and while there wrote several letters to Rosa, appropriate to such relation only. In October defendant again came to the city, and at this time it was arranged that on Saturday they should leave the city, go to Lemoore, and there be married on the following Tuesday. Before leaving the city, defendant purchased carpets for his house, the carpets being selected by Rosa. Defendant also hired a man and his wife, who were to accompany them, the man to work on the ranch, and the wife to assist Rosa. It was further arranged that they should go by way of Stockton, defendant saying that he wished to purchase lumber there for the erection of a dry house. Defendant bought a steamer ticket for a stateroom from San Francisco to Stockton, purporting to be for himself and wife, and upon the boat introduced her as his wife, she being silent and making no remonstrance. Upon the witness stand Rosa denied that she saw the steamer tickets, but admitted that on the way to the boat defendant said he had two rooms, "one for those people, and one for us." She further testified that defendant said on the boat that they would marry on Tuesday; that she did not want to go to the room, and wept; and that defendant said she should not be so foolish, there were but two days more. Upon cross-examination she said, in reply to leading questions, that they occupied the stateroom as man and wife, and were so registered at the hotel in Stockton, and there occupied the same room, and she was introduced as Mrs. Lehmann, and upon the boat and at the hotel had sexual intercourse with defendant. The testimony of Mrs. Skelly, with whom Rosa lived up to the day she went to Stockton, is explicit as to the intended marriage at Lemoore, and that defendant did not claim or pretend that they were then man and wife. Mrs. Skelly suggested to defendant that it was not prudent for Rosa to go with him without being first married, to which defendant replied: "I have a great many men working for me upon my ranch, and I am losing a great deal of money. I have everything prepared up there to be married next Tuesday." There is not a scintilla of evidence of any agreement or understanding that they should become husband and wife before the designated day, or before their arrival at Lemoore, nor without the usual solemnization, unless it is found in the introduction by defendant of Rosa as his wife, and their occupying the same room upon the boat and at the hotel, and the admitted copulation. The defendant left Rosa at Stockton, without explanation, and, so far as the record discloses, did not again see her until the trial of this case.

Section 55 of our Civil Code is as follows: "Marriage is a personal relation arising out of a civil contract, to which the consent of parties capable of making it is necessary. Consent alone will not constitute marriage. It must be followed by a solemnization or by a mutual assumption of marital rights, duties or obligations." What constitutes a "mutual assumption of marital rights, duties, or obligations" has been so fully discussed and repeatedly declared by this court that a brief reference to some of these cases is all that is either necessary or profitable now. In Sharon v. Sharon, 75 Cal. 9, 16 Pac. 345, it was said that "the contract out of which the marriage relation arises must be a contract then and there to become husband and wife." But in this case there was no such contract, unless the copulation and the introduction may be held to be sufficient to show such contract to have been made. In Kilburn v. Kilburn, 89 Cal. 50, 26 Pac. 636, it was said: "The mutual agreement of the parties to live together in the professed relation of husband and wife is essential to create a contract of marriage, and the contract, therefore, imposes upon the parties to it the obligation to do so; and, where the agreement to marry is not followed by solemnization, there is no assumption of marital rights, duties, or obligations, within the meaning of section 55 of the Civil Code, until the commencement of cohabitation by the parties to the agreement; and by cohabitation is not meant simply the gratification of the sexual passion, but 'to live or dwell together, to have the same habitation, so that where one lives and dwells there does the other live and dwell also.' * * * Mere copulation without such cohabitation is insufficient." See, also, Sharon v. Sharon, 79 Cal. 670, 22 Pac. 26, 131, and People v. Beevers, 99 Cal. 286, 33 Pac. 844.

Here there was no cohabitation. The parties were in transit from San Francisco to Lemoore. Passengers using a boat for a short trip, as a means of conveyance, or transient guests at a hotel during a short journey, are not habitants of the boat or hotel. It is true that registering upon the boat and at the hotel as husband and wife, introductions as such, and occupying the same room, is evidence tending to show that such relation existed; but, taken alone, is wholly insufficient to establish the existence of so sacred and important a relation, which so directly concerns the public morals. Such conduct, though natural and proper where the parties are in fact married, is for that very reason often resorted to for the concealment of relations purely meretricious. Indeed, if such conduct were held conclusive proof of marriage, the number of persons who could be legally convicted of bigamy would be alarmingly increased. In this case, neither the prosecutrix nor the defendant claimed or asserted that there was a marriage, or that the relation of husband and wife ever existed between them, by any act or word done or uttered after the defendant left the prosecutrix at the hotel in Stockton. There is no conflict in the evidence, and the question is therefore one of law, whether the facts developed by the evidence constituted a marriage or created the relation of husband and wife; and this question must be answered in the negative.

The judgment and order appealed from should be affirmed.

We concur: SEARLS, C.; TEMPLE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

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4 Cal. Unrep. 889

## PEOPLE v. MORASCO. (No. 21,165.)

(Supreme Court of California. Dec. 3, 1894.)

HOMICIDE—APPEAL.

An appeal from a judgment in a capital case will not be affirmed merely because no counsel has appeared to support the appeal by brief or oral argument.

In bank. Appeal from superior court, Solano county; A. J. Buckles, Judge.

Rico Morasco was convicted of murder, and appeals. Affirmed.

A. J. Dobbins, Oscar Coughlan, and J. A. Spinetti, for appellant. Atty. Gen. Hart, for the People.

PER CURIAM. The defendant in this case was convicted of murder in the first degree, and sentenced to death. His appeal is from the judgment and from an order denying his motion for a new trial. We are furnished with an affidavit of the county clerk of the county in which the case was tried, which shows that a copy of the record was served on "the attorney of record" of the defendant on the 20th day of August, 1894, and we are asked upon this affidavit to affirm the judgment and order appealed from, upon the ground that no brief has been filed in behalf of the defendant, and no counsel has appeared to suggest any error in the proceedings. The affidavit, however, is insufficient. The gentleman upon whom the record was served is not the attorney who acted as counsel for the defendant at the time of his arraignment and plea or during the trial, and his name is not signed to the notice of appeal. And, besides, we should not feel justified, in a capital case, in affirming the judgment without an examination of the record, merely because no counsel has appeared in support of the appeal by brief or oral argument. In view of the gravity of the case, we have directed further notice to be given to the attorneys who signed the notice of appeal, and, they having failed to respond, we have examined the record, in which we discover no error. The judgment and order of the superior court are therefore affirmed, and the cause remanded, with directions to the superior court to take the proceedings necessary for the execution of its judgment.

104 Cal. 602

## DUFFY v. DUFFY. (No. 15,495.)

(Supreme Court of California. Dec. 3, 1894.)

SUIT FOR LAND—CHANGE OF VENUE—APPEAL—AMENDMENT OF RECORD.

1. Const. art. 6, § 5, providing that an action to recover land must be "commenced" in the county where the land is situated, does not prohibit such a suit, after having been so commenced, from being removed to another county for trial.

2. Error in the admission of evidence is not ground for reversal if its exclusion would not have changed the result.

3. Where the admission of certain testimony is assigned as error, the court may allow respondent to amend appellant's transcript by inserting evidence tending to show that the exclusion of such testimony would not have changed the result.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Action by Bridget Duffy, as executrix of the estate of James A. Duffy, deceased, against Michael Duffy. Judgment for defendant. From an order denying a motion for a new trial, plaintiff appeals. Affirmed.

Boyd, Fifield & Hoburg, for appellant. Estee & Miller, for respondent.

HAYNES, C. This action was brought by Bridget Duffy, as executrix of James A. Duffy, against Michael Duffy, for the purpose of compelling the defendant to convey to her, as such executrix, certain real estate situate in the city of Oakland, Alameda county, which, it is alleged, was bought by the said James in September, 1888, with his own money, but which was conveyed to the defendant, who, it is alleged, took such conveyance in trust for James, and that he still holds the same in trust. The answer alleged that the whole of the purchase money paid therefor was the money of the defendant, and denied that the estate had any interest in the real estate, or that defendant held it in trust. The cause was tried by the court, and findings and judgment were for defendant, and this appeal is from the judgment and an order denying plaintiff's motion for a new trial. No question is made as to the sufficiency of the findings to support the judgment, nor as to the sufficiency of the evidence to support the findings, but it is insisted (1) that the court had no jurisdiction of the subject-matter of the action; and (2) that the court erred in admitting certain evidence over plaintiff's objection, and in refusing her motion to strike out the same evidence.

1. The real estate, the subject of the action, is situate in Alameda county. The action was commenced in that county, but was afterwards transferred to the superior court of the city and county of San Francisco for trial; the order changing the place of trial being based on a stipulation of counsel for the respective parties, the ground therein stated being "that the convenience of witnesses would be promoted by such change."

This question is conclusively settled by the case of Hancock v. Burton, 61 Cal. 70, where it was said: "The constitution (section 5 of article 6) does not provide that the action must be tried, but simply that it must be commenced in the county in which the land is situated; and we are of the opinion that section 397 of the Code of Civil Procedure, which authorizes the change of the place of trial where the judge of a court in which the action is brought is disqualified to try the case, is not obnoxious to any provision found in the constitution." See, also, Warner v. Warner, 100 Cal. 11, 15, 34 Pac. 523. In Urton v. Woolsey, 87 Cal. 38, 25 Pac. 154, the action was to foreclose a lien upon lands in Tulare county, and was commenced and proceeded to judgment in Fresno county. Upon appeal the judgment was reversed, and the action dismissed, upon the ground "that no court has jurisdiction to entertain an action like the one at bar unless it has been commenced in the county where the land is situated." In Fritts v. Camp. 94 Cal. 393, 29 Pac. 867, cited by appellant, a similar conclusion was reached. None of the cases cited by appellant sustain her contention. They all go either to the point that in "actions for the recovery of possession of, quieting the title to, or for the enforcement of liens upon real estate," if the action be commenced in a county other than that in which the real estate is situated, the court is without jurisdiction; or that, where such action is commenced in the proper county, the place of trial will not be changed upon the ground that the defendant resides in another county, as may be done in personal actions. While the constitution very properly provides that the actions concerning real estate therein mentioned should be commenced in the county in which it, or some part of it, is situated, it could not have been intended that, under the circumstances mentioned in subdivisions 2, 3, and 4 of sections 397, the place of trial could not be changed.

2. The deceased, James A. Duffy, had long been a resident of California, and the defendant, Michael, was and still is a resident of the state of Michigan. The deposition of the defendant was taken by the plaintiff upon written interrogatories, but upon the trial she declined to read the deposition, and the same was read on behalf of the defendant. Plaintiff objected to the reading of portions of the answers to three of the interrogatories in chief, and afterwards moved to have the same portions stricken out. Her objections were overruled, and the motions to strike out were denied. We think it is not necessary to discuss the correctness of these rulings, inasmuch as the substance of the evidence objected to appeared in other portions of the deposition to which no objection is urged, as well as by the testimony of another witness. It appeared without conflict or contradiction that defendant had at different times sent large sums of money to his brother James for investment in California, and that James held defendant's power of attorney. The original deed from the vendors of the property in question to the defendant as grantee was not produced, but a certified copy showing that it was recorded in the county of Alameda at the request of the grantee was put in evidence by the plaintiff. The answers objected to were to the effect that the defendant had received a letter from his brother James in October, 1888, informing him of the purchase of the property; that he had bought it for him, and taken the deed to him, and stating the price paid at $4,900. The real controversy in the case was as to whether the money paid for the property was the money of James or of the defendant, Michael; and in answer to an interrogatory in the same deposition the defendant testified: "I did not personally pay the money to the Owens, but James A. Duffy had money in his hands at this time belonging to me, and what money was paid to the Owens was paid by him for me." No error was assigned in relation to this interrogatory or answer; and Mr. Estee, a witness on behalf of defendant, testified that the deceased, at the time of the transaction, informed him that he was purchasing the property for the defendant with the defendant's money. The controlling facts in this case are wholly undisputed: That the defendant sent from Michigan to his brother James, who resided here, large sums of money to be invested for the defendant; that James held a power of attorney from defendant; that the deed of the property in question recited a consideration of $4,900 paid by the defendant, the grantee therein named, and the deed was recorded at the request of the grantee, showing that in the matter of recording the deed, at least, James acted as the authorized agent of defendant. As against these facts there appeared—First, that the business was transacted by James; and, second, that about the time of the purchase he sold certain stocks, and from that source may have had sufficient money of his own to make the purchase. In Anthony v. Chapman, 65 Cal. 73, 2 Pac. 889, it was said: "The deed recites that the consideration was paid by Mary A. Smith, the grantee therein; and, while the express declarations of the deed in that respect may be controlled by parol proof alone, it is well settled that such evidence must be full, clear, and satisfactory." See, also, Millard v. Hathaway, 27 Cal. 142; Boyd v. McLean, 1 Johns. Ch. 590; Whitemore v. Leonard, 70 Me. 276. It must be apparent that the exclusion of the evidence sought to be stricken out could not have changed a single finding of the court or the result of the case. A plaintiff who fails to make out a case is not prejudiced by any error which does not prevent him from making out a case. McPhail v. Buell, 87 Cal. 116, 25 Pac. 266; In re Spencer, 96 Cal. 449, 450, 31 Pac. 453. In the case last cited it was said: "But it is difficult to conceive

how the verdict and judgment could have been different if the court had ruled throughout the trial as asked by appellant; and in such case a judgment will not be reversed, even though some errors have occurred during the progress of the trial."

Appellant contends that, in case of affirmance of the judgment and order appealed from, respondent should be taxed with a large proportion of the cost of printing the transcript. The statement on motion for new trial, prepared and proposed by appellant, was very short, reciting that plaintiff gave evidence tending to sustain the allegations of her complaint, and rested; that the defendant thereupon introduced evidence tending to disprove the allegations of the complaint, and to sustain the allegations of his answer, and as part of such evidence offered said deposition, and set out the three questions and answers hereinbefore noticed. The defendant proposed amendments by incorporating in the statement the greater part of the evidence in the case, and the court required the insertion of other portions. We think the defendant had the right to have so much of the evidence inserted as would show that the exclusion of the testimony sought to be stricken out would not have changed the result, and was not obliged to rest upon the correctness of the ruling upon the motion to strike out for the affirmance of the judgment and order appealed from, and that the court did not err in permitting the amendments proposed by defendant, nor in requiring the insertion of other evidence pointed out by the court. The judgment and order appealed from should be affirmed.

We concur: VANCLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

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104 Cal. 655

## LUNDY et al. v. DELMAS et al. (No. 15,556.)

(Supreme Court of California. Dec. 3, 1894.)

STATE UNIVERSITY—BOARD OF REGENTS — INCORPORATION—LIABILITIES.

1. The members of the board of regents of the state university are not individually liable to one injured by a telegraph wire fallen from a line maintained by the university along a highway.

2. The regents of the state university constitute a corporation, the organic act of March 23, 1868, having provided that they should incorporate, and they having taken steps to incorporate and exercise corporate powers.

Department 2. Appeal from superior court, Santa Clara county; John Reynolds, Judge.

Action by Isaac Lundy and others against D. M. Delmas and others for injuries causing death. Judgment was rendered for plaintiffs, and defendants appeal. Reversed.

J. B. Mhoon and D. M. Delmas, for appellants. Frs. E. Spencer, for appellees.

PER CURIAM. The plaintiffs brought this action against the defendants, who are 16 of the regents of the University of California, to recover damages against them, in their individual capacity, for the death of Daniel Lundy, plaintiffs' father. It is alleged in the complaint: "That on and for a long time prior to the 16th day of November, 1891, each and all of said defendants were, and from thence hitherto have been, and yet are, the regents of the University of California, and during all of said time were acting as such, and exercised the duties and assumed the obligations of such regents and as the board of such regents; that, among other things, said defendants, as said regents and as such board of regents, all of said time, as part of their power and duty, constructed and during all of said time maintained a telegraph and telephone line from the city of San José, in said county of Santa Clara, to the Lick Observatory on Mount Hamilton in said county, which said line consisted of wires strung upon poles planted in the ground along and near the public highway; that said defendants, as said regents, so negligently maintained said telegraph and telephone line that by their culpable negligence and inattention they allowed divers of said poles thereof to rot and decay away, and to fall to the ground by reason of their rotten condition; that a short time prior to said 16th day of November, 1891, one or more of said poles had become rotted, as aforesaid, and by reason of such rotting allowed to fall to the ground in such manner and place that the said wires attached thereto were brought across the public highway in such near position to the ground as to endanger the lives of persons traveling thereon; that said wires were so negligently left in said dangerous position by said defendants, and that by reason thereof one Daniel Lundy, who was then on said 16th day of November, 1891, traveling along said highway, was without any fault on his part caught by said wires and thrown to the ground, and instantly killed." The case was tried before a jury, and the verdict was in favor of plaintiffs for $10,000, on which judgment was entered.

At the close of plaintiffs' evidence, the defendants moved for a nonsuit upon the grounds: "(1) The evidence shows that the 'Regents of the University of California' is, and has been since 1868, a corporation duly organized under the laws of this state; that at the time of the injuries complained of, and for more than a year before, said corporation owned, managed, and maintained the telegraph and telephone lines mentioned in the complaint; that the duty of maintaining said lines rested upon said corporation, and it alone is responsible for any negligence in the performance of said duty. * * * (3) The action being based upon negligence, it is necessary for the plaintiffs to show negligence on the part of the defendants; but there is no evidence of such negligence. The negligence shown, if any, is the negligence of the corporation called the 'Regents of the University of California,' which, as owner of the lines in question, owed to the plaintiffs' father the duty of maintaining said lines in proper condition. The defendants did not owe said duty, and cannot be found guilty of negligence from the fact—if fact it be—that said duty has not been discharged." The court denied the motion, and whether it erred in so doing or not is the only question presented for decision.

In 1868 an act was passed by the legislature, and approved March 23d, entitled "An act to create and organize the University of California." St. 1867–68, p. 248. Section 1 of the act declares that "a state university is hereby created pursuant to the requirements of section four, article nine of the constitution of the state of California"; and section 11 provides: "The general government and superintendence of the university shall vest in a board of regents to be denominated the 'Regents of the University of California,' who shall become incorporated under the general laws of the state of California by that corporate name and style. The said board shall consist of twenty-two members, all of whom shall be citizens and permanent residents of the state of California, as follows." There were to be six ex officio members, namely, the governor, lieutenant governor, superintendent of public instruction, and three others, "eight other appointed members, to be nominated by the governor by and with the advice and consent of the senate," and "eight additional honorary members, to be chosen from the body of the state by the official and appointed members." The section further provides that "no member of the board of regents or of the university shall be deemed a public officer by virtue of such membership, or required to take any oath of office; but his employment as such shall be held and deemed to be exclusively a private trust." On June 18, 1868, a certificate properly executed by the governor, lieutenant governor, and superintendent of public instruction was filed in the office of the secretary of state, certifying that, in pursuance of the provisions of the said act of March 23d, they, "three of the persons indicated in and by such enactment as trustees and directors of the corporation thereby directed to be created, have associated ourselves together for the purposes mentioned in and by said enactment, and to form a corporation for such purpose by the name and style designated in and by said enactment, which is the 'Regents of the University of California.'" By section 343 of the Political Code, which took effect January 1, 1873, it is provided: "The number and designation of the civil executive officers are as follows: A governor, a private secretary for the governor, * * * twenty-two regents of the University of California"; and by section 9 of article 9 of the constitution it is provided: "The University of California shall constitute a public trust, and its organization and government shall be perpetually continued in the form and character prescribed by the organic act creating the same, passed March twenty-third, eighteen hundred and sixty-eight (and the several acts amendatory thereof)."

The first question is, did the regents, under the provisions of the organic act and the steps taken to incorporate, become a corporation? We think this question must be answered in the affirmative. At least, when they exercised corporate powers they became a corporation de facto, the validity of which could only be attacked and tested by proceedings on behalf of the people of the state. This conclusion seems to be fully warranted by the provision of the constitution above quoted, that "its organization and government shall be perpetually continued in the form and character prescribed by the organic act." The organization of the university, prescribed by the act referred to, was to be in form and character a corporation, denominated the "Regents of the University of California," and in that corporation the government of the university was to be vested.

This being so, the only remaining question is, were the defendants individually liable for the damages sustained by plaintiffs by reason of the death of their father? The rule undoubtedly is that public officers are answerable in damages to any one specially injured by their neglect or omission to perform the duties of their offices. But the defendants were not public officers. The act of March 23, 1868, declared that no member of the board of regents should be deemed a public officer by virtue of his membership, and the provision of the Political Code, naming the regents as "civil executive officers," was in effect abrogated by the constitutional provision above quoted. The question in hand has never, so far as we are advised, been before this court, but a similar question was before the court of appeals of the state of New York in the case of Bassett v. Fish, 75 N. Y. 303, and was very elaborately considered and discussed by Mr. Justice Folger. The action was brought against the defendants as trustees of a school district for negligence in suffering the floor of one of the recitation rooms in the schoolhouse in the district to become and remain out of repair, in consequence of which plaintiff, who was employed as a teacher in the school, stepped through a hole in the floor and was injured. It was held that under the statute the defendants constituted a corporation, and that, "for a neglect to perform a duty imposed upon such a corporation, the members of the board are not individually liable. The neglect is that of the corporate body, not of the individuals composing it, and the liability rests upon it."

We think that case was correctly decided, and it follows, therefore, that the court below should have granted the motion for nonsuit in this case. The judgment must be reversed, and it is so ordered.

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104 Cal. 661

### LAY v. PARSONS. (No. 15,318.)

(Supreme Court of California. Dec. 3, 1894.)

Election Contest—Review on Appeal—Insufficient Marking of Ballot.

1. In an election contest, a ruling excluding a ballot on account of the insufficiency of the marking will not be reviewed unless the record contain the original ballot, or a fac simile copy thereof, a verbal description of the mark being insufficient.

2. The law requiring a voter to place a cross opposite the name of each candidate for whom he votes is mandatory.

3. Under Code Civ. Proc. § 1122, providing that in an election contest the court shall be governed by the rules of law governing the determination of questions of law and fact, so far as applicable, the rulings of the trial court cannot be reviewed if exceptions are not taken thereto.

Department 1. Appeal from superior court, Santa Cruz county; McCann, Judge.

Election contest by Alfred G. Lay against Henry F. Parsons. There was a judgment for plaintiff, and defendant appeals. Affirmed.

Spalsbury & Burke and Charles B. Younger, for appellant. C. N. Goldsby, for respondent.

VAN FLEET, J. This is a contest under section 1111 of the Code of Civil Procedure, involving the right of the parties hereto to the office of supervisor in district No. 1 in Santa Cruz county. The contest involved simply a question as to which of the parties had received the highest number of legal votes for that office at the general election in November, 1892, and the trial, as is usual in such instances, consisted substantially in a recount of the ballots from the precincts comprised within the supervisor district. The court found that the respondent had received 317 votes, and the appellant but 316, and, by its judgment, declared respondent elected. Defendant appeals from the judgment upon a bill of exceptions, in which the only questions presented are as to the correctness of rulings made by the lower court in counting certain ballots for respondent, which were objected to, and rejecting other ballots, which appellant claims he was entitled to have counted for him. The record is not such as enables us to review any of the alleged errors satisfactorily, while most of them are not open to review at all, by reason of appellant's failure to reserve exceptions to the rulings complained of.

Among the ballots produced at the trial was one described in the bill of exceptions as being a ballot "upon which there appeared in the blank margin opposite the name of the defendant an irregular blot, without the semblance of a cross, apparently made with the same ink with which all the other ballots were marked," and "that on said ballot, in the blank margin opposite the names of all candidates for supervisor other than defendant, no mark or stamp appears." The respondent objected to the counting of this ballot for appellant upon the ground that his name was not marked with a cross, as required by law, and it was rejected, and the action of the court is now assigned as error. We cannot say that there was any error in this ruling. It is manifest from the description of the ballot above given that a perfect apprehension and understanding of the alleged defect could be best had only by a visual inspection. This the court below had an opportunity to make, with the ballot before it, but this court has not, as neither the original ballot nor a copy is either incorporated into or accompanies the record. We have nothing by which to test the correctness of the conclusions of the court below but the word picture of the ballot, as it appeared to the judge who tried the case. The law requires the voter to mark his ballot by means of a stamp, by putting a cross opposite the name of each candidate thereon for whom he intends to vote. This provision of the law is, we think, mandatory, and no other method will satisfy it. The court below found that this ballot was not so marked, and we cannot, on the record as presented, disturb its finding in that regard. In instances involving defects like the one here complained of, in order to put this court as nearly as possible in possession of the facts as they appeared to the lower court, either the original ballot, authenticated and identified in some appropriate manner, and properly referred to in the bill of exceptions, should accompany the record, or a copy, by photographic or other process by which a fac simile can be produced, should be in the bill of exceptions. Certain ballots were produced before us at the argument, which appellant claimed to be the original ballots involved, but they were in no way identified or authenticated so as to entitle them to be considered by this court for any purpose. These considerations apply equally to the ruling of the court in excluding the ballot designated as "Ballot 3," from Branciforte precinct. The objectionable features of the ballot were, in all substantial respects, identical. These were the only rulings of the court to which any exception has been reserved.

Five other ballots were ruled upon adversely to the contention of appellant, but in none of the five instances did he take an exception. It is contended by appellant, however, that he is entitled to have these rulings reviewed, notwithstanding no exception was taken in the court below. His argument is that this is a case in which the people are interested in the result, and is not to be treated as an ordinary adversary proceeding; that if the lower court erred in any of its rulings the public is entitled to have it set right, whether any exception was preserved by the parties or not. We know of no case that has carried the doctrine invoked to the length contended for. We are aware that it has been held in several of these contested election cases that they are not to be regarded as of purely an adversary character; that the public has an interest in their proper determination, which will prevent their being disposed of otherwise than on their merits; and hence, that a default cannot be taken, or a dismissal had, which will preclude an examination into the merits of the controversy. Searcy v. Crow, 15 Cal. 117; Minor v. Kidder, 43 Cal. 229; Lord v. Dunster, 79 Cal. 477, 21 Pac. 865. But none of the cases carry this principle to the extent of holding, or even intimating, that the usual and ordinary rules for the introduction and taking of evidence, and other rules for the orderly conduct of judicial proceedings, do not apply as much to cases of this character as to any ordinary civil action. Not only has this always been the practice in such cases, but it is the rule provided by the Code itself. Section 1122 provides that "the court must be governed in the trial and determination of such contested election by the rules of law and evidence governing the determination of questions of law and fact, so far as the same may be applicable." We perceive no good reason why the rule as to preserving exceptions to adverse rulings is not, in its nature, as applicable here as in any other proceeding. Any other rule would but lead to confusion and uncertainty, and subserve no good purpose. We may add, however, that, notwithstanding the absence of exceptions in this case, we have taken occasion to examine the rulings in question, and find none which, in our judgment, should reverse the judgment. The judgment is affirmed.

We concur: GAROUTTE, J.; HARRISON, J.

104 Cal. 616

## CALIFORNIA & N. R. CO. v. MECARTNEY. (No. 15,548.)

(Supreme Court of California. Dec. 3, 1894.)

TAX SALE—APPLICATION FOR DEED—SUFFICIENCY OF NOTICE—RAILROAD PROPERTY—ASSESSMENT FOR TAXATION.

1. Pol. Code, § 3780, provides that redemption from a tax sale may be made within 12 months from the date of the purchase, "or" at any time before the filing of certain affidavits and the application for a deed. Section 3785 provides that 30 days before the time for redemption expires, or 30 days before the purchaser applies for a deed, he shall serve a notice stating "the time when the right of redemption will expire, or when the purchaser will apply for a deed." *Held*, that a notice stating that the time allowed by law for redemption will expire on a certain date, and, unless redeemed sooner, the purchaser will "hereafter" apply for a deed, is insufficient.

2. Under Const. art. 13, § 2, providing that "land" and the improvements thereon shall be separately assessed, assessments against a railroad, in which the description of the property assessed is the "land" occupied by the company as a right of way, "together with" the track, etc., are invalid.

Department 1. Appeal from superior court, Contra Costa county; Joseph P. Jones, Judge.

Suit to quiet title by the California & Nevada Railroad Company against A. Mecartney. There was a judgment for plaintiff, and defendant appeals. Affirmed.

Moses G. Cobb and Edward J. Pringle, for appellant. N. Hamilton and R. M. F. Soto, for respondent.

PER CURIAM. This is a suit to quiet plaintiff's title to a strip of land described as "that certain strip of land twelve and one-half (12½) miles in length, situate in the county of Contra Costa, state of California, commencing at a point on San Pablo creek, on land owned by H. Brockhurst, in said county, and running thence in a westerly and southerly direction to the Alameda county line, in said state, together with a railroad track thereon, and all the substructures and superstructures supporting the same, and the appurtenances, which during all said times were and now are used by said plaintiff to pass, repass, and occupy, with trains, engines, and cars belonging to it." The defendant pleads title acquired through a tax sale for taxes due for the fiscal year ending June 30, 1891. The plaintiff recovered judgment, and defendant appeals therefrom, and from an order denying a new trial. Respondent, to sustain the judgment, points out a great many alleged defects in defendant's pleading and in the evidence. We do not think it necessary to notice all of them, for, if any one is well founded, the judgment must be affirmed.

1. We think the "notice of redemption," as it is called, is insufficient. It is provided (section 3780, Pol. Code) that a redemption may be made within 12 months from the date of the purchase, or at any time prior to the filing of certain affidavits and the application for a deed. "Or" may be read "and," for it is evident that all the recited events must happen before the owner will be deprived of his right to redeem. The mode of applying for a deed is prescribed in section 3785, Pol. Code. It provides that 30 days before the time for redemption expires, or 30 days before he applies for a deed, the purchaser must serve upon the owner a notice in which, among other things, must be stated "the time when the right of redemption will expire, or when the purchaser will apply for a deed." The notice served by the defendant was, on this point, "that the time allowed by law for the redemption of said property will expire on the 14th day of May, A. D. 1892; and, unless redeemed sooner, the

undersigned will hereafter apply to said tax collector for a deed." If by the phrase "time allowed by law for redemption" is meant when the 12 months from the purchase will expire, the time was incorrectly stated. If it is intended to indicate that the time for redemption will then be ended by the application for a deed, the statement is insufficient, because the notice immediately proceeds to state that the purchaser will at some indefinite time (hereafter) apply for a deed. Had the notice omitted to state anything in regard to the application for a deed, it is possible that the notice that the time for redemption would expire on the day named might be held to mean that the purchaser would then put an end to the right by applying for a deed. For the purchaser could not put an end to the period allowed for redemption except by the performance of the acts designated, one of which is the application for a deed. But a notice that at an indefinite time the purchaser will apply for a deed fixes no time when the right to redeem will expire.

2. If the foregoing were the only fatal objection to defendant's title, it would still leave him with a lien, and he could still give the required notice and demand his deed. But the decree is to the effect that defendant has no rights in the premises. It becomes necessary, therefore, to inquire whether the assessment is valid. The description in the assessment is: "The land claimed and occupied by the California and Nevada Railroad Company as a right of way for the California and Nevada Railroad, together with the track and all substructures and superstructures which support the same, comprising twelve and one-half miles of railroad, commencing at a point on San Pablo creek, on land owned by Henry Brockhurst, and running thence in a westerly and southerly direction to the Alameda county line, valued and assessed at $6,000 per mile. Value, $75,000; total value, $76,000; total tax, $975.00." Although land is here mentioned, still it is said that it, with the track and all substructures and superstructures, "comprises twelve and one-half miles of railroad," which is assessed at $6,000 per mile. There is no separate assessment of land and improvements, and it is contended that therefore the assessment is void. It is provided in the constitution (section 2, art. 13): "Land and the improvements thereon shall be separately assessed." In section 3617, Pol. Code, which is found in title 9 of the Code, in regard to revenue, are some definitions of terms as used in the Code. The second subdivision reads: "Second. The term 'real estate' includes (1) the possession of, claim to, and ownership of or right to the possession of land," etc. If the question were a new one, there might be some plausibility in claiming that the right of way acquired by a railroad company is not real estate, but a mere easement, leaving the title and even the right of possession subject to the easement in the landowner. That position would not help the appellant here. The right of way was valued as land, and as part of the railroad. If the land did not belong to the plaintiff, it was improperly assessed to it; if it did, or if the interest of the corporation in it is properly designated land, then, by virtue of the constitutional provision and the Code, both the roadway and the improvements (the roadbed, track, etc.) should have been assessed separately. Huntington v. Railroad Co., 2 Sawy. 503, Fed. Cas. No. 6,911, and cases there cited. Counsel for appellant cites several provisions from the Code in regard to the assessment of railroads by the state board of equalization, which seem to indicate that the roadway, roadbed, and rolling stock are to be valued together. This matter is fully explained in Railroad Co. v. State Board, 60 Cal. 12. The constitution provides a mode in which the state board shall fix its valuations. This must be construed, so far as it differs from the general rule, as an authorized exception. In the above case, reference is made to the Code provisions requiring the county assessor to specify and separately assess different species of property, and it is said: "It thus appears that while, as to assessments made by the assessor, the kinds are to be separately stated, the assessment by the state board of the franchise, roadbed, etc., is entered in one column, and as a single item." There may be nothing in the point that the right of way cannot pass, because the franchise is not sold with the right of way. If the statute authorizes such sale, possibly there is nothing more to be said. But it is somewhat difficult to determine what a purchaser would get. The right of way is in the nature of an easement, and is acquired only for the purpose of the railroad. When the road is abandoned or removed from the strip of land over which the railroad has a right of way, the land is discharged of the burden. The right of way no longer exists. The plaintiff may be in no condition, however, to raise this point. The judgment and order are affirmed.

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104 Cal. 664

## STOUTENBOROUGH et al. v. BOARD OF EDUCATION OF CITY AND COUNTY OF SAN FRANCISCO. (No. 15,446.)

(Supreme Court of California. Dec. 3, 1894.)

ORDER OF DISMISSAL — MOTION TO SET ASIDE — ENTRY NUNC PRO TUNC—RETRAXIT.

1. Where a case was, on motion of plaintiff, dismissed in open court, but no order of dismissal was entered at the time, and an order of dismissal was afterwards entered, without notice to plaintiff, which recited that the case had been settled, and a judgment of dismissal was entered on such order, the court will, 11 years after the entry of the order, set aside the order and judgment, and enter an order nunc pro tunc, as of the date of dismissal, showing that the case was dismissed in open court on plaintiff's motion.

2. An order of dismissal, to operate as a retraxit, must be made on motion of one party on the written consent of the other.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco, C. W. Slack, Judge.

Action by Charles H. Stoutenborough and others against the board of education of the city and county of San Francisco to quiet title. The complaint was dismissed on motion of plaintiffs, but no order of dismissal was entered by them. Defendant, without notice to plaintiffs, entered an order and judgment of dismissal. Plaintiffs moved to vacate both, and to enter a different order, nunc pro tunc as of the date of dismissal. From an order granting the motion, defendant appeals. Affirmed.

William Grant, for appellant. D. H. Whittemore, for respondents.

BELCHER, C. The plaintiffs commenced this action in March, 1876, to quiet their title to a lot of land in the city and county of San Francisco. In due time an answer and cross complaint were filed, setting up the defendant's ownership of the lot, and thereafter an answer to the cross complaint was filed, denying the defendant's ownership, and setting up the statute of limitations. On July 18, 1881, an order was entered by the clerk in the minutes of the court, which, after setting out the title of the court and cause, reads as follows: "This cause was called on the general calendar this day, and, it appearing to the court that the same has been settled, it is ordered that the said action be, and the same is hereby, dismissed." Nothing further appears to have been done in the case until September 20, 1892, when a formal judgment of dismissal was recorded, and a judgment roll made up and certified by the clerk. In January, 1893, the plaintiffs served on defendant, and filed in court, a notice that on a day named they would move the court to set aside and vacate the said judgment of September 20, 1892; also, to set aside and vacate the said order of July 18, 1881, and to enter an order nunc pro tunc, as of August 4, 1880, reading as follows, after setting out the title of the cause: "On motion of plaintiffs, made in open court, the above-entitled cause is hereby dismissed." The notice stated that the motion would be made upon the grounds that the said judgment and order were entered inadvertently and without notice, and that the cause had been dismissed in open court on August 4, 1880, and the court had lost jurisdiction to make said order of July 18, 1881. The motion was submitted for decision upon affidavits and exhibits presented and filed by the plaintiffs,—no counter affidavits or proofs of any kind were offered,—and on February 20, 1893, "the court granted plaintiffs' motion on the payment of the sum of $4, which sum was paid, and received and receipted for by the attorney for defendant." From the order thus made, this appeal is prosecuted.

It appears from the affidavits and exhibits introduced that in April, 1879, the attorney for defendant submitted to it a written opinion, in which he stated that, after a thorough examination of the matter, "I am satisfied that the board has no title to the property in question." And, after setting out the facts shown by his examination, he concluded by saying: "My opinion is, * * * the legal title is in the plaintiffs, and that it would be useless expense to defend the action." It further appears that the attorney for defendant informed plaintiffs' attorneys that the said board had no title to said lot, and disclaimed all title or interest in the same, and that thereafter plaintiffs' attorneys instructed a clerk in their office to move for the dismissal of said action, and said clerk did so, in open court, on August 4, 1880; and the court ordered the same dismissed at that time, but the clerk failed to make any entry of such order. It also appears that another attorney, in September, 1880, who was examining the title to the lot in question, called on the secretary of the board of education, and was informed that the board did not claim said lot, and that he then called on the attorney for the board, and was informed by him that said board of education did not claim said lot, and had no title thereto. It would seem, too, that the plaintiffs had no notice or knowledge of the order made and entered on July 18, 1881, until after the recording of the judgment of September 20, 1892. Upon these facts, it is argued for appellant that the court below had no power to set aside, on motion, the order of July 18, 1881, because it was the act of the court, and complete and final in itself, and had been for more than 11 years in force; and it is said that respondents, if entitled to any relief, must seek it by an independent action in equity. It is also argued that the court had no power to set aside the judgment of September 20, 1892, because the recording of it was a mere clerical act, which was authorized by, and followed as a consequence of, the prior order. No objection is made to that part of the order appealed from which ordered and directed an order to be entered nunc pro tunc as of August 4, 1880, dismissing the action. But, when the last-named order was so entered, it took effect as of the date of August 4, 1880, and the action was in fact not pending in July, 1881. Whether, therefore, the court erred in setting aside the order of July 18, 1881, or not, is immaterial, since the appellant was in no way aggrieved thereby. And besides, unless the order and judgment set aside operated as a retraxit, and so barred any future action by the plaintiffs for the same cause, the appellant was not aggrieved by the order complained of. Under our statute, an action may be dismissed "by either party upon the written consent of the other" (section 581, Code Civ. Proc.); and only such a dismissal will operate as a retraxit (Merritt v. Campbell, 47 Cal. 542). In view of the facts shown, the order of dismissal of July 18, 1881, could not have been made on motion of the respondents, or upon their written consent, and it could not, therefore, have operated as a retraxit. We advise that the order appealed from be affirmed.

We concur: TEMPLE, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

104 Cal. 626

## BJORMAN v. FT. BRAGG REDWOOD CO.

(No. 15,502.)

(Supreme Court of California. Dec. 3, 1894.)

NEGLIGENCE—BURDEN OF PROOF—CONTRIBUTORY NEGLIGENCE.

1. In an action for injuries, where the defense was negligence of a fellow servant, the burden is not on plaintiff to show that the injuries were not caused by such negligence.

2. In the absence of knowledge on the part of an employé of danger in working with or near defective machinery, he is not chargeable with negligence for not abandoning the employment.

3. Whether plaintiff's injuries were caused by his own negligence or by that of his fellow servant is a question of fact.

Commissioners' decision. Department 2. Appeal from superior court, Mendocino county; R. McGarvey, Judge.

Action by Henry Bjorman against the Ft. Bragg Redwood Company for personal injuries. Verdict and judgment for defendant. From an order granting a motion for a new trial, defendant appeals. Affirmed.

J. A. Cooper, T. L. Carothers, and C. E. Wilson, for appellant. A. Morgenthal and J. M. Mannon, for respondent.

BELCHER, C. The plaintiff brought this action to recover damages for a personal injury sustained by him, and alleged to have been caused by the negligence and gross carelessness of the defendant. The case was tried, and the verdict and judgment were in favor of the plaintiff. The defendant moved for a new trial, and its motion was granted, and on appeal to this court the order was affirmed. 92 Cal. 500, 28 Pac. 591. The case was again tried, and the verdict and judgment were in favor of the defendant. The plaintiff then moved for a new trial, and his motion was granted, and from that order the defendant prosecutes this appeal. The motion was granted upon the ground that the court had erred in giving to the jury two instructions, numbers 5 and 12, at the request of defendant.

Instruction number 5 was as follows: "The plaintiff claims that the injury to his leg was caused by the negligence and carelessness of the defendant in having a brake upon its car that was defective and improperly constructed. I charge you that the burden is upon the plaintiff to prove by a preponderance of evidence that such injury was caused by the negligence of the defendant as claimed by plaintiff, and not by any one else, or by a fellow servant of defendant, and, unless the plaintiff has so proven it, it will be your duty to find for the defendant." One of the defenses set up in the answer was that the injury to plaintiff was caused by the negligence of a fellow servant. This was an affirmative defense, and the burden was clearly upon the defendant to establish it. The instruction, however, seems to tell the jury that the burden was upon the plaintiff to prove primarily that the injury was not caused by the negligence of a fellow servant. This, if so, was erroneous and misleading. Instruction number 12 was in these words: "I charge you that the law also requires of the servant the use of ordinary care and watchfulness on his part to avoid danger or injury. And in this case, if you believe from the evidence that the injury to plaintiff was caused by the brake on the defendant's car being defective or unsafe, and that the plaintiff knew of such defect or unsafeness, or if in the course of plaintiff's employment he had the same means of knowledge concerning the said defects or unsafeness that the defendant had, and that it was the duty of the plaintiff to know of such defect by the exercise of ordinary care, and yet he continued in the employ of defendant, he cannot recover in this action." This instruction wholly ignores a well-settled rule of law in regard to the liability of an employer in a case like that supposed. That rule is that the employer is not exempt from liability unless the employé knows or ought to know of the danger to which he is exposed by working with or near the defective machinery or appliances. In the absence of such knowledge, the employé is not chargeable with negligence because he does not abandon his employment, and he cannot be said to have voluntarily exposed himself to such danger. Sanborn v. Flume, etc., Co., 70 Cal. 261, 11 Pac. 710; Colbert v. Rankin, 72 Cal. 197, 13 Pac. 491; Gisson v. Schwabacher, 99 Cal. 419, 34 Pac. 104.

It is claimed, however, that if the instructions above referred to were erroneous in the respects named, still the plaintiff was not injured by the errors, for the reason that under the evidence he was not entitled to recover in any event. But whether the injury sustained by plaintiff was caused by the negligence of a fellow servant or resulted from his own negligence was a question of fact, and not of law. Magee v. Railroad Co., 78 Cal. 430, 24 Pac. 114; Martin v. Railway Co., 94 Cal. 326, 29 Pac. 645. We cannot, therefore, say that the court abused its discretion in granting the motion, even though it felt "constrained to say that had the instructions been so framed as to meet all the requirements of the law the verdict of the jury would have been the same."

Numerous other errors are assigned and urged by counsel for respondent, but they need not be considered. The order appealed from should be affirmed.

We concur: HAYNES, C.; TEMPLE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

104 Cal. 649

## PEOPLE'S HOME SAV. BANK v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO. (No. 15,802.)

(Supreme Court of California. Dec. 3, 1894.)

CORPORATE STOCKHOLDER — VOTING BY PROXY— LIMITATION IN BY-LAWS—VALIDITY.

1. Under Civ. Code, § 312, providing that stockholders of corporations may be represented at all corporate elections by proxies, a stockholder may choose any person to cast his vote, and a by-law providing that no proxy shall be voted by one not a stockholder is unreasonable and invalid.

2. Civ. Code, § 303, providing that a corporation may, by its by-laws, provide for "the mode of voting by proxy," does not authorize a by-law forbidding all but stockholders from casting proxy votes.

In bank.

Action by the People's Home Savings Bank against the superior court of the city and county of San Francisco. Motion for a substitution of attorney for plaintiff. Granted.

Delmas & Shortridge, for petitioner. James Alva Watt, for respondent.

GAROUTTE, J. The present proceeding is a motion for a substitution of attorneys in the above-entitled cause. Mr. James Alva Watt, claiming authority to represent the petitioner, makes the motion. The solution of the question here presented is dependent upon the following state of facts: One E. H. Knight, a creditor, commenced an action in the superior court of the city and county of San Francisco, department No. 4, against the petitioner, People's Home Savings Bank, and its directors, for the purpose of enforcing his demand, and asked that the board of directors be enjoined from the further transaction of business; that they be removed from office; that a receiver be appointed; and that the bank corporation be thrown into liquidation. Certain allegations of plaintiff's complaint, charging fraud of the board of directors in the administration of the business of the corporation, and insolvency of the bank, form the basis for the relief prayed for. In this action, John F. Sheehan was by the court appointed receiver to take possession of the assets of the corporation, etc., and he retained James Alva Watt as his attorney and legal adviser in carrying on the business of the receivership. Thereafter, the petitioner in the above-entitled cause, to wit, the People's Home Savings Bank, made an application to this court for a writ of prohibition, asking that the proceedings of the superior court in the matter of the appointment of the receiver be annulled as being in excess of its jurisdiction. This application was made to the court by the petitioner through its regularly appointed attorneys, Messrs. Delmas & Shortridge. Thereafter, a motion for a substitution of James Alva Watt as attorney for petitioner in the above-entitled cause, to act in the place and stead of Messrs. Delmas & Shortridge, was made. This motion was based upon a showing by affidavits to the effect that subsequent to the inception of the prohibition proceeding the directorate of the petitioner corporation had been changed at an election held by the stockholders, and that the corporation petitioner, by its new board of directors, appointed said Watt attorney for the corporation in the above-entitled cause, and revoked the authority of Messrs. Delmas & Shortridge to act for it in any litigation then pending. The legality of Watt's appointment as attorney for the bank depends upon the validity of the election of the board of directors appointing him, and the only serious question presented as to the validity of such election involves the right of a person not a stockholder to participate in the election by virtue of his position as a proxy of a bona fide stockholder; and to this question we shall direct our attention.

While it is provided by section 312 of the Civil Code that stockholders of corporations may be represented at all elections by proxies, yet the by-laws of the petitioner bank provide that no proxy shall be voted by any one not a stockholder of the corporation; and it is upon the validity of such by-law that the merits of this case hinge. It is suggested in argument of counsel that all banking corporations have a by-law of similar import; but, notwithstanding this general practice, we have arrived at the conclusion, after careful consideration, that the making of such a law is without the power of the corporation. Corporations have no power to create by-laws that are unreasonable in their practical application, or that are violative of the statute of the state; and we think this by-law an infringement upon the statute, and a most substantial limitation upon the rights of stockholders granted by section 312 of the Civil Code. That section is broad in its terms, and when it says that a stockholder in a corporation may appoint a proxy —an attorney in fact—to represent him at elections held by the corporation, in the absence of limitations in the law, it must be held that the statute gives him the right to name an attorney in fact of his own selection. Any other construction would entirely nullify all benefits intended to be conferred by its provisions. To declare that, though the statute in general terms gives all stockholders of corporations the right to vote by proxy, yet the corporation, by its by-laws, has the power to say who that proxy shall be, is to give the corporation full power to throttle the statute. The stockholders of many of our corporations are limited in number, and the case would undoubtedly often arise where the absent stockholder, desirous of being represented at an election, would be unable to find a friend among them in whom to trust his interests. The statute contemplates no such conditions, and neither says nor intended to say that such a stockholder would be deprived of his right to vote by proxy. If you may limit by by-law the right of holding a proxy to stockholders, you may limit it to directors, or the president, or the secretary, and thus the interests in control would have the power to compel the minority interests, if unable to be present in person, to be represented by the very interests to which they are opposed, and to reinstate in office the very men whose election they desire to defeat. The principle of cumulative voting has been authorized and approved in the interests of minority representation, yet this by-law squarely strikes at this principle which has been so carefully fostered. The substantial rights of a stockholder under the law cannot be taken from him, or even abridged, by the by-laws. The right to vote by proxy is a most substantial right, and this by-law handicaps this right out of all usefulness.

While no authority for or against the principles we have here declared was cited by counsel upon the elaborate argument of the case, we had no doubt at the time that they rested upon solid grounds, and since the submission of the cause our investigation has brought to light a recent case fully in line with all that we have said upon the question. The principle here involved was the sole question there involved, and in an opinion covering the entire ground the court there said: "It has not restricted the right of the stockholder to select any person whom he may consider to be advisable for that object to vote under his authority upon his shares as a stockholder. In this respect the largest liberty has been secured and provided for the stockholders, and, being entirely unrestrained by the legislature, this privilege was maintained by the authority of the law. Without having so declared expressly, the clear implication of the section is that it was not intended to impose any restriction whatever upon the stockholder as to the person he should be at liberty to select to act under his proxy; and, the statute having in this manner created this right in as general a manner as it did, the trustees of the corporation were not at liberty to restrict or declare by their by-laws that it should not be so used." In re Lighthall Manuf'g Co., 47 Hun, 258. Section 303 of the Civil Code provides: "A corporation may by its by-laws, where no other provision is specially made, provide for: * * * (3) The mode of voting by proxy." This provision does not give the corporation power to pass the by-law here assailed. It refers to the preliminary requirements to be followed in order that the proxy may be entitled to vote, as that the authorization must be in writing, properly witnessed, acknowledged, filed with the records, etc. In creating this provision it was not in the mind of the legislature to curtail the right of voting by proxy, but rather that such right might be exercised by stockholders within any reasonable restrictions which the corporation deemed proper to incorporate into their by-laws. The statute gives to the corporation the power to regulate the exercise of the right, but no power to either qualify or limit the right, and certainly no power to so shackle the right as to result in its nullification.

As a second ground of opposition to the granting of the motion for substitution, it is insisted that James Alva Watt, by reason of his relations to the respondent as attorney, is disqualified to represent the petitioner in the prohibition proceeding. We attach but little importance to this contention, and do not deem it necessary to enter into a discussion of the questions, namely: (1) Are the interests of the receiver and the bank antagonistic? or (2) is Watt attorney for the respondent in the above-entitled cause? The conclusion we have arrived at upon the preceding question discussed declares the business relations theretofore existing between the bank and its attorneys, Messrs. Delmas & Shortridge, were severed by virtue of the action of the newly and legally elected board of directors, and, such being the case, the attorneys opposing this motion stand before us as strangers to the proceeding, having no interest or standing in the litigation; and we are unable to see that it is of any concern to them who represents the various parties in this proceeding. As to Mr. Watt's conduct in the litigation, all that he has done has been open and upon the record. There has been no concealment, no imposition practiced upon the court, but, upon the contrary, all that has been done in the past, and all that he proposes to do in the future, he has done and proposes to do under a claim of right, supported by the law. These things being so, until some party to the litigation objects, we will not investigate. If all parties to the litigation are satisfied, we know of no proper party to object. We might suggest, in conclusion, that Mr. Watt states in open court that he desires to be substituted as attorney for the petitioner bank, in order that he may dismiss the prohibition proceeding. The bank retains him as its attorney to dismiss the proceeding, and there is no reason why it has not the right so to do. Such a dismissal in no aspect of the case prejudices the interests of the respondents, and the bank, the petitioner, has the right to dismiss its petition if it deem such the proper course. The motion for a substitution as prayed for is granted.

We concur: BEATTY, C. J.; McFARLAND, J.; VAN FLEET, J.; HARRISON, J.

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4 Cal. Unrep. 895

## BYRNE v. LUNING CO. (No. 15,628.)

(Supreme Court of California. Dec. 3, 1894.)

City Improvement — Enforcement of Assessment—Sufficiency of Complaint—Recitals in Contractor's Bond—Effect.

1. In an action to enforce an assessment for street improvements, a complaint which, after alleging that the work was to be done according to specifications to be provided by the city, alleges general performance of the requirements, without specially setting out the specifications, is not subject to general demurrer.

2. Where a bond given for the faithful performance of a contract for public work recites that it is of "even date with the contract," the fact that it is dated one day earlier is not sufficient to prove, in an action to enjoin an assessment levied therefor, that the bond was in fact executed a day earlier than the contract.

3. The fact that such a bond provides that the superintendent of streets shall not be liable for any delinquency on his part does not vitiate the entire bond, though such provision be against public policy.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; James M. Troutt, Judge.

Action by Thomas Byrne against the Luning Company to enforce a street assessment. From a judgment for plaintiff, and from an order denying defendant's motion for a new trial, defendant appeals. Affirmed.

J. P. Langhorne, for appellant. J. C. Bates, for respondent.

VANCLIEF, C. Action to enforce a street assessment upon a lot of land in the city of San Francisco for the sum of $181.45, in which judgment passed for plaintiff, and defendant's motion for new trial was denied. Defendant appeals from the judgment, and also from the order denying its motion for a new trial.

1. Counsel for appellant contends that the complaint does not state a cause of action, because the specifications for the work, furnished by the city engineer and made part of the contract were not set out in haec verba in the complaint. The complaint, however, does not purport to state any part of the contract in haec verba, but only the substance of it, according to its legal effect. The work to be done was described in the resolution of intention passed by the board of supervisors, and in the complaint, as follows: "That a 16-inch iron stone pipe sewer, with manhole and cover, be constructed in Jones street, from Vallejo to Green street." And it is alleged in the complaint that the specifications for this work were furnished at the proper time by the city engineer, and that they were attached to and made a part of the contract; that, by the contract, plaintiff agreed "that he would do and perform all the aforementioned work under the direction and to the satisfaction of the said superintendent of streets, in a good and workmanlike manner, and with the materials required by said specifications, which were also to be to the satisfaction of said superintendent of streets, and were to be furnished by the said party of the first part therein [plaintiff] according to the said contract and specifications." It is then alleged "that plaintiff duly performed all the terms and conditions of said contract therein contained to be performed on the part of said plaintiff, in every respect, within the time fixed in said contract, and according to the terms of said contract and specifications, under the direction and to the satisfaction of said superintendent, and with the materials required by him, and called for by said specifications; and the said work was duly approved and accepted by said superintendent." The complaint is in the usual verbose form which seems to have been generally adopted by the profession, specifically detailing all proceedings of the board of supervisors and other municipal officers relating to the street work in question; but the foregoing extracts contain all that relates to the specifications attached to the contract, and all that is necessary to illustrate the alleged ground of demurrer. I think the complaint states the substance of a contract, and the performance thereof on the part of plaintiff, the legal effect of which is to entitle plaintiff to the relief demanded. This is sufficient to shield it against attack by the general demurrer, however vulnerable it may be to a special demurrer. Whether a copy of the contract upon which an action is based is or is not set forth in the complaint, the defendant may always demand and obtain an inspection of the original by pursuing the course prescribed by section 1000 of the Code of Civil Procedure; and if, upon such inspection, it appear that the complaint misrepresents the contract, or has omitted a substantial part of it, to the prejudice of the defendant, such misrepresentation or omission is matter of defense, but is not available as a ground of general demurrer, because it does not appear on the face of the complaint. And in this case the defendant, to maintain the issues on his part, obtained and introduced in evidence the original contract, with the specifications thereto attached; and it appears by the statement on motion for new trial that they were substantially as alleged in the complaint, and in due form, omitting nothing required by law. The case of Libbey v. Elsworth, 97 Cal. 316, 32 Pac. 228, cited by appellant, is not in point. A general demurrer to the complaint was sustained in that case on the grounds that the complaint did not show that the contract to do the work was entered into within 15 days after the first posting of the notice of its award, and did not show that the superintendent of streets

fixed the time for commencement of the work within 15 days from the date of the contract, nor fix a time for the completion of the work. But it is alleged in this case that notice of the award of the contract was posted March 30, 1892, and that the contract was entered into April 12, 1892; and it is also alleged that the superintendent of streets fixed the time in said contract for the commencement of said work at 14 days from the date of the contract, and the time for the completion thereof at 90 days from said date.

2. It is urged that the finding by the court that, at the time of entering into the contract, the plaintiff executed a bond for the faithful performance of the contract, is not justified by the evidence. The original bond was introduced by defendant, and is admitted to be sufficient and in due form, with the following exception: It bears the date April 11, 1892, whereas the contract bears the date April 12, 1892; and it is contended that the bond is void, because it appears to have been executed the day before the execution of the contract. Conceding, for the sake of argument, this extremely doubtful proposition, yet there is no evidence, except the written dates, tending to prove that the bond was delivered before the contract was executed. The true date of the execution of bond was the time of its delivery. It recites that it is of "even date with the contract." If this recital is true, it follows that there was a mistake of one day in the date of either the bond or the contract, and that such mistake is immaterial. At all events, the recital in the bond neutralizes the tendency of the written dates to prove that the execution of the bond was not contemporaneous with that of the contract; and, in this state of the evidence furnished by the bond and contract, the court was justified in finding that it did not overcome the prima facie case for plaintiff made by the warrant, assessment, diagram, etc. Street Work Act March 18, 1885, § 12, as amended (St. 1889, p. 168). This view obviates any necessity for deciding what effect a defective or even a void bond would have upon the contract.

3. In addition to the statutory and lawful requisites, the contract contains a superfluous provision, to the effect that neither the superintendent of streets nor his bondsmen shall "be liable or holden * * * for any delinquency on his own part." It is contended that this provision is against public policy, and therefore is not only void, but that it vitiates the whole contract. The provision is probably void, for the reason that the superintendent of streets had no authority to require or to make it; but it is easily separable from all other provisions of the contract, and therefore does not vitiate any one of them. The contract contains all the provisions required by law, and the finding of the court (not excepted to) is that plaintiff fully performed it on his part. It seems inconceivable, therefore, that the defendant, not being a party to the contract, could have been injured by the superfluous clause, whether it be valid or void. I think the judgment and order should be affirmed.

We concur: HAYNES, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

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4 Cal. Unrep. 899

## GRAHAM v. FRANKE. (No. 15,483.)

(Supreme Court of California. Dec. 3, 1894.)

PARTIES—ACTION ON CONTRACT—HARMLESS ERROR.

1. Under Code Civ. Proc. § 369, the party in whose name a written contract is made, though partly for the benefit of another, may sue thereon without joining the latter.

2. Error in admitting evidence is not ground for reversal, unless it was prejudicial.

Commissioners' decision. Department 2. Appeal from superior court, Alameda county; John Ellsworth, Judge.

Action by A. L. Graham against R. Franke. There was a judgment for plaintiff, and defendant appeals. Affirmed.

Sawyer & Ayer, for appellant. G. S. Langan and W. R. Davis, for respondent.

BELCHER, C. This is an appeal by the defendant from a judgment entered against him, and from an order denying his motion for a new trial. Two points only are made for a reversal. They are (1) that the court erred in admitting certain evidence over the objections of defendant; and (2) that the court erred in denying defendant's motion for a nonsuit at the conclusion of plaintiff's evidence.

The complaint contains two counts. The first is based upon a written contract executed by the parties, and dated April 26, 1890, whereby the plaintiff agreed to sell and deliver to the defendant certain vegetable products, and defendant agreed to purchase and pay for the same certain stipulated prices. The second count is for goods, wares, and merchandise sold and delivered. In each count it is alleged that defendant had not made full payment, and judgment is asked for the amount still due and unpaid. The evidence objected to by the defendant at the trial, and the admission of which is assigned as error, was to the effect that on April 4, 1890, the plaintiff and one Worthington became partners in the business of raising vegetables, and that this partnership continued up to the time of the trial; and the objection was that the evidence was immaterial, and irrelevant to any issue raised by the pleadings. Conceding that this objection was well taken, still it is evident that the defendant was in no way prejudiced by the ruling. The evidence did not, to any extent, tend to fix, establish, or enlarge the liability of defendant.

At the close of plaintiff's evidence, and after he had rested his case, defendant moved for a nonsuit upon the ground "that the evidence shows that the plaintiff, A. L. Graham, is not the real party interested, and that this suit should not and cannot be maintained by him alone; that the evidence shows that the transaction, the matter of the suit, is a partnership debt." The motion was denied, and we see no error in the ruling. The plaintiff's contract with the defendant was in writing, and under section 369, Code Civ. Proc., he was authorized to sue upon it without joining Worthington, even if it was partly made for the benefit of the latter. The judgment and order appealed from should be affirmed.

We concur: TEMPLE, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

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'04 Cal. 623

## In re DONOVAN'S ESTATE. (No. 15,740.)
## FITZPATRICK v. SECORD.

(Supreme Court of California. Dec. 3, 1894.)

APPOINTMENT OF ADMINISTRATOR—RESIDENCE.

D., who has only been in the state a few days, to look after the interest of his deceased brother's estate, and who came in order to claim a residence, so as to be able to control the administration of the estate, and could not tell whether he would remain or not, and only brought his daughter with him, leaving his wife in the foreign state, where he had lived for 38 years, was not a bona fide resident, so as to be competent to nominate an administrator, under Code Civ. Proc. § 1379.

Commissioners' decision. Department 2. Appeal from superior court, Santa Clara county; W. G. Lorigan, Judge.

In the matter of the estate of Timothy Donovan, deceased. Contest between Edwin F. Fitzpatrick and J. K. Secord for the office of administrator. From an order appointing the latter administrator, the former appeals. Affirmed.

Edw. F. Fitzpatrick, in pro. per. C. D. Wright and Wm. L. Gill, for respondent.

HAYNES, C. Timothy Donovan died intestate in Santa Clara county, in this state, leaving an estate in said county. Appellant and respondent each applied for letters of administration, the latter being the public administrator of said county. John Donovan, a brother of the deceased, requested the appointment of appellant. This request was denied upon the ground that John Donovan was not a bona fide resident of this state, and therefore not entitled to administer the estate, under section 1369, Code Civ. Proc., nor competent to nominate another, under section 1379 of the same Code. See In re Beech's Estate, 63 Cal. 458, and In re Bedell's Estate, 97 Cal. 342, 32 Pac. 323. The sole question, therefore, is whether John Donovan was, at the time he made the request, a bona fide resident of this state. If he was, he was first entitled to administer, and so had the right to nominate appellant.

Timothy Donovan died January 10, 1894. John Donovan was then residing, and for about 38 years had resided, at Chicopee, in the state of Massachusetts. On January 20, 1894, he and others entitled to share in the estate signed and forwarded to appellant a written request for his appointment as administrator, and on January 25th appellant filed his petition praying that letters of administration be issued to him. Both petitions came on for hearing February 9, 1894. Three days before the hearing, John Donovan arrived in California, and on the day of the hearing filed a written request for the appointment of appellant; describing himself therein as a resident of San Mateo county, in this state. He was called as a witness by appellant, and, after testifying that he resided in Redwood City, he was asked, upon cross-examination: "Q. How came you to California? A. Well, because I was sent for. Q. Who sent for you? A. The death of my brother. Q. Who sent for you? A. Mr. Fitzpatrick. Q. And that is the reason you came out here? A. I came out here to live. Q. He sent for you? A. Of course. I came out here to see about the interests of my brother's estate. He told me— He sent for me. He wrote me, and, of course, I wanted to come out, to see to the interests of my brother's estate. He sent for me, that I should come out here and claim I have a residence here, to have any say in this matter." The witness gave other testimony of like character upon cross-examination, and upon redirect examination he was asked: "Q. You are now a resident of this state, are you? A. Yes, sir. Q. Is it your intention to remain? A. I cannot tell that. I will remain here if I can,—as long as I can. It is my intention to remain here." When he came he brought an unmarried daughter with him, leaving his wife with a married son and daughter in Massachusetts. We think the evidence failed to show that John Donovan was a bona fide resident of this state. Appellant contends that the court was bound by the direct evidence of the witness that he was a resident. But it was conceded that for many years he was a resident of Massachusetts, and "union of act and intent are necessary to make a change of residence." Pol. Code, § 52. He had been in this state but three days, and nothing could be inferred, from his presence for so short a time, as to his intention in coming, and it was for the court to determine from the whole of his testimony what his intention was. Appellant cites Hansen v. Graham, 82 Cal. 631, 23 Pac. 56. That case does not sustain his contention. The question there was as to what constituted nonresidence, under the attachment laws. It was there said (page

633, 82 Cal., and page 56, 23 Pac.): "In statutes relating to taxation, settlements, the right of suffrage, and qualification for office, it may have a very different construction from that which belongs to it in the statutes relating to attachments." Our attachment laws use the expressions "not residing" and "nonresident," without other qualification, while the Code provision in relation to the office of administrator requires that the petitioner, or the person requesting his appointment, must be "a bona fide" resident of this state. This must involve an abandonment of his domicile in Massachusetts, and that was not shown. The order refusing to appoint appellant, and the order appointing respondent, should each be affirmed.

We concur: VANCLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the orders appealed from are affirmed.

104 Cal. 690

## CHAPMAN v. STATE. (No. 15,706.)

(Supreme Court of California. Dec. 4, 1894.)

STATE LIABILITY FOR NEGLIGENCE OF OFFICERS—ACTION ON CONTRACT—LIABILITY OF BAILEE.

1. In the absence of statute, a state is not liable for the negligence of its officers in the discharge of their ordinary official duties.

2. Under Const. art. 4, § 31, which prohibits the legislature from making a gift of public money or other thing of value to any person, it cannot, by statute, create a liability against the state for acts of past negligence on the part of its officers.

3. A complaint in an action against the state, alleging that defendant, for a valuable consideration, received on the public wharf coal belonging to plaintiff, to be delivered to him, and that the coal was lost by the giving way of the wharf, and that plaintiff was damaged thereby, states a cause of action on the contract of bailment, and not on negligence.

4. A wharfinger is impliedly bound to use ordinary care for the safety of property intrusted to him, and must see that the wharf is reasonably safe.

5. Under Act Feb. 28, 1893, providing that all persons who shall thereafter have claims against the state on contract, which have not been allowed by the state examiners, may sue the state, an action may be maintained against the state on a contract on which the right of action accrued before the passage of the act.

6. The rejection by the state examiners of a claim against the state is not a bar to an action to enforce it, as provided in Act Feb. 28, 1893.

In bank. Appeal from superior court, city and county of San Francisco; John Hunt, Judge.

Action by one Chapman against the state of California for damages. From a judgment sustaining a demurrer to the complaint, plaintiff appeals. Reversed.

Dodge & Fry, for appellant. Atty. Gen. Hart, for the State.

DE HAVEN, J. Action for damages, brought by the plaintiff as assignee of the firm of John Rosenfeld's Sons. In the superior court a demurrer to the complaint was sustained, and judgment thereupon rendered in favor of the defendant. The complaint, omitting merely formal and immaterial averments, may, as against a general demurrer, be construed as alleging, in substance, that on August 10, 1891, the defendant, in consideration of wharfage and dockage charges paid to its officers, the state board of harbor commissioners, received upon one of its public wharves, situate in the city of San Francisco, and under the jurisdiction and control of the state board of harbor commissioners, about 130 tons of coal belonging to the assignors of plaintiff, and to be removed by them from such wharf; and that on said day a large portion of the wharf on which this coal was placed broke and gave way "by reason of the negligence, omission, and carelessness of defendant, its officers and agents, the state board of harbor commissioners and said wharfinger, in failing and neglecting to keep said wharf in good and sound condition and repair," and all the coal of plaintiff's assignors then on the wharf was sunk in the bay of San Francisco, and became a total loss, to their damage in the sum of $1,266.47, the alleged value of said coal. The complaint further alleges that a claim for the damages so sustained was duly presented to the state board of examiners for allowance, and the same was by said board rejected on September 13, 1893. The prayer of the complaint is for a judgment against defendant for the sum of $1,266.47, and interest thereon from August 10, 1891. The demurrer was upon the general ground that the complaint does not state facts sufficient to constitute a cause of action; and also set forth, as a special ground, that "the said complaint shows upon its face that the claim against the state, which is the subject-matter of the action of plaintiff, was duly and legally presented to the state board of examiners of this state prior to the commencement of this action for allowance, and was by said board rejected and disallowed, and the said action of said board in the premises has never been reversed, but remains in full force and effect."

1. It is claimed by the plaintiff that he is entitled to maintain this action under the permission and authority given by the act authorizing suits against the state, approved February 28, 1893 (St. 1893, p. 57). The first section of this act provides as follows: "All persons who have or shall hereafter have claims on contract or for negligence against the state not allowed by the state board of examiners, are hereby authorized, on the terms and conditions herein contained, to bring suit thereon against the state in any of the courts of this state of competent jurisdiction, and prosecute the same to final judgment." The cause of action set forth in the complaint arose prior to the passage of the act just referred to; and it is argued by the attorney general that, at the time when the

coal belonging to the assignors of plaintiff was lost, the state was not liable for the damage occasioned by said loss, and growing out of the alleged negligence of said officers in charge of the wharf mentioned in the complaint, and that the act should not be construed as intended to create any liability against the state for such past negligence. It is well settled that, in the absence of a statute voluntarily assuming such liability, the state is not liable in damages for the negligent acts of its officers while engaged in discharging ordinary official duties pertaining to the administration of the government of the state. Bourn v. Hart, 93 Cal. 321, 28 Pac. 951; Story, Ag. § 319. It is also true that under section 31 of article 4 of the constitution of this state, which forbids the legislature from making any gift of public money or other thing of value to any person, the legislature has no power to create a liability against the state for any past act of negligence upon the part of its officers; and a statute undertaking to assume a liability upon the part of the state for the negligence of its officers in cases where, under the general rules of law, a master would have to respond for the negligent acts of his servant, would only be valid in so far as it might relate to future acts of negligence. If, therefore, the present action is to be regarded as one for the recovery of damages arising out of the negligence of the officers of the state in the discharge of a strictly governmental duty, it cannot be sustained. But we are clearly of the opinion that the cause of action alleged in the complaint is not of this character. It is not founded upon negligence constituting a tort pure and simple, and unrelated to any contract, but is substantially an action for damages on account of the alleged breach of a contract. The facts stated in the complaint show that the defendant, in consideration of wharfage paid to it, received upon one of its public wharves the coal belonging to plaintiff's assignors, and to be delivered to them on such wharf for removal therefrom. A wharfinger is one who for hire receives merchandise on his wharf, either for the purpose of forwarding or for delivery to the consignee on such wharf; and the matters alleged in the complaint show a contract of the latter character, and the state is bound thereby to the same extent as a private person engaged in conducting the business of a wharfinger would be under a similar contract. The principle that a state is bound by the same rules as an individual in measuring its liability on a contract is well expressed by Allen, J., in his concurring opinion in the case of People v. Stephens, 71 N. Y. 549, in which he said: "The state in all its contracts and dealings with individuals must be adjudged and abide by the rules which govern in determining the rights of private citizens contracting and dealing with each other. There is not one law for the sovereign, and another for the subject. But when the sovereign engages in business, and the conduct of business enterprises and contracts with individuals, whenever the contract, in any form, comes before the courts, the rights and obligations of the contracting parties must be adjusted upon the same principle as if both contracting parties were private persons. Both stand upon equality before the law, and the sovereign is merged in the dealer, contractor, and suitor." See, also, Carr v. State, 127 Ind. 204, 26 N. E. 778.

What, then, was the nature and extent of the obligation assumed by the state when, in consideration of the wharfage paid by them, it received the coal of plaintiff's assignors upon its wharf? "The wharfinger is bound to return or deliver the goods according to his contract." Edw. Bailm. (3d Ed.) § 362. A wharfinger is impliedly bound, by his contract as such, to exercise ordinary care for the preservation and safety of property intrusted to him (Id. § 359), and this imposes upon him the duty to exercise ordinary care to ascertain the condition of his wharf, that he may know whether it is reasonably safe for the purposes for which he hires it; and, if merchandise is received by him upon a wharf which is unsafe, and is thereby lost so that he cannot deliver it according to his contract, the wharfinger is liable therefor if ordinary care would have enabled him to know the condition of his wharf, and such negligence on his part will be treated as a failure to exercise ordinary care for the safety of the property intrusted to him. This negligence, however, and the consequent loss of the goods intrusted to him, would be a breach of the terms of his contract, and his liability therefor could have been enforced at common law by an action of assumpsit (1 Chit. Pl. *114; Baker v. Liscoe, 7 Term R. 171); and under our practice the owner or consignee may sue upon the contract for the damages sustained by reason of such negligence. "The wharfinger's responsibility begins as soon as he acquires the custody of the goods, and ends when he has fulfilled his express or implied contract with respect to both." Edw. Bailm. § 357. And the supreme court of Washington, in the case of Oregon Imp. Co. v. Seattle Gaslight Co. (Wash.) 30 Pac. 672, in passing upon the question of the liability of a wharfinger, upon his contract as such, by reason of his wharf giving way and precipitating into the waters beneath a quantity of shale which had been received thereon, said: "This was a contract of bailment. The contract was proven, the loss was proven, and the negligence of respondent was proven, and the measure of the damages is the value of the shale." We are entirely satisfied that plaintiff's cause of action, as alleged in the complaint, arises upon contract, and that the liability of the state accrued at the time of its breach,—that is, when the coal was lost through the negligence of the officers in charge of the state's wharf,—although there was then no law giving to the plaintiff's assignors the right to sue the state therefor. At that time the only remedy given the citizen to enforce the contract liabilities of the state was to present the claim arising thereon to the state board of examiners for allowance, or to appeal to the legislature for an appropriation to pay the same; but the right to sue the state has since been given by the act of February 28, 1893, and, in so far as that act gives the right to sue the state upon its contracts, the legislature did not create any liability or cause of action against the state where none existed before. The state was always liable upon its contracts, and the act just referred to merely gave an additional remedy for the enforcement of such liability, and it is not, even as applied to prior contracts, in conflict with any provision of the constitution. "The fact that the state is not subject to an action in behalf of a citizen does not establish that he has no claim against the state, or that no liability exists from the state to him. It only shows that he cannot enforce against the state his claim, and make it answer in a court of law for its liability. What is made out by this objection is not that there is no liability and no claim, but that there is no remedy." Coster v. Mayor, etc., 43 N. Y. 407.

2. It is further argued, in behalf of the state, that the rejection of plaintiff's claim by the state board of examiners has the effect of a judgment, and constitutes a bar to this action; and in support of this contention the case of Cahill v. Colgan (Cal.) 31 Pac. 614, is cited. That case is not authority for such a proposition. The court there decided that when a claim had been presented to the state board of examiners and approved, and an appropriation made by the legislature to pay it, the approval by the board of examiners was conclusive upon the comptroller as to the value of the services rendered by the claimant, and the amount to which he was entitled; and the general language found in the opinion in that case, as to the conclusive effect of the approval or rejection of a claim by the state board of examiners, must be construed with reference to the particular facts then before the court. But a sufficient answer to the contention of the defendant on this point is that the act under the authority of which this suit is brought contemplates that claims against the state shall first be presented to the state board of examiners for allowance; and, as we construe its language, it is only on claims so presented, and "not allowed by the state board of examiners," that the state gives its consent to be sued, and certainly as to claims which have been approved by that board there could be no necessity for such a remedy. Judgment reversed, with directions to overrule the demurrer to the complaint.

We concur: BEATTY, C. J.; FITZGERALD, J.; GAROUTTE, J.; McFARLAND, J.; HARRISON, J.; VAN FLEET, J.

105 Cal. 95

## In re OGBURN'S ESTATE. (No. 15,629.)

(Supreme Court of California. Dec. 13, 1894.)

HOMESTEAD—DECLARATION — SUFFICIENCY OF DESCRIPTION—USE OF PART OF BUILDING FOR BUSINESS PURPOSES—EFFECT.

1. Where a declaration of homestead states that the family resides on the lot, and such statement and the description which follows clearly designate the premises "intended" to be claimed as such homestead, the description is sufficient.

2. Premises claimed as a homestead consisted of a lot on which was a one-story house, with a partition extending to the ceiling running lengthwise through the center of it. The husband used one side of the house as a tin shop. The family lived in the other half, and the wife also did millinery business there. There was a kitchen at the rear. The whole rear part of the lot was used as a back yard for flowers, stable, etc. *Held*, that the homestead character of the premises was not destroyed by the uses made of such building.

Department 2. Appeal from superior court, city and county of San Francisco; Walter H. Levy, Judge.

Petition by H. U. Ogburn, surviving husband of Caroline Ogburn, deceased, to have certain property set apart to him as a homestead. From an order granting the petition, deceased's heirs appeal. Affirmed.

Lawyer & Burnett, for appellant. S. C. Denson, for respondent.

McFARLAND, J. This is an appeal by heirs at law of the deceased from an order granting the petition of H. U. Ogburn, her surviving husband, that certain property be set apart to petitioner as a homestead, and from an order denying a new trial. Two points, only, are made by appellants which need to be noticed.

1. It is contended that the declaration of homestead offered in evidence was void because it describes no property. This contention cannot be maintained. The declaration stated that the family then resided upon the lot and premises sought to be erected into a homestead; and this statement, together with the description which followed, clearly enough designated the premises intended to

be claimed as such homestead. This was sufficient.

2. It is contended that the premises did not constitute a homestead, because they were partly occupied for business purposes. Shortly after the marriage of petitioner and deceased, and when they were without means, his father, in 1866, bought a lot for them in Woodland, for $170, which money they afterwards repaid. The lot was 37 feet wide and 190 feet deep, fronting on Main street. They borrowed money, and built on this lot a one-story house 37 feet wide by 50 feet deep. It was all one house; but a partition as high as the ceiling was run lengthwise through the building, dividing it into two nearly equal parts. Petitioner was a tinner, and one side of the house was used by him as a tin shop. The other half was used for ordinary family living purposes, and the wife also did millinery business there. A kitchen was afterwards built to the rear. The whole rear part of the lot was used as a back yard for flowers, shrubbery, drying clothes, stable, chicken house, etc. The whole property was claimed as a homestead. There was no division of the building above the ceiling. We do not think that the homestead character of the premises was destroyed, either in whole or in part, by the fact that the husband and wife thus used parts of the building for doing their work as artisans. This work which they did there did not constitute such a pretentious business as to blot out the character of the place as a residence and a home, or to make the latter merely incidental to the former. The case is within the rule of Heathman v. Holmes, 94 Cal. 291, 29 Pac. 404; Ackley v. Chamberlain, 16 Cal. 181; Skinner v. Hall, 69 Cal. 195, 10 Pac. 406; Lubbock v. McMann, 82 Cal. 226, 22 Pac. 1145; and many other cases. The judgment and order appealed from are affirmed.

We concur: FITZGERALD, J.; DE HAVEN, J.

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4 Cal. Unrep. 910

## GARBE v. WILKS. (No. 15,726.)

(Supreme Court of California. Dec. 11, 1894.)

FINDINGS—INADEQUACY.

A finding "that the plaintiff did not on the 18th day of November, 1892, lend the said defendant the sum of eight hundred dollars in U. S. gold coin," is insufficient on an issue framed by a complaint which states that "within two years last past, and on or about" that day, plaintiff loaned defendant "eight hundred dollars in gold coin of the United States."

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; Walter H. Levy, Judge.

Action by Henry Garbe against Nellie Wilks to recover a certain sum of money loaned to defendant by plaintiff. There was judgment for defendant, and from that, and an order denying him a new trial, plaintiff appeals. Reversed.

H. D. Talcott, for appellant. Alex. Campbell, Jr., for respondent.

TEMPLE, C. This action was brought to recover money alleged to have been loaned to the defendant. The defendant recovered judgment, and the plaintiff appeals from the judgment and from an order refusing a new trial.

One of the points made is that there is no adequate finding upon a material issue, and that without such finding the judgment cannot be sustained. The complaint states that "within two years last past, and on or about the 18th day of November, A. D. 1892, the said plaintiff lent to the said defendant, at her request, the sum of eight hundred dollars in gold coin of the United States." It further states that the money was loaned to enable defendant to purchase a lodging house, and was so used, and that defendant agreed to pay the same in installments of $50 per month, but has failed and neglected to do so, and, though requested, refuses to pay any part thereof. The only finding relating in any way to these allegations is in the following words and figures: "That the plaintiff did not on the 18th day of November, 1892, lend the said defendant the sum of eight hundred dollars in U. S. gold coin." With a strong desire to avoid the reversal of a judgment for the insufficiency of a finding, when it appears probable that the court intended by the finding to cover that issue, we yet think this finding cannot be sustained. Under the present practice, unless findings are waived, so far as the issues are concerned, which must be determined in order to justify the judgment, no findings are presumed. It is true, if the judgment is thus supported, the fact that there are other issues upon which there are no findings will not always necessitate a reversal. As to the fact of a loan here, the evidence was highly conflicting. There was even some evidence which appellant thinks corroborated his evidence, to the extent that he loaned defendant $780. He might have done so, and yet the finding be exactly true. The language of the finding is not as broad as the language of the complaint. It is not averred that plaintiff loaned the money to defendant on the 18th day of November, but within two years last past, and on or about November 18th. Potentially, this is an allegation as to every day of the past two years, and as to every imaginable sum included in $800. The finding seems carefully worded so as not to negative the loaning on any other day, or of any other sum. Of course, we know the judge did not intend a finding so evasive, but we have no right to suppose he intended more than he has said. No construction can be given to the language which will make it cover the whole issue; and we cannot, with due regard to the statute or to proper practice, sanction such looseness in preparing findings,—premising that we can suppose the judge really intended to negative the entire allegation.

Plaintiff is not injured by the fact that the counterclaim is entitled "Cross Complaint and Counterclaim." It is evidently a counterclaim only, and plaintiff did in fact file an answer to it. Had it been doubtful whether it was a cross complaint or a counterclaim, and, because of the fact that defendant called it a "counterclaim," plaintiff had filed no answer to it, then, if a default had been claimed, the considerations expressed in Shain v. Belvin, 79 Cal. 262, 21 Pac. 747, would have been in point. But here no injury has resulted. The judgment and order should be reversed.

We concur: BELCHER, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed.

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(104 Cal. 642)

## DARCY v. MAYOR, ETC., OF CITY OF SAN JOSE. (No. 15,632.)

(Supreme Court of California. Dec. 3, 1894.)

CLASSIFICATION OF CITIES—SALARIES OF OFFICERS—SPECIAL LAW—INCREASE DURING TERM.

1. Under Const. art. 11, § 6, empowering the legislature by general laws to provide for the organization, incorporation, and classification of municipal corporations, the legislature has no power to pass a classification law which does not classify all the municipal corporations in the state, or which is not amendatory of a law classifying all such corporations.

2. The classification of municipal corporations according to population, authorized by Const. art. 11, § 6, must be based on such a difference in population as rationally calls for, or at least justifies, diversity in organization.

3. Act March 23, 1893, in providing that police officers of cities having from 10,000 to 25,000 inhabitants shall receive a certain salary, violates Const. art. 4, § 25, subd. 29, which provides that the legislature shall not pass local laws affecting the salary of any officer.

4. Under Const. art. 11 § 9, providing that the compensation of any municipal officer shall not be increased during his term of office, Act March 23, 1893, which provides that police officers in certain cities shall receive a certain salary, and that the city councils shall fix such salary in the following July, is void as to an officer appointed for one year from January 1, 1893, at a salary less than that fixed by said law.

Commissioners' decision. Department 2. Appeal from superior court, Santa Clara county.

Action by James Darcy against the mayor and common council of the city of San José for a mandate directing the fixing of plaintiff's salary. Judgment for defendants, and plaintiff appeals. Affirmed.

H. V. Morehouse and Hiram D. Tuttle, for appellant. Wm. B. Hardy, for respondents.

TEMPLE, C. This is an appeal from a judgment entered upon demurrer to the complaint. The complaint shows that San José is a municipal corporation, whose mayor and common council have full power to create and establish a city police for said city, and prescribe their duties and compensation and the terms of their employment; that prior to December 1, 1892, said mayor and common council did duly and regularly pass and adopt an ordinance creating a police force, and in December, 1892, appointed plaintiff as a policeman, and fixed his compensation at $75 per month, and the term of his employment as one year from the 1st day of January, 1893; that in March, 1893, the legislature passed an act requiring the mayor and common council of all cities containing a population of not less than 10,000 nor more than 25,000 inhabitants, at its first regular meeting in July of each year, to fix by ordinance the compensation of the policemen of the city at not less than $100, nor more than $125, per month; that San José had more than 10,000, and less than 25,000, inhabitants; that at the first meeting of the common council in July, 1893, plaintiff demanded from said council that they proceed to fix his salary as required by said act; that the council refused, and still refuse, to fix his salary; that the ordinance fixing compensation was repealed by the act of the legislature alluded to, and there is now no law or ordinance fixing the compensation which plaintiff is entitled to receive. He asks for a writ of mandate directed to the mayor and common council, requiring them to fix his compensation. The demurrer is upon the ground that the act of the legislature upon which plaintiff relies is unconstitutional and void, because: (1) It contravenes subdivision 29, § 25, art. 4, of the constitution. It confers special privileges upon policemen, and imposes burdens upon cities arbitrarily selected from those which stand in the same relation to the subject of the law, and the classification contained in the act is not founded upon any constitutional distinction. (2) The act contravenes sections 9–12, art. 11, and section 32, art. 4, of the constitution.

The city of San José was incorporated by a special act of the legislature, March 17, 1874. The act of March 23, 1893, consists of two sections, as follows:

"Section 1. The police officers and captains of police in all cities of this state containing a population of not less than ten thousand and not exceeding twenty-five thousand shall receive a salary of not less than one hundred dollars, and not exceeding one hundred and twenty-five dollars per month; and the chief of police in all such cities shall receive a salary of not less than one hundred and twenty-five dollars and not exceeding one hundred and fifty dollars per month.

"Sec. 2. The city council of such cities shall, by ordinance, at its first regular meeting in July of each year, fix the compensation of said chief, captain and police officers, at a sum not less nor exceeding the amounts herein provided."

It is said by appellant that the legislature may classify municipal corporations (section 6, art. 11, Const.), and may amend this classification at any time; that a law is general which operates upon all of a class. The manner of the classification is for the legislature. People v. Henshaw, 76 Cal. 442, 18 Pac. 413. By this act the legislature amended the act of 1883 classifying cities, and made a class containing from 10,000 to 25,000 inhabitants. The law applies alike to all within the class. It is therefore a general law. The statute in question says nothing about classifying. Counsel is right, however, as to the construction of the statute. Every special law classifies unless applied to named individuals, and hence by this logic no limitation is imposed upon the power of the legislature by the numerous constitutional provisions against special and local laws. To illustrate, it is desired to raise the salary of a police officer in San José. It cannot be done by a special law saying the salary of James Darcy is hereby raised from $75 to $100 per month, but it can as easily be done by simply designating a class which shall include Darcy, and may not include any one else. In Dougherty v. Austin, 94 Cal. 601, 28 Pac. 834, and 29 Pac. 1092, it is said: "If there is any one feature of the constitution more marked, any characteristic more pervasive, than all others, it is this oft-reiterated, this general and specific, inhibition of local and special laws." And yet, if they can be thus easily evaded, how ineffectual and farcical they are. Legislatures and courts are not at liberty to disregard a policy so plainly manifested in the fundamental law. But, while the sovereign will is thus plainly expressed in the fundamental law, the rule must not receive an interpretation too absolute. It will not be presumed that it was intended to deprive the legislature of all power to adapt its laws to the varying conditions of its inhabitants. From necessity, it has been held that the legislature may classify, in order that it may adapt its legislation to the needs of the people. If this cannot be done, laws will not always bear equally upon the people. This classification, however, must be founded upon differences which are either defined by the constitution or are natural, and which will suggest a reason which might rationally be held to justify the diversity in the legislation. It must not be arbitrary, for the mere purpose of classification, that legislation really local or special may seem to be general, but for the purpose of meeting different conditions naturally requiring different legislation. Dougherty v. Austin, supra; City of Pasadena v. Stimson, 91 Cal. 238, 27 Pac. 604. The rule has been still more strongly expressed in numerous cases in other states. In Ayars' Appeal, 122 Pa. St. 266, 16 Atl. 356, it is said: "Some of the cases above cited have been quoted at considerable length for the purpose of showing that this court never intended to sanction classification as a pretext for special or local legislation. On the contrary, the underlying principle of all the cases is that classification with the view of legislating for either class separately is essentially unconstitutional unless a necessity therefor exists,—a necessity springing from manifest peculiarities clearly distinguishing those of one class from each of the other classes, and imperatively demanding legislation for each class separately that would be useless and detrimental to the others. Laws enacted in pursuance of such classification and for such purposes are, properly speaking, neither local nor special. They are general laws, because they apply alike to all that are similarly situated as to their peculiar necessities." In State v. Hammer, 42 N. J. Law, 439, it is said: "But the true principle requires something more than a mere designation by such characteristics as will serve to classify, for the characteristics which thus serve as a basis for classification must be of such a nature as to mark the object so designated as peculiarly requiring exclusive legislation. There must be a substantial distinction, having a reference to the subject-matter of the proposed legislation, between the objects or places embraced in such legislation and the objects or places excluded. The marks of distinction on which the classification is founded must be such, in the nature of things, as will in some reasonable degree, at least, account for or justify the restriction of the legislation." This language has been often cited by other courts as a correct statement of the rule. In Township of Lodi v. State, 51 N. J. Law, 402, 18 Atl. 749, it is said: "The rule is that in any classification for the purpose of a general law all must be included and made subject to it, and none omitted that stand upon the same footing regarding the subject of legislation. To omit one so circumstanced is as fatal a defect as to include but one of a number."

On the 3d day of March, 1883, the legislature did, by a general law, as the constitution requires, classify all the cities of the state. The class mentioned by the law in question is not one of those classes. It is a class created by the act itself. I am of the opinion that this cannot be done. Section 6, art. 11, was evidently intended to limit, and not to enlarge, the power of the legislature; and I think it was intended that the classification there authorized was to be by a general law in the same sense, and in the same way, in which it was necessary to provide for the incorporation and organization of cities and towns. Legislation in regard to such corporations would thereafter be made by reference to the classes thus made. The special authority to thus classify cities and towns would also seem to imply that they cannot be otherwise classified for purposes of legislation. If they can be, and new classes created whenever it is desired by any one to procure legislation which shall apply to only a few cities of the class, the limitations of the constitution so carefully made, and so often repeated, can be easily defeated. I think a law made in conformity with this special permission in the constitution must be a law classifying all cities in the state, or a law amendatory of such a law. It must leave all the municipal corporations classified. Furthermore, the classification authorized by the constitution must be itself in accordance with the principles above declared. Considerable difference in population may justify diversity in organization, but the difference must be such as might rationally be deemed to call for, or at least to justify, diversity in organization; otherwise, the restriction evidently intended by section 6, art. 11, of the constitution would be defeated. If a classification can be arbitrary, such as would not suggest reasonable ground to believe diversity of organization necessary, the whole provision is a deliberate folly. We are not at liberty to attribute such absurdity to the people. On the other hand, a construction should be given to the language which will effectuate the evident intent of the constitution to prohibit special laws upon this subject, and to prevent the legislature from responding to applications from interested parties for laws designed solely to increase their salaries.

Again, in Dougherty v. Austin it is intimated that the classification authorized is only for the purpose of incorporation and organization. This law can hardly be said to be for either purpose. It is suggested that San José, having been incorporated before the present constitution was adopted, is not and cannot be classified by a general law passed for that purpose in pursuance of section 6, art. 11. If this be conceded, it would seem to follow that municipalities incorporated before the present constitution took effect are not affected by any laws in regard to municipalities which do not apply to all municipalities in the state, or, if they can be classified for the purpose of legislation, such classification, not being authorized by express provision, must be strictly in accordance with the principles above stated. The law in question here, if the class specified would include San José alone, is a law limiting the discretion of the council of San José in regard to the compensation of policemen. There is nothing in the fact that the population is between 10,000 and 25,000 which suggests a possible reason for excepting such municipalities from the general rule. No rational ground for the distinction appears. The classification is therefore arbitrary and unauthorized. So far as the law affects appellant, it merely raises his salary from $75 per month to $100 per month. The fact that this is done by requiring the council to so increase the salary, instead of doing it directly, does not make any difference. It is certainly void as to appellant. Const. art. 11, § 9; Id. art. 4, § 25, subd. 29. I think the judgment should be affirmed.

We concur: BELCHER, C.; HAYNES, C.

DE HAVEN and FITZGERALD, JJ. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

McFARLAND, J. I concur in the judgment of affirmance upon the ground that a valid classification can be made only by a general act which classifies all the counties, putting each into a distinctive category, or by an act amending such general act so as either to preserve the original classes, or to reconstruct them, in whole or in part, into new and distinctive classifications.

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104 Cal. 608

## PEOPLE v. BIDLEMAN. (No. 21,147.)

(Supreme Court of California. Dec. 3, 1894.)

Embezzlement from Employer — Evidence — Proof of Handwriting—Cross-Examination.

1. On a trial for embezzlement, it appeared the defendant collected bills, which he credited to the personal accounts of the customers, without entering them on the cashbook, or charging them to himself, or paying them over to his employer. Defendant claimed that he was authorized to expend money in the interest of candidates for office who were friends of his employer, and also in entertaining customers. Defendant was allowed a specific amount for personal expenses, and admitted that there was no understanding that he could expend money and not enter it on the books of his employer. *Held*, that the evidence sustained a verdict of guilty.

2. On a trial for embezzlement, a receipted bill, the amount of which was charged in the information to have been embezzled, and shown to have been paid by a customer to defendant, and not accounted for, is admissible.

3. On a trial for embezzlement, where the information which charged the offense to have been committed on or about December 31, 1891, and before May 1, 1892, was presented on August 22, 1892, evidence of an offense committed on March 7, 1892, is admissible; Pen. Code, § 955, providing that "the precise time at which an offense was committed need not be stated in the information, but may be alleged to have been committed at any time before finding or filing thereof."

4. On a trial for embezzlement, a witness for the people cannot, on cross-examination, state his conclusion, from the manner in which defendant conducted his employer's business, as to whether defendant was the manager thereof.

5. On a trial for embezzlement, the identification of receipts purporting to have been signed by defendant is sufficiently proved to permit them to be put in evidence when a witness testifies that he is familiar with defendant's handwriting, and that he thinks the handwriting on the receipt is that of defendant, but that he did not see defendant sign them, and would not swear that it was his handwriting.

6. On a trial for embezzlement, evidence that money belonging to his employer received by defendant, other than that specified in the information, was not entered on the books or accounted for, is admissible to show a plan and an intent to conceal the appropriation of the money mentioned in the information.

7. On a trial for embezzlement, evidence of what the profits of defendant's employer were

while defendant was misappropriating the money is irrelevant.

8. Testimony as to what defendant said about opening a new ledger, and the condition of the books kept by him, and the possibility of making a trial balance, is competent to show the methods and conduct of defendant in disposing of the misappropriated moneys.

9. On a trial for embezzlement, defendant testified that his employer permitted him to expend money for many different purposes, in order to promote the business of his employer; that he felt justified in what he expended; and that he did not intend to steal or embezzle the money taken. *Held*, that it was competent to show on his cross-examination that his conduct in leaving the city was inconsistent with such statements.

10. Exceptions not presented by the bill of exceptions cannot be reviewed on appeal.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

Enoch G. Bidleman was convicted of embezzlement, and appeals. Affirmed.

James H. Long and Eugene N. Deuprey, for appellant. Wm. S. Barnes and E. S. Pillsbury, for the People.

HAYNES, C. Appellant is charged with the embezzlement of $7,486.63, the moneys of D. V. B. Henarie, doing business under the firm name of E. Martin & Co., in the city and county of San Francisco, and was found guilty of the embezzlement of $717.65, part of the sum charged in the information, and was sentenced to imprisonment for the term of four years. His motion for a new trial having been denied, he appeals from the judgment and order denying a new trial. Appellant contends that the verdict is not justified by the evidence, and, under this head, specifies certain particulars, which will be briefly noticed.

The evidence shows very clearly and without conflict that many bills for goods sold to customers were collected by defendant, all of which collections, with one or two exceptions, were credited to the personal account of the customer on the ledger, but were not entered upon the cashbook, nor charged to the personal account of the defendant, nor in any manner accounted for or paid over to his employer. To meet and avoid the effect of these facts, it is claimed that the evidence shows that the defendant was authorized by his employer to expend money in the interest of candidates for office who were friends of the house of E. Martin & Co., and thereby promote the business interests of Henarie, the proprietor, and also to expend money in entertaining customers from the interior, and in other ways for the like purpose, and that it was agreed that moneys so spent should not be entered as items of disbursements or receipts upon the books, and that the moneys charged to have been embezzled were expended with the consent and under the direction of his employer. Prior to June, 1890, defendant was paid a salary of $3,000 per annum, and, in addition, was allowed the sum of $50 per month for personal expenses in connection with the business; and after that date he was paid a salary of $4,000, which was to cover defendant's personal expenses in connection with the business, as well as his services. Defendant testified in his own behalf, and admitted that there was no understanding that he could expend money, and not enter it upon the books; and, so far as his testimony went to sustain any of the facts now claimed to be unsupported by the evidence, he was met by the positive testimony of Henarie to the contrary. We have carefully read and considered all the evidence, and entertain no doubt that the verdict was fully sustained, and so far, at least, as this branch of the motion for new trial is concerned, the motion was properly denied.

Defendant's objection to the testimony of Mr. Cox in relation to a bill receipted by defendant for $107.04 was properly overruled. The objection was not only premature, being to a preliminary question, but the evidence afterwards showed that said amount was paid to defendant, and not accounted for, and was included in the amount charged in the information to have been embezzled.

John Clonen, called on behalf of the people, testified that he paid E. Martin & Co.'s bill, $121.90, to defendant, March 7, 1892, and produced the bill receipted by defendant. Defendant's objection that the time of payment of this bill was too remote from the time alleged in the information, we think, was properly overruled. The information charged the offense to have been committed "on or about the 31st day of December, 1891, and before the 1st day of May, 1892." The information was presented and filed August 22, 1892. Section 955 of the Penal Code provides: "The precise time at which an offense was committed need not be stated in the indictment or information, but it may be alleged to have been committed at any time before the finding or filing thereof, except where the time is a material ingredient in the offense." The evidence was received by the court upon the representation that it would be shown the money was never accounted for or paid over to Henarie, and that it was part of the sum charged in the information; and, as no motion was afterwards made to strike it out, we assume that such proof was made. Similar objections were made to evidence of many other sums of money received by defendant from persons indebted to the house for merchandise, and to which the foregoing remarks apply.

Upon cross-examination of a witness for the prosecution, counsel for defendant asked him what conclusion he came to, from the manner in which defendant conducted the business, as to whether or not he was the manager, and had full control, or otherwise. The court very properly refused to permit the question to be answered, though the district attorney did not state the grounds of his objection. What the witness thought could not change the relation which in fact existed, nor would the statement of the objection have enabled the defendant to show that it might have been obviated. Spottiswood v. Weir, 80 Cal. 450, 451, 22 Pac. 289, and cases there cited.

As to the evidence of Buneman in relation to certain receipts purporting to have been signed by defendant, to the effect that he was familiar with his handwriting, that he thought it was his handwriting, but that he did not see him sign them, and would not swear that it was his handwriting, while not conclusive or positive, it was sufficient to permit the receipts to be put in evidence, and the court did not err in overruling defendant's objection. It is said by appellant, however, that these sums were not of the moneys charged to have been embezzled. Whether this is true or not, is not easy to determine. There were a large number of witnesses, and there is in the transcript no index to the testimony of any of them, nor does appellant give any reference in his brief to the page or folio where any item of evidence may be found. But if we concede that any particular sum which is shown by the evidence to have been received by the defendant, and not entered upon the books, or accounted for, was received at a period remote from the date named in the information, or not included in the sum therein specified, it may still be competent evidence tending to show a system adopted by the defendant to conceal the conversion of the money, and the intent with which the money mentioned in the information was appropriated by him to his own use, and thus tend to prove the defendant guilty of the offense charged. People v. Lane, 100 Cal. 379, 34 Pac. 856; People v. Walters, 98 Cal. 138, 32 Pac. 864.

It is also specified that the court erred in not permitting the witness Bell to answer the question: "What had been the profits of this firm for the three years preceding July 25, 1892?" This question was not asked of Bell, but of the defendant, upon redirect examination, and it was objected that it was not a re-examination. The ruling was not erroneous. Even though the court might, in its discretion, have permitted a matter to be inquired about which was not within the scope of a proper examination, the evidence called for was wholly irrelevant. The testimony of the witness Bell touching the conversation with defendant about opening a new ledger, and as to the condition of the books kept by defendant, and whether a trial balance could be made from them, for the reasons stated by the witness, was competent, and properly received. It all tended to show the methods and conduct of the defendant touching the moneys charged to have been embezzled. The conversations touching discrepancies occurring in the year 1891 were competent, inasmuch as these tended to show a method so long continued as to preclude the supposition that the later ones were accidental, or the result of negligence.

Defendant, having testified in his own behalf, was asked the following question: "Did you leave this city and county on the 25th day of July, 1892?" His counsel objected that it was not cross-examination. No answer was given to the question. It appeared from the testimony of other witnesses that on the day named in the question, just before lunch time, Mr. Henarie asked defendant for an explanation of certain entries on the ledger that were not entered on the cashbook, and which defendant did not explain; but Henarie, still not believing that defendant was dishonest, invited him to go to lunch with him, as he usually did. When they entered the place where they usually lunched, defendant left him, took a coupé, went to the bank, and drew his money, then went to the Panama steamer, which was ready to sail, bought his ticket on board, under the name of E. H. Young, and left for Panama. The steamer put into San Diego for coal, and while there the defendant was arrested. Other questions in regard to his going away were also asked upon cross-examination, to which the same objection was made. The circumstance under which defendant went away, as well as the fact of his going, having been shown by the prosecution, and not denied by the defendant, the cross-examination upon this point was unnecessary; but it was not improper in a legal sense, nor prejudicial. His testimony tended to show that he was permitted by Mr. Henarie to expend moneys for many different purposes, with a view to promoting the business of the house; that Henarie knew he was spending money; that he did not expend any moneys that he did not feel he was justified in expending; and that he never took any money with the intent to steal or embezzle it. It was entirely competent for the prosecution to show, upon cross-examination, that his conduct was inconsistent with the statements made in his direct testimony. This question was very carefully considered and fully discussed in the recent case of People v. Gallagher, 100 Cal. 466, 475, 35 Pac. 80, which is conclusive.

In this connection we may notice the specification that the court erred in putting to defendant the question: "Well, if you didn't take the money, why did you go away?" The bill of exceptions does not show that the court put any question to the defendant. There is in the transcript an affidavit made by counsel for defendant showing that such question was put. This affidavit was filed in the case long before the bill of exceptions was settled, but for what purpose does not appear. It has no place in the record, and cannot be considered.

It is also specified that the court erred in refusing to permit the complaint and answer in the civil action of Henarie v. Bidleman to be read in evidence. This exception cannot be considered, as the record does not contain the papers offered, nor the substance of them, nor even show what the action was about.

Another specification is that the court erred in permitting a change or amendment of the verdict by the jury after it was first presented to the court. The bill of exceptions, however, does not show that any objection was made thereto, or any exception taken. The point cannot therefore be reviewed. We may say, however, that the proceedings in relation thereto appear to be fully justified by People v. Jenkins, 56 Cal. 7, and People v. Lee Yune Chong, 94 Cal. 385, 29 Pac. 776.

We find in the record no error which would justify a reversal, and think the judgment and order appealed from should be affirmed.

We concur: SEARLS, C.; VAN CLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

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104 Cal. 635

## OLMSTEAD v. DAUPHINY et al. (No. 15,594.)

(Supreme Court of California. Dec. 3, 1894.)

PARTNERSHIP—CHANGE OF MEMBERS—ASSUMPTION OF DEBTS OF OLD FIRM—EFFECT—JOINDER OF ACTIONS—CONDUCT OF TRIAL.

1. In an action to recover over payments to defendant firm on an account with the firm which it succeeded, evidence that the new firm was composed of one of the members of the old firm and another who had purchased the retiring member's interest and had agreed to assume the old firm debts, and that plaintiff's account was carried forward without change, and without balancing after the dissolution of the old firm, will sustain a finding that defendant assumed the debts of the old firm, including a charge against it for payments made on the account, but not credited on the books when they were transferred to defendant.

2. Under Code Civ. Proc. § 427, providing that several causes of action may be united in the one complaint if they arise out of contracts express or implied, a cause of action for rent under a lease and one for the recovery of money paid by mistake may be joined.

3. Courts of law and equity have concurrent jurisdiction of an action to recover money paid under mistake of fact.

4. Under Code Civ. Proc. § 625, making it optional for the court, in an action to recover money only, to submit particular questions of fact to the jury, its refusal to do so can be reviewed only for abuse of discretion.

Commissioners' decision. Department 2. Appeal from superior court, Humboldt county; G. W. Hunter, Judge.

Action by W. T. Olmstead against A. C. Dauphiny and P. McAleenan, copartners, to recover rent and money paid on account stated. Judgment for plaintiff, and defendants appeal. Affirmed.

Ford & Burnell, for appellants. E. W. Wilson, for respondent.

SEARLS, C. This action is brought to recover the sum of $1,362.46, as follows: $140 for rent upon certain premises leased, concerning which there is practically no controversy; and the further sum of $1,222.46, for money averred to have been paid by plaintiff to defendants under a mistake upon an account stated. Plaintiff had a verdict for $720, upon which judgment was entered. The appeal is from the judgment and from an order denying defendants' motion for a new trial.

It appears from the pleadings and evidence that on or about January 1, 1892, the defendants rendered to plaintiff an account in writing, showing a balance due from the latter to the former, which account and balance was acquiesced in by the plaintiff, except as to some items due him on account of the rent of a building leased by him to defendants. These items were adjusted, and a balance of $528.81, appearing due from plaintiff, was by him paid to defendants. Plaintiff subsequently discovered that defendants had failed to credit him with certain checks paid by him to them, and brought this action to recover therefor. The evidence showed beyond reasonable doubt that a draft dated January 22, 1890, on, etc., for $40, and one of June 15, 1890, for $540, were received from plaintiff, and no credit given therefor. These amounts, with $140 due on account of rent, make up the amount of the verdict. The only question of any importance in the case relates to the liability of the firm of A. C. Dauphiny & Co., composed of defendants, for the amount of these checks. In 1890, when such checks were paid in by plaintiff, the firm was that of Dauphiny Bros. On January 1, 1891, G. A. Dauphiny, one of the members of the firm of Dauphiny Bros., sold his interest in said firm to the defendant P. McAleenan, who thereupon formed a copartnership with the other defendant herein under the firm name of A. C. Dauphiny & Co., and said firm have since said date carried on the business of merchandising at Eureka, Humboldt county, theretofore conducted by their predecessors. The vital question at the trial was, did the new firm assume the debts and liabilities of the old firm of Dauphiny Bros.? In addition to finding a general verdict, certain special issues were submitted to the jury, upon which they were instructed to find, and upon the above question of the assumption of such liabilities the finding was in the affirmative. This finding is assailed as being unsupported by the evidence. It must be conceded that the evidence is not very clear, and not entirely satisfactory. That defendant McAleenan purchased the interest of G. A. Dauphiny in the old firm of Dauphiny Bros., and agreed to assume the liabilities of that firm, is abundantly established. The contention is that the assets and liabilities of the old firm were marshaled, the amount of each determined, the former purchased, and the latter assumed; that, as the mistake in plaintiff's account did not appear on the books, it was not assumed by defendants. As a general rule, one who purchases credits, and as a part of the consideration assumes debts, takes them cum onere. If the credits turn out to be in excess of their supposed value, the purchaser is entitled to the excess, and if the debts are larger than is supposed, he must bear the burden. There is some evidence tending to show that that is just what the parties did here. The defendants and the firm of which they are the successors constituted a family, consisting of a father, his two sons, and the brother-in-law of one, at least, of the latter. The accounts as rendered and in evidence tend to show that upon a dissolution of the former firm and organization of the latter no change was made in the account of plaintiff, but it was carried forward without a rest or striking a balance, precisely as though no change had occurred in the personnel of the firm. The jury evidently thought that the theory that defendant McAleenan bought the assets and assumed the liabilities of his vendor, but did not agree to assume the real balance due plaintiff, was an afterthought, and there is some reason for such an assumption. There was a deduction made in favor of defendant McAleenan from the book accounts of over $1,000 for what is termed "contingencies," which is not explained, and which the jury may have supposed was intended to meet just such emergencies as that presented by this case. Upon the whole, it is concluded that, as the court below and jury were satisfied with the verdict, it should not be disturbed here.

The demurrer to the complaint was properly overruled, and the motion for a nonsuit properly denied. The contention that there was a misjoinder of causes of action, one cognizable in a court of law and the other in a court of equity, cannot be maintained. "The plaintiff may unite several causes of action in the same complaint where they all arise out of: (1) Contracts, express or implied." Code Civ. Proc. § 427. Each of the causes of action set out in the complaint arose upon contract, the one upon an express and the other upon an implied contract. Again, an action to recover back money paid upon a mistake of fact is one in which courts of law and equity had concurrent jurisdiction. The primary right and the remedy, where it seeks only to recover the money thus paid, are as certainly cognizable in a court of law as in an action upon a quantum valebant for goods, wares, and merchandise sold and delivered, or a quantum meruit for services rendered, etc. Had the right to recover depended, not upon the violation of a primary right recognized by the law, but only in equity, or if for the violation of a legal right the remedy sought had been such as a court of equity only could give, it would be proper to denominate it an equitable action; but nothing of the kind is claimed here. The causes of action are both legal, and not equitable.

The statute of limitations was not properly invoked. The account between the parties was a "mutual, open, and current account," with reciprocal demands between the parties, up to within two years of the time when the action was brought, and the mistake upon which the action is predicated was shown to have been discovered within one year next before suit brought.

At the trial the court submitted to the jury certain special issues upon which it required said jury to find in addition to a general verdict, which was done. Counsel for defendants requested the court to submit certain other special issues, which it refused, and such refusal is assigned as error. This was an action for the recovery of money only, and, under section 625 of the Code of Civil Procedure, it was optional with the court to submit or refuse to submit particular questions of fact to the jury. The exercise of the power, and the extent of its exercise, are left to the discretion of the court, and error cannot be maintained without at least a clear showing of the abuse of such discretion, which does not appear in the present instance.

Objections were made by counsel for appellants to the giving of certain instructions asked by plaintiff, to the refusal of the court to give instructions asked by defendants, and to the modification of others of defendants' instructions. The errors predicated upon these several rulings are noticed in appellants' brief, but are not argued at length. To demonstrate the propriety of the action of the court below in the premises would involve the necessity of setting out all of the instructions given, refused, and modified, the effect of which would be to extend this opinion to great length; and, as the questions present no principle of importance except to a disposition of the case in hand, we shall content ourselves by saying that the instructions given by the court at the request of the parties presented the law of the case fully, clearly, and fairly, and that those refused were either presented more clearly in those given or were inapplicable as applied to the facts in the case. The objections to evidence are unimportant. Upon a review of the whole case, no error is discovered calling for a reversal, and the judgment and order appealed from should be affirmed.

We concur: VANCLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

105 Cal. 12

## MAHAN v. WOOD. (No. 15,608.)

(Supreme Court of California. Dec. 6, 1894.)

ACTION ON NOTE—EVIDENCE—MATERIALITY.

In an action on a note, in which the defense is failure of consideration, evidence that defendant subscribed for stock in a certain association, for which the note in suit was not given, is irrelevant and immaterial.

Department 2. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

Action by Henry H. Mahan against Guy M. Wood on a promissory note. From a judgment for defendant, plaintiff appeals. Affirmed.

Pringle, Hayne & Boyd and Wm. H. Fifield, for appellant. Edward R. Taylor, W. S. Goodfellow, and John R. Jarboe, for respondent.

PER CURIAM. This is an action to recover the amount of principal and interest alleged to be due on a promissory note executed by the defendant to the plaintiff on March 19, 1869. The defense is failure of consideration. This is the third appeal in the case. On the first trial the plaintiff had judgment, and the defendant appealed. It was held by this court that the defense was established by the facts shown, and the judgment was accordingly reversed, and the cause remanded for a new trial. 44 Cal. 462. On the second trial the defendant had judgment, and the plaintiff moved for a new trial. His motion was granted, and the defendant appealed from the order. The appellant contended that the facts were substantially the same as on the former appeal, and for that reason the court below was bound, as a matter of law, to refuse a new trial. It was said by this court: "There is no doubt that, where the facts are the same as on a former appeal, the principles and rules announced by the court will be recognized on a subsequent appeal as the law of the case. And if the case were before us now on appeal from the last judgment of the court below, which was in favor of the defendant, we should doubtless affirm the judgment,—unless some error in the admission or exclusion of evidence necessitated a new trial,—because the facts found are substantially the same as the facts shown by the record when the case was here before; but, where the court has set aside its findings of fact and granted a new trial, can we say what the facts are without usurping the functions of the trial court?" It was held that the evidence was conflicting, and the order was affirmed. 79 Cal. 258, 21 Pac. 757. On the third trial the court found the facts and gave judgment in favor of the defendant, from which, and from an order denying his motion for a new trial, the plaintiff prosecutes this appeal.

The appellant contends that the findings were not justified by the evidence, and for that reason the judgment should be reversed. This contention cannot be sustained. The evidence was conflicting, but that given on behalf of the defendant, if true,—and it must have been believed,—was clearly sufficient to justify and support all of the findings. The facts shown were substantially the same as on the two former trials, and, without stating the evidence, we deem it enough to say that the judgment cannot be reversed on this ground.

Only one alleged error of law is relied upon. That arose from the striking out of an answer given by plaintiff's witness Nye. The record shows as follows. Nye said: "I know he used to come in and pay installments on the Point Lobos Avenue Association. I was acting as secretary of the Point Lobos in the absence of Mr. Blake. * * * Q. Do you know whether or not Mr. Wood subscribed for shares in that association? A. Simply by having his name entered in the book, and paying his installments. Mr. Taylor: We move to strike that out. Mr. Pringle: I want to show what the transaction was." The court sustained the objection, and the plaintiff excepted to the ruling. We fail to see how the plaintiff was or could have been prejudiced by this ruling. The note in suit was not given for shares of stock in the Point Lobos Avenue Association, and evidence that defendant had subscribed for stock in that association would have had no tendency to prove that he had subscribed for stock in another association. He might have subscribed for shares in the Point Lobos, and have bought shares from the plaintiff in some other association. The question was irrelevant and immaterial, and there was no error, therefore, in striking out the answer. The judgment and order are affirmed.

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104 Cal. 672

## BROWN v. ROUSE et al. (No. 15, 491.)

(Supreme Court of California. Dec. 4, 1894.)

HUSBAND AS AGENT—RATIFICATION OF ACTS BY WIFE—ESTOPPEL.

1. The fact that a wife, under the mistaken belief that a note and mortgage executed by her husband, as her agent, for money borrowed by him, was binding on her, acquiesced in the payment of installments of interest on the note, does not constitute a ratification of his act.

2. A married woman who gives her husband a power of attorney to borrow money for her and execute a mortgage in her name, which is invalid, in that her acknowledgment did not state that she was examined separately, is not estopped to assert that the transaction is not binding on her.

Department 2. Appeal from superior court, Santa Clara county; John Reynolds, Judge.

Action by Adam Brown against Charlotte D. Rouse and others. There was a judgment for plaintiff, and defendant Rouse appeals. Reversed.

John H. Durist, Jacobs & Wolf, and Wm. A. Bowden, for appellant. W. C. Kennedy, for respondent.

McFARLAND, J. This cause was here on a former appeal, 93 Cal. 237, 28 Pac. 1044. The original complaint alleged these facts: On November 18, 1887, the defendant Charlotte Rouse, a married woman, by her alleged attorney in fact, G. M. Rouse, who was her husband, made and executed to plaintiff her promissory note for $1,200, and a mortgage to secure the same on certain land which was her separate property, situated in Santa Clara county, Cal. She properly acknowledged the power of attorney under which the mortgage was executed, but the notary neglected to recite in his certificate that she was examined apart from her husband, etc. At that time there was a previous mortgage on the land for $400, executed by said Charlotte to one Davis; and, at the time of the execution of the mortgage sued on, the said Davis mortgage was satisfied out of the $1,200 for which said mortgage sued on was given. It was alleged that said Charlotte "procured plaintiff to pay and satisfy said (Davis) lien and mortgage," and that he did pay it at her request. The prayer of the complaint was that the certificate of the notary be corrected; that plaintiff be subrogated to the rights of Davis under his mortgage; and that the mortgaged premises be sold, all the parties defendant foreclosed, and a deficiency judgment docketed against the said Charlotte. The court found that the said power of attorney gave the husband no right to make said note and mortgage. It also found that the Davis mortgage had been paid by plaintiff, but that the payment was voluntary, and denied the subrogation. The court, however, gave a personal judgment for plaintiff against Charlotte for the amount of the note. Upon appeal, the judgment was reversed for the reason stated in the opinion. 93 Cal. 237, 28 Pac. 1044. When the case went back to the superior court the plaintiff amended his complaint by inserting therein the averments "that on the 18th day of November, 1887, plaintiff above named loaned to said Charlotte Rouse, in U. S. gold coin, the sum of $1,200," which she promised to repay, but had not repaid. The complaint otherwise remained as it had been. The court found, as before, that the power of attorney gave the husband of the said Charlotte no power to make said note and mortgage, and that plaintiff was not entitled to be subrogated to the rights of said Davis. It found, however, that on November 18, 1887, said G. M. Rouse, assuming to act for the said Charlotte, borrowed from plaintiff $1,198, and gave him the said note for $1,200, and executed said mortgage, and that said Charlotte ratified and confirmed said loan by causing two installments of interest to be paid thereon. It was also found that, of the money borrowed by G. M. Rouse from plaintiff, $481.65 was paid in satisfaction of said prior mortgage to said Davis. Upon these findings a personal judgment is entered against said defendant, Charlotte, for the amount of said loan, with interest, amounting to $1,510.68. From this judgment, and from an order denying a new trial, the said defendant, Charlotte D. Rouse, appeals. A motion was submitted here to dismiss the appeal on account of alleged insufficiency of the undertaking on appeal, which motion is denied.

Appellant's counsel argues strenuously that under our statutes a cause of action for borrowed money not covered by a mortgage cannot be united with a cause of action for the foreclosure of a mortgage; also, that the alleged borrowed money is a new cause of action, and cannot be presented as an amendment; and also that, under any view, the action for borrowed money, independent of the note and mortgage, was not brought until the said amendment was made to the complaint, and that then the two-years period of limitation had barred it. See Anderson v. Mayers, 50 Cal. 525. We do not, however, deem it necessary to pass definitely upon these points, because we agree with appellant's contention that the evidence does not support the finding that appellant ratified and confirmed the alleged loan made by her husband from plaintiff. This question depends more upon the correct conclusion to be drawn from facts proven, than upon a correct weighing of conflicting evidence. The court below deduced the conclusion that appellant ratified the original loan from the fact that she allowed her agent to pay two installments of interest upon the note and mortgage, and we think that the conclusion was erroneous. During these transactions, appellant lived in Oregon. She had an agent in Santa Clara county, Cal., where the mortgaged premises were situated, who collected rents, paid taxes and expenses, etc., for her. The note and mortgage bore interest payable every six months, and her agent paid the two first installments of interest, and included the same in the stated accounts which he sent to her in Oregon, and it appears that she acquiesced in the accounts. But it abundantly appears that she thought that the payments were made on the note and mortgage, as they in fact were, and that she supposed the note and mortgage were valid instruments which effectually bound her, and from which she could not escape. When asked if she acquiesced in the execution of the mortgage, appellant said: "I was obliged to. It was done, he had the money, and I could not help myself." She consented to the two payments of interest, not as interest upon a mere verbal loan made by her husband, but as interest on a genuine note and mortgage executed in her name, and which bound her firmly and irrevocably. Now, it is an inherent element of ratification that the party to be charged with it must have fully known what he was doing. In King v. Lagrange, 50 Cal. 332, the court say: "If ignorance or mistake of law should enlarge the estate transferred by the executor's deed, it should excuse her; for the very essence either of an election or ratification is that it is done advisedly, with full knowledge of the party's rights." The case at bar does not involve the principle that ratification will be strongly presumed against one who has accepted and had the beneficial use of the property or money involved in the transaction. With the exception of the amount paid on the prior Davis mortgage (which will be noticed hereafter), appellant did not receive or have the benefit of any of the money obtained from plaintiff by her husband. He kept it all himself, and shortly afterwards deserted her. Neither is there any element of estoppel here. Appellant did not fraudulently induce plaintiff to loan money to G. M. Rouse. Paintiff, no doubt, feels aggrieved; but one who deals with an assumed agent of a married woman whom he has never seen should certainly make careful inquiry as to the validity and scope of the agency. As to the $481.65 which went to satisfy the Davis mortgage, it would certainly be proper and just for appellant to pay it, and it is stated in appellant's brief that she is willing to pay it. We do not see, however, that in the present state of the case we can modify the judgment without making new findings. Perhaps, under appropriate pleadings and findings, plaintiff could recover for the amount of the money that went to satisfy the said prior mortgage. The judgment and order appealed from are reversed.

We concur: DE HAVEN, J.; FITZGERALD, J.

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105 Cal. 49

## EASTON, ELDRIDGE & CO. v. MILLINGTON. (No. 15,485.)

(Supreme Court of California. Dec. 10, 1894.)

REAL PROPERTY—CONTRACT TO CONVEY—SPECIFIC PERFORMANCE.

Specific performance of a written agreement entered into by a property owner with a real-estate broker, "to sell and give full title and deed" to a certain lot, with the buildings thereon, for a sum named, and the assumption of a mortgage on such lot by "the buyer," and containing also an agreement to transfer insurance "to the purchaser on completion of this sale," but omitting any reference to the time in which the sale was to be made, cannot be compelled after its revocation by the owner.

Department 2. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Action by Easton, Eldridge & Co., a corporation, against S. Millington, to compel the specific performance by defendant of an alleged contract to convey certain real property to plaintiff. From a judgment for defendant, and an order denying it a new trial, plaintiff appeals. Affirmed.

Thornton & Merzbach, for appellant. Reinstein & Eisner, for respondent.

McFARLAND, J. This action was brought by the plaintiff, a corporation, to compel the specific performance of an alleged contract by defendant to sell and convey certain real property to the plaintiff. Judgment was rendered for defendant, from which, and from an order denying a motion for a new trial, plaintiff appeals.

On November 19, 1892, plaintiff was, and for a long time had been, a corporation organized "for the purpose of buying and selling real estate, and of dealing in the same as an agent or broker upon commission, and also for the purpose of collecting the rentals of real estate, as an agent for real-estate owners, upon commission." Upon that day defendant executed and gave to plaintiff the written instrument upon which this action is based, and which plaintiff claims can be specifically enforced as a contract by defendant to convey to plaintiff the property described in the instrument. It is as follows: "San Francisco, Nov. 19, 1892. I hereby agree to sell and give a full title and deed of my interest in and to the lot and improvements, 50x100, on S. S. Pine street, between Buchanan and Webster streets, S. F., for the sum of fifteen hundred dollars, the buyer to assume the mortgage on the property to the El Dorado Loan Association, and to have all the rents from date; and I hereby agree to assign to the purchaser all my right and interest in and to 83 shares of stock of the loan association pledged with the mortgage above, and to the insurance now on the property, which I agree to transfer to the purchaser on completion of this sale. S. Millington." At the same time the defendant ordered, in writing, his tenants to pay the rents of the property accruing after said November 19th to plaintiff. Nothing further was done touching the sale of said property before December 10, 1892; and on said last-named day defendant revoked and rescinded said instrument, and also the said authority to collect said rentals, and notified plaintiff of said revocation and rescission. The said instrument is not a sufficient basis for an action to compel defendant to specifically perform a contract to convey to plaintiff the premises therein mentioned. It merely gave plaintiff, a real-estate agent, authority to sell said premises; and, as no time was stated within which the sale could be made, the authority was revocable, at the will of the defendant, at any time before the authority to sell had been exercised. Under any view, the instrument presents no such certainty and mutuality as would warrant the equitable remedy of specific performance, which is always addressed to the discretion of the court, and will not be sustained when the contract is not clear, mutual, and certain, both as to subject-matter and parties. The order of defendant to his tenants to pay rents to plaintiff does not change the character of said written instrument. The court finds that the parties mutually understood and agreed that plaintiff was to collect the rents as agent of defendant, and for the latter's use; but, apart from that finding, the view most favorable to plaintiff is that plaintiff was to collect the rents during the time it was attempting to sell the property, so that it might be in a position to turn them over to "the purchaser," should one be found, as provided in the instrument itself. As, in our opinion, the instrument sued on does not, upon its face, warrant a decree for specific performance, as prayed for, it is not necessary to notice the many other points argued by counsel. Whether or not plaintiff has any cause of action for a breach of contract is a question which does not here arise. The judgment and order are affirmed.

We concur: DE HAVEN, J.; FITZGERALD, J.

105 Cal. 15

## MACDONOUGH v. STARBIRD et al. (No. 15,541.)

(Supreme Court of California. Dec. 6, 1894.)

TRADE FIXTURE—WHAT CONSTITUTES—LANDLORD AND TENANT — SALE BY LANDLORD—CONTINUANCE OF LEASE BY PURCHASER.

1. A one-story wooden building, 20 feet square, having for a foundation mudsills laid on the surface of the ground, on which are placed short posts which support the main sills, built and used by tenants on leased premises for a lumber-yard office, is a trade fixture, which the tenants have a right to remove any time during the term.

2. Where land occupied by tenants under a lease from month to month is sold by the landlord, and the purchaser afterwards accepts from the tenants the customary rent for several months, without giving any notice terminating the old lease in the manner prescribed by Civil Code, §§ 789, 827, such purchaser recognizes and continues such lease.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; D. J. Murphy, Judge.

Action by Joseph Macdonough against A. W. Starbird and others for an injunction. From a judgment for defendants, and from an order denying a motion for a new trial, plaintiff appeals. Affirmed.

Edward P. Cole, for appellant. J. H. Henderson, for respondents.

BELCHER, C. The plaintiff commenced this action to obtain an injunction restraining the defendants from removing a building from a lot of land owned by him. The case was tried, and the findings and judgment were in favor of the defendants. The plaintiff appeals from the judgment and an order denying his motion for a new trial.

It appears that in 1881 one Bartlett was the owner of beach and water lot No. 586, in the city of San Francisco, and leased the same to the defendants from month to month for a lumber yard. The defendants erected on the lot the building in question, to be used by them as an office in conducting their business. The building was a one-story wooden structure 20 feet square, and for its foundation they placed mudsills on the surface of the ground, and on these mudsills were short posts on which the main sills rested. The defendants occupied the lot as tenants of Bartlett, and paid him monthly rent therefor, until about September 1, 1885, when he sold and conveyed the same to one Jennings. Jennings recognized and renewed the said lease, and the defendants thereafter held and occupied the lot as his tenants from month to month; and it was understood and agreed by him that the said building was the property of defendants, and might be removed by them from the lot at any time. In December, 1891, Jennings conveyed to the plaintiff, by an ordinary bargain and sale deed, the said lot, "together with, all and singular, the tenements, hereditaments, and appurtenances thereunto belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof." When the plaintiff bought the property he had no knowledge or notice of the agreement between Jennings and defendants that they might remove the building from the lot at any time, other than such as would be given by their occupancy as tenants. No new lease, or agreement as to lease, was made between plaintiff and defendants, but they continued to hold the property from month to month, and to pay to the plaintiff the same rent as before, until December, 1892, when they attempted to remove the building, and this action was commenced. The contention of appellant is (1) that the building was affixed to the land and was a part of the realty, and that he was an innocent purchaser of the land and building, and hence was not bound by the oral agreement of Jennings that defendants could remove the building; (2) that defendants took a new lease from plaintiff, without any new arrangement as to removal, and that they had no right to remove after they ceased to be tenants of Jennings.

The questions arising under appellant's first contention are very elaborately discussed by counsel, but we do not deem it necessary to consider them. In our opinion, the building, if a fixture, was a trade fixture, which, under section 1019 of the Civil Code, defendants had a right to remove at any time during the continuance of their term. Security Loan & Trust Co. v. Willamette Steam Mills Lumbering & Manuf'g Co., 99 Cal. 636, 34 Pac. 321.

The only questions, then, are: Did the term of defendants' lease end when plaintiff purchased the property? And did the occupancy of the premises after the purchase, without objection, and the payment to and acceptance by the plaintiff of the monthly rent, constitute a new lease, or only a continuance of the old one? It is clear that the mere transfer of the title did not in any way change, modify, or affect the lease. The grantee simply took the place of his grantor, and became the landlord of defendants. The lease continued as before, subject only to change in the mode prescribed by statute. Section 789 of the Civil Code provides: "A tenancy or other estate at will, however created, may be terminated by the landlord's giving notice in writing to the tenant, in the manner prescribed by section 1162 of the Code of Civil Procedure, to remove from the premises within a period of not less than one month, to be specified in the notice." And section 827 of the same Code provides: "In all leases of lands or tenements, or of any interest therein, from month to month, the landlord may, upon giving notice in writing at least fifteen days before the expiration of the month, change the terms of the lease, to take effect at the expiration of the month." Here no notice was given by plaintiff, and no attempt was made by him to terminate the lease or change its terms in any way. On the contrary, he accepted the customary rent and allowed the occupancy to continue for a full year. This, it seems to us, shows the recognition and continuance by plaintiff of the old lease, and not the taking of a new one by defendants. It follows, in our opinion, that when defendants commenced to remove the building it was during the continuance of their term of lease, and they had a right to make the removal. The judgment and order appealed from should be affirmed.

We concur: SEARLS, C.; TEMPLE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

105 Cal. 471

## In re PHILBROOK.

(Supreme Court of California. Dec. 7, 1894.)

In bank.

Order on Horace W. Philbrook to show cause why he should not be debarred from further practice as an attorney at law.

PER CURIAM. It has come to the attention of the court that one Horace W. Philbrook, an attorney at law, authorized to practice in this court, did upon the 30th day of November, A. D. 1894, file a certain brief in a certain cause then pending in this court, numbered 15,857, and entitled "Ira P. Rankin, Special Administrator of the Estate of John Levinson, Deceased, Plaintiff and Appellant, vs. William J. Newman and Benjamin Newman, Defendants and Respondents," in which said brief there are found matters which in the mind of the court are of a scandalous and contemptuous character. The said scandalous and contemptuous matters are found upon the pages of said brief commencing at page 313 thereof, and extending consecutively down to and including a portion of page 379 thereof, and the whole tenor of said matter may be fairly illustrated by the following excerpt, taken from pages 377 and 378: "It is not enough for courts of justice to be, in fact, pure. In addition to the fact, there must exist the fullest confidence in their purity. It is not enough for judges to be, in fact, strong enough to resist temptation. They must not allow themselves to be tempted. Examine carefully and thoroughly the secret transaction of September 6, 1890. It was without an extenuating circumstance. You have before you here the proof of what its contrivers and users think of courts of justice and of judges. You behold their evil and most contemptuous confidence. They rely solely upon the corrupting force of their corrupt contrivance,—the secret transaction of September 6, 1890, and solely upon that reliance they have been ever since September 6, 1890, and still are, as confident of a final judgment for the Newmans as if they already had it locked up at home. And is it not probable, then, that many others think with them that the courts may be corrupted, the judgments of judges perverted, and that others, still more numerous, suspect it? But if this secret transaction of September 6, 1890, is not declared illegal and void, upon the rules and principles declared in Egerton v. Earl Brownlow, then all to whom knowledge of the case shall come will no longer merely suspect or even think that the courts may be corrupted; they will know it. They may point to the decision here as full proof of it, for it will be established that such practices are permissible, and, if permissible, they are sure to have effect." By reason of the foregoing premises, it is therefore ordered that he, the said Horace W. Philbrook, appear before the court on the 17th day of December, A. D. 1894, at 10 a. m., at the court room thereof, in the city and county of San Francisco, and at that time show cause why he, the said Philbrook, should not be removed from his office as an attorney at law, and debarred from further practicing before the courts of this state, for having violated his oath and duties as an attorney of this court in filing the said brief. It is further ordered that a certified copy of the foregoing order be forthwith served upon said Horace W. Philbrook by the bailiff of this court, and due return made thereof.

104 Cal. 668

## HEINTZ v. COOPER. (No. 15,522.)

(Supreme Court of California. Dec. 4, 1894.)

NEW TRIAL—NEWLY-DISCOVERED EVIDENCE—DILIGENCE.

In an action by a doctor against a patient on an account stated, the defense being that no account was stated, defendant's motion for a new trial on the ground of newly-discovered evidence was based on an affidavit of a person, who lived in defendant's house, that she heard plaintiff say that defendant would not pay his bill because he said it was excessive; that defendant was ill at the time, and shortly afterwards was removed from his home to another city; and that she never told defendant or his attorney of what the plaintiff had said till after the trial. *Held*, that an order granting a new trial would not be disturbed.

Department 1. Appeal from superior court, Monterey county; N. A. Dorn, Judge.

Action by J. P. E. Heintz against J. B. H. Cooper on an account stated. Judgment was rendered for plaintiff. A motion for a new trial on the ground of newly-discovered evidence was granted, and plaintiff appeals. Affirmed.

W. A. Kearney, for appellant. S. F. Geil and John J. Wyatt, for respondent.

VAN FLEET, J. This is an appeal by plaintiff from an order granting the defendant's motion for a new trial. The motion was made upon several grounds, among which was that of newly-discovered evidence, and the order granting the motion specifies the latter as the ground upon which the new trial is granted. The appellant does not deny that the showing was sufficient to warrant the court in holding the evidence newly discovered, and that it was material but the sole ground upon which he urges a reversal of the order is that there was no sufficient showing of diligence. We have carefully examined the record with this objection in view, and we are unable, after such examination, to say that the showing upon the point urged is so devoid of merit as to amount to an abuse of discretion. The granting of a new trial upon this ground is so peculiarly within the discretion of the trial court that the record must be very bald indeed which will induce this court to interfere with its action. And that this should be so is perfectly obvious. "Diligence" is a relative term, incapable of exact definition. What would amount to due diligence under one state of facts would fall absolutely short of it under another and different state of facts. It depends, therefore, so essentially upon the particular circumstances of each case, with all their distinct and varying phases and bearings, as they have appeared to the lower court at the trial and throughout the conduct of the cause, in determining whether diligence has been used in any particular instance, that this court should hesitate to disturb a ruling upon this ground where it has any substance whatever upon which to rest. The presumption is that the discretion has been properly exercised, and that presumption must be overcome by a clear want of facts before the order will be disturbed. See Jones v. Singleton, 45 Cal. 92; Baker v. Joseph, 16 Cal. 180; Kenezleber v. Wahl, 92 Cal. 202, 28 Pac. 225. There is no such want in the showing made here. The action was to recover for surgical and medical services rendered defendant while suffering from a broken leg. The complaint contained two counts, one upon an account stated and the second upon quantum meruit. Both the existence of an account stated and the value of the services were denied. At the trial there arose a sharp conflict in the evidence as to the value of the services, but the positive testimony upon the question whether the account had become a stated account was confined solely to that given by the plaintiff on the one part and the defendant on the other, and between whom there was a contradiction, the plaintiff testifying that defendant made no objection to the amount of his bill,—at least until some time after it was rendered,—and defendant testifying that he had. It did appear, however, that the defendant immediately discharged plaintiff upon receiving his bill, and shortly after sent him a check for $500; and defendant within a day or so thereafter had himself removed from the town of Monterey, where he then was, to San Francisco, and put in charge of another physician. The court found the account had become stated, and gave judgment for the full amount demanded. The newly-discovered evidence is all addressed to the point whether there was a stated account between the parties, and the principal feature of it is that given by the affidavit of one Concepcion Speegle, a woman who lived at the house in Monterey where defendant was confined with his broken limb. She says, in substance, that just before defendant was removed to San Francisco she heard Dr. Heintz, the plaintiff, say that defendant would not pay his bill because defendant said it was too large and excessive; that defendant was ill, and confined to his bed at the time, and that she never informed defendant or his attorney of what Dr. Heintz had said until after the trial of this case. The materiality of this evidence, as above suggested, is not denied; but appellant claims that with any sort of diligence defendant could have informed himself of it in time to produce it at the trial. But it does not appear that there was anything to put defendant upon inquiry for any such evidence. The witness, it seems, said nothing about the circumstance, and very likely thought little, if anything, of it. She lived at the time, it is true, in the same house with defendant, but he was confined to his room, and the next day or so was taken to San Francisco, where it appears he has since resided, while the witness, we infer from the record, has continued to have her home in Monterey. The lower court might well say, under all the circumstances, that there was not an absence of diligence on the part of defendant; and, having found against him upon the issue to which the newly-discovered evidence is addressed, have felt constrained, in view of the conflict as to the value of the services rendered, to grant the motion for a new trial. Order affirmed.

We concur: GAROUTTE, J.; HARRISON, J.

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4 Cal. Unrep. 901

## VERMONT MARBLE CO. v. BLACK.[1]

(No. 15,591.)

(Supreme Court of California. Dec. 7, 1894.)

JUDGMENT BY DEFAULT—VACATING.

While a motion to open a default is addressed largely to the discretion of the court, all doubts should be resolved in favor of the application; and, where the circumstances lead the court to hesitate as to the merits of the application, an order denying such a motion will be reversed on appeal.

Department 2. Appeal from superior court, city and county of San Francisco; W. H. Levy, Judge.

Action by Vermont Marble Company against William Black. Judgment by default was rendered for plaintiff. After defendant's death, Annie Black, his administratrix, moved to open the default, and from an order denying her motion she appeals. Reversed.

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[1] Rehearing denied. See 38 Pac. 961.

Geo. C. Sargent, for appellant. F. Wm. Reade, for respondent.

PER CURIAM. The respondent commenced this action against William Black in the superior court of the city and county of San Francisco on May 6, 1893, and on the same day summons was issued and personally served upon him in said city. No appearance by or on behalf of Black was made, and on May 31st a judgment by default was entered against him. On June 5, 1893, he died, and thereafter the appellant, Annie Black, the surviving wife of deceased, was duly appointed administratrix of his estate. On July 14th, upon suggestion of the death of Black, appellant, as such administratrix, was, by an order of the court, substituted as defendant in his place; and thereafter, on the 22d day of the same month, she served notice upon the respondent that she would on a day named move the court to vacate and set aside the said judgment by default, upon the ground that it was taken against said deceased through his excusable neglect. At the hearing of the motion, appellant produced and read several affidavits, including an affidavit of merits, and presented a verified answer. The respondent also read several counter affidavits. The motion was submitted upon the judgment roll and the affidavits read by the respective parties, and denied by the court, and from that order this appeal is prosecuted.

It is settled law in this state that applications of this kind are addressed largely to the legal discretion of the trial court, and that the exercise of that discretion ought to tend in a reasonable degree, at least, to bring about a judgment on the merits of the case; and when the circumstances are such as to lead the court to hesitate upon the motion to open the default, it is better, as a general rule, that the doubt should be resolved in favor of the application. Watson v. Railroad Co., 41 Cal. 17; Pearson v. Fishing Co., 99 Cal. 425, 34 Pac. 76. The affidavits read by appellant, if true, clearly establish the fact that the original defendant, William Black, from the time summons was served upon him till he died, was diseased in mind and body, and unable to attend rationally to any business. It is true that many of the facts stated in those affidavits are controverted by the counter-affidavits; but, after carefully reading all the affidavits, we are satisfied that the circumstances were such as to lead any court to hesitate, and, this being so, we think the doubt should have been resolved in favor of the application. As the order must be reversed, it is not necessary to consider the question as to whether the court erred in sustaining the objection of respondent to the affidavit of Dr. C. N. Ellinwood, the physician who attended upon said Black during his illness. The order is reversed, and the cause remanded, with directions to the court below to set aside the judgment, and allow appellant to file her answer to the complaint.

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105 Cal. 9

## WHITE v. BEER et al. (No. 15,480.)

(Supreme Court of California. Dec. 6, 1894.)

REVIEW ON APPEAL.

Findings made on conflicting evidence will not be disturbed.

Department 2. Appeal from superior court, Mendocino county; R. McGarvey, Judge.

Action by one White against Mrs. Jennie Beer and others on a promissory note. Judgment for plaintiff, and defendants appeal. Affirmed.

J. W. Oates and J. H. Seawell, for appellants. Thomas L. Carothers and Thornton & Merzbach, for respondent.

DE HAVEN, J. 1. So far as relates to the question of the sufficiency of the evidence to support the findings, we think the case falls within the well-settled rule that the findings of the trial court will not be set aside by us when there is a substantial conflict in the evidence.

2. The refusal of plaintiff to release the defendant Mrs. Jennie Beer from the payment of the note sued on, and to accept the other defendants, Clifton and Weil, as his sole debtors thereon, was not a fraud upon the other creditors of Mrs. Beer, under the circumstances disclosed by the evidence. Judgment and order affirmed.

We concur: McFARLAND, J.; FITZGERALD, J.

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105 Cal. 32

## PEOPLE v. ANDERSON. (No. 21,120.)

(Supreme Court of California. Dec. 7, 1894.)

HOMICIDE—EVIDENCE—CREDIBILITY OF WITNESS—INSTRUCTIONS.

1. Where defendant in a murder trial, to show that deceased was of a quarrelsome character, testifies that he saw him stab a person in a difficulty, he may, on cross-examination, be examined as to what he saw in connection with the stabbing, to show who was the aggressor.

2. Insulting remarks by defendant, made concerning a witness, which were repeated to the witness, and statements by the witness showing prejudice against defendant, are admissible as affecting her credibility.

3. Where the charge, taken as a whole, correctly states the law, error in isolated paragraphs thereof is not ground for reversal.

Department 1. Appeal from superior court, Humboldt county; G. W. Hunter, Judge.

Richard Anderson was convicted of manslaughter, and appeals. Reversed.

Ford & Burnell, for appellant. Atty. Gen. Hart, for the People.

PER CURIAM. The defendant was charged with the crime of murder, and found guilty of manslaughter, with a recommendation to the mercy of the court. He was sentenced to be imprisoned in the state prison for the term of six and a half years, and has appealed from the judgment and an order denying his motion for a new trial. It was clearly proved at the trial that the defendant committed the homicide charged, and the only defense was that, under the circumstances shown, it was justifiable or excusable. It is claimed that the court committed several errors prejudicial to the defendant in its rulings upon the admission and exclusion of evidence, and in the giving, modifying, and refusing instructions to the jury.

1. When the defendant was on the stand as a witness, he testified at great length, on his direct examination, about the difficulties and quarrels he had had with the deceased, Donohue, and about Donohue's quarrelsome character, and, among other things, said he had seen him stab a young man named Cook twice in the back. On cross-examination he said he did not see the stabbing, but saw the marks on his back, and was there at the time it was done. He was asked: "Who was the cause of that trouble,—Cook or Donohue?" "Who did commit the assault at that time?" "What I want to know is who committed the assault there. You say he stabbed a man. I want to know who was the cause of the trouble." These questions were all objected to as not proper cross-examination, and the court ruled that the witness might answer as to what he saw. The witness said: "As far as actually who committed the assault, I don't know. Mr. Donohue told me since that he was the man that was to blame." He then went on to tell what he saw, and closed by saying: "I didn't know how the trouble commenced until last summer, and then I found out." On redirect examination, counsel for the defense offered to prove by the witness what he had heard or knew about the matter, but the court refused to admit the offered evidence, saying: "I don't care about going into that at all. I think it was proper to ask this witness as to what he saw there when he claimed he saw him stab a man. I think it was proper to ask him what the circumstances were that he saw, to show what effect it might have upon him in this case; that is all." It is earnestly urged that each of the rulings above referred to was erroneous, but we see no prejudicial error in either of them. A defendant in a criminal action, who offers himself as a witness, may be cross-examined as to all matters about which he was examined in chief. Pen. Code, § 1323. The defendant testified on his direct examination that he saw Donohue stab Cook, and it was proper, therefore, to cross-examine him as to what he saw in connection with the matter. Besides, the evident purpose of the direct examination was to prove that Donohue wrongfully committed the assault; and this was, in effect, shown by his subsequent statement to the witness that he was the one to blame. The claim that the witness should have been permitted to testify as to what he heard about the stabbing is clearly untenable. It was an effort to introduce hearsay evidence, which was inadmissible.

2. M. T. Steinbrum and Mrs. Steinbrum were witnesses for the prosecution, and gave damaging evidence against the defendant. On cross-examination the former was asked: "Didn't Mr. Donohue tell you, * * * in the presence of Mr. Fisher, that Anderson had made remarks about your family and others?" He answered: "I don't recollect whether he did or not." Counsel for defendant then said: "Well, I will make the offer to prove by the witness Fisher and the witness Morgan that these conversations did occur with Mr. Steinbrum as I have indicated in the questions I asked him." On objection of the district attorney, the offered evidence was excluded. On cross-examination, Mrs. Steinbrum was asked about what had occurred at a time and place named, and then: "Do you remember saying something about hanging Anderson if your evidence would be sufficient?" The witness denied saying anything of the kind, and counsel afterwards offered to prove that she had said " she would hang the defendant if her evidence would do so." This offered evidence was also excluded on objection of the district attorney. It is claimed that these rulings were erroneous, and, in our opinion, the claim must be sustained. The obvious purpose of the offers was to show bias and ill feeling on the part of the witnesses against the defendant, and this it was competent to do. People v. Wasson, 65 Cal. 538, 4 Pac. 555; People v. Lee Ah Chuck, 66 Cal. 662, 6 Pac. 859; Schultz v. Railroad Co., 89 N. Y. 242, and cases there cited.

3. It is urged that the defendant was prejudiced before the jury by certain questions propounded by the district attorney to a witness, and by certain remarks made by him in his closing argument. The questions were as to who was the assailant in the affray between Donohue and Cook, and the attorney said: "Tell all about it. I want to show just how it occurred; that Donohue was not to blame." The questions were objected to, and the objection was promptly sustained. It is not perceived, therefore, how the defendant was or could have been prejudiced by them. The remarks complained of were in regard to an ineffectual attempt made by defendant to have Donohue put under bonds to keep the peace some time before he was killed. The attorney said: "Anderson went to see Ben Harris about getting out a warrant to have Dono-

hue arrested. Harris was a justice of the peace. He knew the law, and knew that it was necessary to have the testimony of some other person who heard the threats before the complainant would be entitled to have a warrant of arrest issued to have Donohue bound over to keep the peace. Harris knew this, and he must have told Anderson what was necessary for him to do in order to have Donohue arrested. So, when Anderson started to Garberville, as he says, to have Donohue arrested and put under bonds to keep the peace, he knew that a warrant could not be issued for the arrest of Donohue without the deposition of another witness." This was only a statement as to some of the facts proved in the case, and the law applicable thereto, and, whether correct or not, we see no such misconduct on the part of the district attorney in making it as would justify a reversal.

4. The court instructed the jury at great length, the instructions given covering about 25 pages of the printed transcript. Among other instructions given at the request of the people was one in the language of section 1105 of the Penal Code, as follows: "Upon a trial for murder, the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon the defendant, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable." It is earnestly contended that this instruction was misleading, because it imports that the burden was cast upon the defendant to prove circumstances that justified or excused the homicide by a preponderance of the evidence, while under the decisions in People v. Bushton, 80 Cal. 160, 22 Pac. 127, 549, and other subsequent cases, the rule is settled in this state that he was only bound to produce such evidence as would create in the minds of the jury a reasonable doubt of his guilt of the offense charged; and it is claimed, as said in the Bushton Case, that "the jury should have been instructed that the burden of proving circumstances of mitigation, or that justified or excused the killing, devolved upon the defendant, but that if, upon the whole case, they entertained a reasonable doubt from the evidence as to his guilt, he should be acquitted." The court instructed the jury very fully as to a reasonable doubt, and how it might arise, and, among other things, told them, at the request of the people: "The defendant is entitled to the benefit of every reasonable doubt which you may have on the evidence. * * * A doubt, to justify an acquittal, must be reasonable, and arise from a candid and impartial consideration of all the evidence in the case." And at the request of the defendant the court told the jury that "the law presumes him (defendant) innocent of the crime with which he is charged until he is proven guilty beyond a reasonable doubt by competent evidence; and, if the evidence in this case leaves in your minds any reasonable doubt as to the defendant's guilt, the law makes it your duty to acquit him." Instructions must be read as a whole, and, if the entire charge fairly presents the law of the case, the judgment will not be reversed for minor and unimportant defects, or because the court refuses to repeat itself. Looking at the whole charge as given, we think it very fully and fairly presented the law of the case, and left the defendant no valid ground of complaint. The instructions modified were properly changed to make the statements of the law more clear and explicit, and those refused were either inaccurate statements or repetitions of what had already, in effect, been given.

The court instructed the jury as to defendant's testimony as follows: "The defendant has been examined as a witness on his own behalf. This it is his right to be, and the jury will consider his testimony as they would that of any other witness given before you. It is proper, however, for the jury to bear in mind the situation of the defendant, the manner in which he may be affected by your verdict, and the very grave interest he must feel in it, and it is proper for the jury to consider whether this position and interest may not affect his credibility or color his testimony. Still, you are to consider it fairly, and give it such weight as you believe it entitled to receive." Complaint is made that this instruction is in violation of that provision of the constitution which forbids judges to charge juries with respect to matters of fact. While the instruction is not so wide a departure from instructions which have been allowed to pass by this court as not furnishing sufficient ground for reversal, we deem it proper to again call attention to the criticism of similar instructions in the recent cases of People v. Murray, 86 Cal. 31, 24 Pac. 802; People v. Curry (Cal.) 37 Pac. 503; and People v. Lang, Id. 1031.

The other points discussed by counsel need not be considered. For the errors above noted in sustaining objections to the cross-examination of the witnesses Mr. and Mrs. Steinbrum, the judgment and order must be reversed, and the cause remanded for a new trial. So ordered.

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4 Cal. Unrep. 908

## McVEY v. BEAM. (No. 15,509.)

(Supreme Court of California. Dec. 11, 1894.)

APPEAL—REVIEW—OBJECTION NOT RAISED BELOW.

Error in the admission of evidence will not be considered on appeal, where no exception is taken to the ruling admitting it.

Commissioners' decision. Department 2. Appeal from superior court, Del Norte county; James E. Murphy, Judge.

Action by Asa N. McVey against Lewis Beam to recover the price of personal property sold and delivered by plaintiff to defendant. From a judgment for plaintiff, and from an order denying a motion for a new trial, defendant appeals. Affirmed.

R. W. Miller, for appellant. L. F. Cooper, for respondent.

VANCLIEF, C. It is alleged in the complaint that plaintiff sold and delivered to defendant a certain lot of personal property for the agreed price of $600, viz. 2 horses, 2 buggies, 1 stage, 1 dead axe wagon, a lot of hay (estimated at 15 to 20 tons), 2 sets of double harness, robes, and a lot of oats; and that defendant promised to pay therefor said sum of $600 on or before December 2, 1892, but had failed to pay said sum, or any part thereof, except the sum of $20, whereupon plaintiff prays judgment for $580. The complaint was filed December 17, 1892. The answer denies the alleged delivery of all the property described in the complaint, but admits the delivery of the greater part thereof; denies that any price was fixed or agreed upon, or that defendant agreed to pay more than the reasonable value of the property delivered, and alleges that the reasonable value thereof did not exceed $314; also sets up counterclaims exceeding the alleged value of the property delivered by $27.50, and prays judgment against the plaintiff for this excess. The jury by which the case was tried returned a verdict in favor of plaintiff for $580, upon which judgment was rendered. The defendant appeals from the judgment, and also from an order denying his motion for a new trial.

Counsel for appellant has not very clearly specified, either in his bill of exceptions or in his brief, the points he relies upon for a reversal; but I understand him to claim that the evidence is insufficient to justify the verdict, in one or two particulars, and that the court erred in admitting evidence of a novation of the debt in suit. The evidence is more or less conflicting on several issues, but on each of them it is sufficient to justify the verdict. Indeed, appellant's specifications under this head in the bill of exceptions claim little more than that there was a preponderance of evidence in favor of defendant, the two principal specifications being as follows: "There is not a preponderance of evidence in favor of the plaintiff upon any issue made by the pleadings. * * * There is a preponderance of evidence in support of, and affirming, the counterclaim of the defendant." All other specifications are of what the evidence shows, what it "fails to show," and what "the uncontradicted evidence shows." But I find all the alleged uncontradicted evidence to have been contradicted.

As to the alleged error of admitting evidence of a novation, there was no exception taken to the ruling of the court admitting it. Besides, it related to averments in the answer, and did not tend to prove a novation, but the contrary. I think the judgment and order should be affirmed.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

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104 Cal. 680

## MALONE v. BOSCH et ux. (No. 15,334.)

(Supreme Court of California. Dec. 4, 1894.)

MORTGAGE FORECLOSURE—IRREGULARITY OF JUDGMENT—OMISSIONS OF FINDINGS—EFFECT ON APPEAL — ACKNOWLEDGMENT OF DEEDS — COURT COMMISSIONERS.

1. The irregularity of entering judgment in a suit to foreclose a mortgage without first entering a default against one of the defendants cannot be complained of by the other.

2. Judgment will not be reversed because of the failure of the trial court to find upon every issue, unless the omitted findings would have affected the final judgment.

3. The power conferred upon court commissioners by Code Civ. Proc. § 259, "to take acknowledgments and proofs of deeds, mortgages," etc., was not affected by the subsequent enactment of the amendment to Civ. Code, § 1181, that "the proof or acknowledgment of any instrument may be made" before certain named officers, omitting court commissioners.

Commissioners' decision. Department 2. Appeal from superior court, Del Norte county; James E. Murphy, Judge.

Action by John Malone against John G. Bosch and his wife to foreclose a mortgage upon defendants' homestead. Plaintiff had judgment, and appeals from an order granting defendants a new trial. Reversed.

R. W. Miller, for appellant. S. F. Cooper, for respondents.

TEMPLE, C. This appeal was taken by plaintiff from an order granting the defendants' motion for a new trial. The action was brought against John G. Bosch and his wife to foreclose a mortgage upon the homestead of the defendants. The homestead had been duly selected prior to the execution of the mortgage. Both defendants were served with the summons, but the wife did not appear in the action, and her default was not entered. The husband appeared and answered, setting up the homestead character of the premises, and denying the validity of the mortgage. A copy of the mortgage was set out in the complaint, showing that it was acknowledged by both husband and wife on the 17th day of August, 1885, before R. G. Knox, a court commissioner of the superior court of Del Norte county. It is contended that court commissioners at that date had no authority to take and certify acknowledgments. No separate document designated "findings" was signed by the judge, but in the decree which was signed by the judge it is stated that the court finds all the averments of the complaint to be true. Nothing is said about the averment of the homestead in the answer. The new trial was granted upon two grounds: (1) The default of the wife ought to have been entered before the decree was made; and (2) findings were not waived, and therefore the judgment was irregular.

1. The trial court was right in holding that it was irregular to enter judgment without first entering the default of the defendant who failed to appear and answer, but the judgment was not therefore void, and the irregularity did not concern John G. Bosch, who was the only party moving for a new trial.

2. Since the bill of exceptions shows affirmatively that findings were not waived, it was undoubtedly necessary that the court should find upon every issue a decision of which was necessary before rendition of judgment. But a judgment will not be reversed here for such an omission, if this court can see that the additional fact pleaded in the answer would have constituted no defense if it had been found as averred. The mortgage, with the acknowledgment, was set out at length in the complaint. Its correctness was admitted. The only new fact averred was that the premises constituted the homestead of the mortgagors at the time of the execution of the mortgage. Had that been found, would it have affected the judgment? The doubt in regard to the validity of the mortgage arises from these facts: April 1, 1880, the legislature amended the 259th section of the Code of Civil Procedure, in regard to the powers of court commissioners, by providing, among other changes, that every court commissioner shall have power "to take acknowledgments and proof of deeds, mortgages and other instruments requiring proof or acknowledgment for any purpose under the laws of this state." Three days afterwards the legislature amended section 1181 of the Civil Code so as to read as follows: "The proof or acknowledgment of an instrument may be made in this state within the city, city and county, county or district for which the officer was elected or appointed, before either: 1. A clerk of a court of record; or, 2. A county recorder; or, 3. A notary public; or, 4. A justice of the peace." The changes made in the section were these: The words "city and county" were added, and the words "a court commissioner" were omitted. In the original section the court commissioner was the third officer mentioned as one who could take and certify acknowledgments. The title to the article in which section 1181 is found is, "Proof and acknowledgment of instrument." The heading to the section is, "By whom acknowledgments may be taken in this state." At the time the acknowledgment was taken, this was the last law upon the subject, and it is contended that the language is first, in effect, that no others than the officers specified shall take acknowledgments; and, second, that it is inconsistent with the provision in regard to court commissioners, and therefore repealed it. As to the first, the statute does not say or imply that no others can take and certify acknowledgments. It is true we would naturally expect to find under such heading a list of all officers who could take and certify acknowledgments. But this implication is not so strong as to effect the repeal of a special statute empowering another officer to do so. Repeal by implication is not favored, and the conflict must be irreconcilable, or the intent to repeal very manifest, or both statutes will stand. I see no conflict in the statutes. The fact that court commissioners may also take acknowledgments does not interfere with the provisions of the Civil Code. The rule laid down in section 4481, Pol. Code, only obtains where there is a conflict. It implies that where there is no conflict a provision will be valid, although, in the sense of that rule, it is not in regard to a question arising out of the subject-matter of that title.

Since, therefore, it is manifest that, in case the additional facts averred in the answer had been found as averred, it would not affect the judgment, I think the new trial ought not to have been granted on that ground. I think, therefore, that the order should be reversed.

We concur: BELCHER, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is reversed.

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105 Cal. 41

## LAWRENCE NAT. BANK v. KOWALSKY.

(No. 15,486.)

(Supreme Court of California. Dec. 8, 1894.)

EQUITABLE ASSIGNMENT OF DEMAND — FORM—ESSENTIALS.

1. An equitable assignment of a demand may be effected by means of an instrument having the form of an order or bill of exchange, drawn by the creditor upon the debtor, in favor of the assignee, for the full amount of the indebtedness, without an intention to so assign appearing on its face.

2. A refusal to sustain a general demurrer to the complaint will be reversed only when it omits entirely the statement of some fact essential to sustain the judgment.

Department 2. Appeal from superior court, city and county of San Francisco.

Action by the Lawrence National Bank against Edwin H. Kowalsky to recover on an instrument in the form of an order drawn on defendant in favor of plaintiff's cashier by W. H. Pendleton. A demurrer to the complaint was overruled, and this defendant assigns as error, judgment being rendered against him. Affirmed.

Geo. A. Rankin and H. T. Kowalsky, for appellant. Fox, Kellogg & King, for respondent.

DE HAVEN, J. The defendant appeals from a judgment against him. The appeal is brought here upon the judgment roll, which does not contain any bill of exceptions. The court below overruled a general demurrer to the complaint, and the appellant claims that this ruling was erroneous, and that the judgment should be reversed upon the ground that the complaint does not state facts sufficient to constitute a cause of action. The plaintiff sues as assignee of one Pendleton, and the complaint alleges, among other matters: That "on the 17th day of April, 1891, the said defendant was indebted to W. H. Pendleton, of Lawrence, Kansas, in the full sum of fifteen hundred and ninety ($1,590) dollars, as and for the purchase price of four hundred cases of eggs theretofore sold by the said Pendleton to the said defendant, and delivered free on board at Lawrence, Kansas. That on that day, to wit, the 17th day of April, 1891, the said W. H. Pendleton made and executed his certain draft on the said defendant, under and by the name of 'Kowalsky & Co.,' in the words and figures following, to wit: '$1,590. April 17, 1891. Pay to the order of H. C. Vaughan cash fifteen hundred and ninety dollars, value received, and charge the same to account of W. H. Pendleton. To Kowalsky & Co., No. ——, San Francisco, Cal.' That the said H. C. Vaughan was then, and ever since has been, and still is, cashier of this plaintiff. That for valuable consideration said Pendleton then and there, on the 17th day of April, 1891, sold and delivered the said draft to this plaintiff, and thereby assigned and transferred to this plaintiff his claim against the said defendant, doing business under the name of Kowalsky & Co., and the said plaintiff then and there became, ever since has been, and still is the owner and holder of the said draft, and of the said claim, and of all moneys due thereon."

The objection urged against the complaint is that it does not sufficiently set forth an assignment to plaintiff of defendant's alleged indebtedness to Pendleton. The complaint is certainly very carelessly drawn, but is, we think, sufficient to sustain a judgment, and therefore the general demurrer was properly overruled. An equitable assignment of a demand may be effected by means of an instrument having the form of an order or bill of exchange, drawn by the creditor upon the debtor for the full amount of the indebtedness, when such is the intention of the parties, and it is not essential that the intention to make such assignment should appear upon the face of the order or bill of exchange. Bank v. Bogy, 44 Mo. 13; 1 Daniel, Neg. Inst. (4th Ed.) § 20; Wheatley v. Strobe, 12 Cal. 92. And it was not the intention of this court to overrule the latter case by anything said in the course of the opinion in Cashman v. Harrison, 90 Cal. 297, 27 Pac. 283. While the complaint here does not, in direct terms, allege that the draft therein set out was drawn for the purpose of making an assignment to plaintiff of the drawer's demand against defendant on account of the eggs sold and delivered to him as alleged, still the complaint is not wholly silent as to the fact of an assignment, and, while it must be conceded that its allegation in relation thereto is informal and argumentative, the defect is one that could only be reached by a special demurrer. It is only when a complaint entirely fails to state some fact necessary to uphold the judgment that this court will reverse the judgment because of the failure of the lower court to sustain a general demurrer to the complaint. But, in addition to this, the answer in this case presents the issue as to the assignment of defendant's indebtedness from Pendleton to plaintiff, and we must presume, in support of the judgment, that the fact was litigated upon the trial, and that the case was there treated by the parties as involving that issue. Judgment affirmed.

We concur: FITZGERALD, J.; McFARLAND, J.

105 Cal. 66

## PEOPLE v. BROWN. (No. 21,169.)

(Supreme Court of California. Dec. 11, 1894.)

GRAND LARCENY—WHAT CONSTITUTES.

One taking a bicycle from the house of another, with the intention of returning it the same day, and innocent of any felonious intent of permanently depriving that other of his property, is not guilty of grand larceny.

In bank. Appeal from superior court, Orange county; J. W. Towner, Judge.

John Brown was convicted of burglary, in that he entered a certain house with the purpose of committing grand larceny, and appeals. Reversed.

J. W. Ballard, for appellant. Atty. Gen. Hart, for the People.

GAROUTTE, J. The appellant was convicted of the crime of burglary, alleged by the information to have been committed in entering a certain house with intent to commit grand larceny. The entry is conceded, and also it is conceded that appellant took therefrom a certain bicycle, the property of the party named in the information, and of such a value as to constitute grand larceny. The appellant is a boy of 17 years of age, and, for a few days immediately prior to the taking of the bicycle, was staying at the place from which the machine was taken, working for his board. He took the stand as a witness, and testified: "I took the wheel to get even with the boy, and, of course, I didn't intend to keep it. I just wanted to get even with him. The boy was throwing oranges at me in the evening, and he would not stop when I told him to, and it made me mad, and I left Yount's house Saturday morning. I thought I would go back and take the boy's wheel. He had a wheel, the one I had the fuss with. Instead of getting hold of his, I got Frank's, but I intended to take it back Sunday night; but, before I got back, they caught me. I took it down by the grove, and put it on the ground, and covered it with brush, and crawled in, and Frank came and hauled off the brush, and said: 'What are you doing here?' Then I told him * * * I covered myself up in the brush so that they could not find me until evening, until I could take it back. I did not want them to find me. I expected to remain there during the day, and not go back until evening." Upon the foregoing state of facts, the court gave the jury the following instruction: "I think it is not necessary to say very much to you in this case. I may say, generally, that I think counsel for the defense here stated to you in his argument very fairly the principles of law governing this case, except in one particular. In defining to you the crime of grand larceny, he says it is essential that the taking of it must be felonious. That is true; the taking with the intent to deprive the owner of it; but he adds the conclusion that you must find that the taker intended to deprive him of it permanently. I do not think that is the law. I think in this case, for example, if the defendant took this bicycle, we will say for the purpose of riding twenty-five miles, for the purpose of enabling him to get away, and then left it for another to get it, and intended to do nothing else except to help himself away for a certain distance, it would be larceny, just as much as though he intended to take it all the while. A man may take a horse, for instance, not with the intent to convert it wholly and permanently to his own use, but to ride it to a certain distance, for a certain purpose he may have, and then leave it. He converts it to that extent to his own use and purpose feloniously." This instruction is erroneous, and demands a reversal of the judgment. If the boy's story be true, he is not guilty of larceny in taking the machine; yet, under the instruction of the court, the words from his own mouth convicted him. The court told the jury that larceny may be committed, even though it was only the intent of the party taking the property to deprive the owner of it temporarily. We think the authorities form an unbroken line to the effect that the felonious intent must be to deprive the owner of the property permanently. The illustration contained in the instruction as to the man taking the horse is too broad in its terms as stating a correct principle of law. Under the circumstances depicted by the illustration, the man might, and again he might not, be guilty of larceny. It would be a pure question of fact for the jury, and dependent for its true solution upon all the circumstances surrounding the transaction. But the test of law to be applied to these circumstances for the purpose of determining the ultimate fact as to the man's guilt or innocence is, did he intend to permanently deprive the owner of his property? If he did not intend so to do, there is no felonious intent, and his acts constitute but a trespass. While the felonious intent of the party taking need not necessarily be an intention to convert the property to his own use, still it must in all cases be an intent to wholly and permanently deprive the owner thereof. As directly and fully sustaining this principle, we cite: State v. Davis, 38 N. J. Law, 176; State v. Homes, 57 Am. Dec. 275, note; State v. South, 75 Am. Dec. 250; State v. Ryan, 12 Nev. 401; State v. Slingerland, 19 Nev. 135, 7 Pac. 280; Desty, Cr. Law, § 155j; People v. Juarez, 28 Cal. 380. For the foregoing reasons, it is ordered that the judgment and order be reversed, and the cause remanded for a new trial.

We concur: McFARLAND, J.; HARRISON, J.; VAN FLEET, J.; FITZGERALD, J.; DE HAVEN, J.

105 Cal. 60

## GRAY v. FARMERS' EXCH. BANK. (No. 19,467.)

(Supreme Court of California. Dec. 10, 1894.)

CONSTRUCTIVE TRUST—MONEY OF ESTATE—APPLICATION ON ADMINISTRATOR'S DEBT.

To render a person receiving, at the request of an administrator, money belonging to the estate, in satisfaction of a personal debt of the administrator, a trustee for the estate, it is necessary that the administrator should be in default to the estate.

Commissioners' decision. In bank. Appeal from superior court, San Bernardino county; Geo. E. Otis, Judge.

Action by Ada Suhr, administrator, against the Farmers' Exchange Bank. Pending the action, Suhr died, and Charles R. Gray was appointed administrator in her place. There was a judgment for defendant, and plaintiff appeals. Affirmed.

Chas. R. Gray and E. R. Annable, for appellant. Elmer E. Rowell, for respondent.

VANCLIEF, C. F. C. Suhr died intestate in the county of San Bernardino in May, 1887, and on June 18, 1887, Ada Suhr, his widow, was appointed administratrix of his estate. On July 5, 1887, Ada Suhr, in her private capacity, borrowed $10,000 from the defendant bank, to secure the payment of which she and John Ruffen gave to the bank their joint and several promissory note for that sum, payable July 20, 1887, with interest at 1 per cent. per month. As between Mrs. Suhr and Ruffen, he was merely a surety, and received no part of the money borrowed. Before any payment was made on this note, to wit, October 1, 1887, Ada Suhr indorsed and delivered to the defendant the following instrument:

"No. 954. San Francisco, Sept. 28, 1887. Three days after sight, pay to the order of

Ada Suhr, administratrix of the estate of Ferdinand C. Suhr, deceased, ten thousand dollars, and charge to the account of loss under policy number 62,670. F. C. Suhr.

"To New England Mutual Life Insurance Co., Boston, Mass.

"$10,000. Henry K. Field,
"General Agent."

This instrument was indorsed by Mrs. Suhr as administratrix, etc. Before, and at the time of this transaction, and until December, 1890, Ada Suhr had a running private account, and also a distinct account as administratrix, with the defendant bank. On July 6, 1891, she commenced this action, alleging that, as administratrix, she indorsed the draft on the insurance company, and deposited it with the bank, merely to be collected for the use of the estate of F. C. Suhr; that the bank had collected the full sum for which it was drawn, but had paid to the estate of F. C. Suhr only the sum of $3,343 thereof,—and praying judgment for the balance, of $6,657. The answer of the defendant is to the effect that the bank purchased the draft from the administratrix, and paid her therefor, at the time of the purchase, the full face value thereof, and denies that said draft was ever taken or received by defendant for collection for the use of said estate. Pending the action the administratrix died, and the appellant, Charles R. Gray, having been appointed administrator, was substituted as plaintiff on March 8, 1892. The court found that the answer of defendant, as above stated, was true, and adjudged that plaintiff take nothing by the action. Plaintiff appeals from the judgment, and from an order denying his motion for a new trial.

1. The appellant contends, in effect, that the answer contains no defense to the action, and consequently that all findings by the court in conflict with the complaint are outside of any material issue, and that plaintiff is entitled to judgment on the pleadings. This point is founded upon an alleged inconsistency of that part of the answer above stated with certain denials therein. But I perceive no such inconsistency. There is a denial, for want of information or belief, that Field executed the draft for the use and benefit of the estate of Suhr, deceased; but this, though apparently inconsistent with the face of the draft, is not inconsistent with the affirmative allegation in the answer that defendant purchased and paid for the draft, such as it was. Besides, the affirmative part of the answer is stated as a further and distinct answer, introduced by the following formula: "Further answering, defendant alleges." There was no demurrer to the answer, and no motion to strike out any part of it. I think the pleadings and findings support the judgment.

2. Appellant contends that the evidence is insufficient to justify the findings. It appears that the business of transferring to the bank the draft on the insurance company was transacted by and between Ada Suhr and Mr. Morse, who was then cashier of the bank, and who died before the trial of this action, but when he died does not appear. It does appear, however, that he ceased to be cashier of the bank on the last day of November, 1887, one month after the transaction, and was succeeded by Mr. Zombro, who was general bookkeeper at the time of the transaction. Mr. Zombro and the president of the bank, Mr. Drew, were called as witnesses for the plaintiff and produced all the books of the bank called for by plaintiff. John Ruffen and the appellant also testified on behalf of plaintiff, but no evidence appears to have been introduced by defendant. The testimony of the witnesses and the documentary evidence strongly tend to prove that defendant purchased the draft, and paid for it $3,343 in cash, and, with the consent or at request of the administratrix, credited $6,657 on her private note made by herself and Ruffen, as above stated. Assuming that the crediting of $6,657 on the note with the consent of the administratrix was valid and lawful, as between her and the bank, the evidence clearly shows that the defendant was not indebted to the estate of F. C. Suhr, nor to Ada Suhr, individually, in any sum, at the time this action was commenced. The substance of appellant's contention, however, is that, inasmuch as the face of the draft notified defendant that it was held by Ada Suhr as administratrix in trust for the estate of F. C. Suhr, the application of it, or any part thereof, even at her request, to the payment of her private debt, made the defendant an involuntary trustee of the draft, to the extent of its application to the payment of her debt; citing section 2243 of the Civil Code, which provides: "Every one to whom property is transferred in violation of a trust holds the same as an involuntary trustee under such trust, unless he purchased it in good faith and for a valuable consideration." But the complaint does not state, nor the evidence tend to prove, a cause of action under this rule. In order to charge the defendant as an involuntary trustee of the draft, or of the money applied on the Ruffen note, it should appear that the administratrix (the original trustee) was in default, to the detriment of the cestuis que trustent (heirs or creditors). If the administratrix had fully accounted, or was able, ready, and willing to account, to the estate, at all proper times, for all property and money for which she was accountable, as it must be presumed she was, then there was no breach of trust on her part, to the injury of the estate or the heirs of F. C. Suhr, and consequently no beneficiary of the original trust has any cause of action against her, either as trustee or otherwise. And since an involuntary trust can be enforced against persons who come into possession of trust property only to the same extent, in the

same manner, and with like force and effect as against the original trustee, there is no cause of action against the defendant, unless the administratrix has failed to account for that part of the proceeds of the draft which was applied to the payment of her private debt. Lathrop v. Bampton, 31 Cal. 17; Theller v. Such, 57 Cal. 460; Pom. Eq. Jur. § 1048. For aught that appears, she may have advanced and paid on account of the estate, from her private funds (possibly from the $10,000 borrowed on the Ruffen note), a sum equal to that applied to the payment of said note. Besides, it is to be presumed, prima facie, that she obeyed the law and performed her official duty, and consequently that all the property and money of the estate for which she was accountable at the time of her death passed into the possession of her successor, the appellant (Code Civ. Proc. § 1963), and there is neither allegation nor evidence to the contrary. The sole object of the action, disclosed by the complaint, is the recovery of money alleged to have been collected by defendant from the New England Mutual Life Insurance Company for the use of the estate of F. C. Suhr, under a special contract with the administratrix. Having failed to prove the alleged contract, appellant seeks to recover upon a constructive involuntary trust, ex maleficio, as to which there is not the slightest intimation in the complaint. Nor is the evidence sufficient to raise such a trust, since no party appears to have been injured by the transactions of which it is said to have been constructed, while it does appear that its effect would be to compel the defendant to pay the sum demanded twice,—an effect never sanctioned by a court of equity, except in favor of a legal right or superior equity of another party. I think the judgment and order should be affirmed.

We concur: BELCHER, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

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105 Cal. 1

FELIZ et al. v. FELIZ et al. (No. 15,250.)

(Supreme Court of California. Dec. 5, 1894.)

TENANTS IN COMMON—ADVERSE POSSESSION—EVIDENCE OF OUSTER—EJECTMENT—INSTRUCTIONS.

1. When a tenant in common is in possession and exercises acts of ownership of an unequivocal character, and of such a nature, as, by their own import, to give notice to the other cotenants that an adverse possession and a disseisin are intended to be asserted against them, then the possession of such tenant in common is adverse.

2. Where, in ejectment between cotenants, the jury are instructed as to what will constitute adverse possession by one cotenant, it is not error to charge generally as to the effect of adverse possession.

3. Adverse possession by a cotenant, as against the other cotenants, is not affected by the mere fact that one of the latter resided with him on the land, as a member of his family.

4. In ejectment, an instruction that if the jury find for plaintiff their verdict will be that they find for plaintiff, for the recovery of the possession of the premises described in the complaint, is not objectionable, as requiring the jury to give a verdict for the whole premises, where the answer raises no question as to the amount of land plaintiff might recover, and defendant asks for no instruction with reference to the amount of such land.

5. Evidence that one of several coheirs entered into occupancy of the premises owned by their ancestor, inclosed them with a fence, cultivated them, and rented them to others, appropriating the entire rents to himself, and claimed the land as his own, paying the taxes thereon, and taking conveyances purporting to be of the entire tract, and executing a mortgage thereon to secure his own debt, supports a finding that he claimed the land as his own, to the exclusion of his cotenants.

Department 1. Appeal from superior court, Santa Cruz county; John Reynolds, Judge.

Ejectment by Clara Feliz and others against Frank Feliz and others. Judgment was rendered for plaintiffs. On motion of defendants, a new trial was granted, and plaintiffs appeal. Reversed.

Joseph H. Skirm, for appellants. Charles B. Younger and Spalsbury & Burke, for respondents.

HARRISON, J. The plaintiffs recovered judgment against the defendants for possession of certain lands in the city of Santa Cruz, and a motion for a new trial, having been made by the defendants, was granted by the court "upon the sole ground" that the court erred in giving certain instructions to the jury. From this order the plaintiffs have appealed.

The lands in controversy are included in the tract granted by congress to the town of Santa Cruz, July 23, 1866, and were conveyed by the town to Juan Jose Feliz, March 4, 1867. Juan Jose Feliz died intestate in June, 1871, leaving several heirs at law; but administration upon his estate was not had until April, 1885, when the defendant Frank Feliz was appointed administrator. Miguel Feliz, one of the sons of Juan Jose Feliz, lived for many years on a portion of the premises in controversy, claiming them as his own, and after his father's death went into occupancy and possession of the entire tract of land in controversy, and held possession of the same until July, 1885, when he was ejected therefrom by the defendants. The plaintiffs are children of Miguel, and their title to the premises is derived by means of conveyances from him. September 19, 1874, the widow of Juan Jose Feliz, who, after the death of her husband, continued to reside on the premises with her son Miguel, made a conveyance of the entire tract to him, and thereafter continued to reside with him, as a member of his family, until he was dispossessed thereof by the defendants. Miguel also received conveyances of the premises from others of the heirs of his father, but not from all of them.

The court gave to the jury the following instructions: "(1) The jury are instructed that when a cotenant enters and exercises acts of ownership upon lands in which he has a cotenant, the intent with which such acts are performed must in all cases determine whether or not they amount to an ouster, and when a tenant in common is in possession, and exercises acts of ownership of an unequivocal character, overt and notorious, and of such a nature as, by their own import, to impart information and give notice to the other cotenants that an adverse possession and a disseisin are intended to be asserted against them, then the possession of such tenant in common is adverse; and if such a possession is actual, adverse, open, notorious, and exclusive, and continuing for the period of five years, it extinguishes the right of the party having the true title, and vests a perfect title in the adverse holder, provided that such possession existed for five continuous years before the 1st day of April, 1878. But if such possession did not exist for five continuous years before the 1st day of April, 1878, then the person so in possession of the land must have paid all the taxes, state, county, or municipal, which had been levied and assessed upon such lands during all of said period of five years subsequent to the 1st day of April, 1878, in order to vest a perfect title in such adverse holder. (2) The jury are instructed that an adverse, open, notorious, exclusive, and continued possession for the period of five years extinguishes the right of the party having the true title, and vests a perfect title in the adverse holder, if such possession had so existed for five years before the 1st day of April, 1878; and if such possession existed for five years, and was not completed before said 1st day of April, 1878, then the person so in possession of the land must have paid all the taxes, state, county, or municipal, which had been levied and assessed upon such land during the whole of said last-named period of five years subsequent to the 1st day of April, 1878."

There was no error in giving these instructions. Unger v. Mooney, 63 Cal. 586; Bath v. Valdez, 70 Cal. 350, 11 Pac. 724; Oglesby v. Hollister, 76 Cal. 136, 18 Pac. 146; Winterburn v. Chambers, 91 Cal. 170, 27 Pac. 658. The plaintiffs based their right of recovery upon an adverse possession of the lands in controversy by Miguel, while it was claimed on the part of the defendants that, as he was a cotenant with the other heirs of his father, his possession inured to their benefit; and, for the purpose of meeting this contention, evidence was given on behalf of the plaintiffs tending to show that the possession of Miguel was accompanied by acts hostile to and inconsistent with any claim of his cotenants, and with such open disavowal of their claim as to give them notice that his possession was adverse, and thereby constituted an ouster sufficient to set the statute of limitations running. It was shown that upon the death of his father he entered into the occupancy of the premises, caused them to be inclosed with a fence, cultivated them himself during many years, and in other years rented them to others, and appropriated the entire rents to himself, claimed the land as his own, paid the taxes thereon, took conveyances purporting to be of the entire tract, and executed a mortgage thereon to secure his own debt. These were acts of ownership on his part inconsistent with a recognition of the claim of any other to the land, and were of sufficient notoriety to have presumptively been brought to the notice and knowledge of his cotenants; and the jury were authorized to determine from these acts that they were notified that he claimed the land as his own to the exclusion of his cotenants, and thereby ousted them therefrom. Such possession, when continued for five years, accompanied with the payment by him of the taxes thereon, extinguished the right of his cotenants therein.

The second of the foregoing instructions is substantially a repetition of the latter part of the first, and while it gives in general terms the rule of law necessary to establish a title by adverse possession, and, if taken by itself, would not be complete when such question is between cotenants, yet it is to be read in connection with the prior instruction, in which the rule of adverse holding between cotenants was properly given to the jury. The instructions given to a jury by the court are to be considered as a whole, and if, when so considered, the law is correctly stated, as applicable to the case before the court, the jury will be deemed to have properly applied the law as thus stated. It is not to be assumed that the jury have disregarded one part of the instruction any more than another, but they will be assumed to have given full consideration to each and every proposition of the law that the court has laid before them. Stephenson v. Pacific Co., 102 Cal. 143, 34 Pac. 618, and 36 Pac. 407. There is nothing inconsistent in the two instructions, nor does either of them incorrectly state the law. The second instruction states the effect of adverse possession upon the claim of the holder of the record title, while the former states what constitutes adverse possession as against a cotenant. Similar observations may be made with reference to the second instruction and its relation to the fact that prior to 1866 the title to the land was in the United States. The jury were instructed that prior to July 23, 1866, there could have been no adverse possession of the land, and they must be deemed to have given this rule its proper consideration in connection with the other instruction upon the question of adverse possession.

The fact that his nephew, Antone Feliz, continued to reside with Miguel upon the premises did not prevent Miguel's possession from being adverse. It does not appear that Antone questions the sufficiency of the ouster, or the adverse holding by Miguel, nor do the appellants claim that it could be questioned by him or on his behalf upon any other ground than that he continued to reside with Miguel, as a member of his family, after Miguel had entered into possession of the land. Merely being a member of Miguel's family would not necessarily imply that Antone was in such possession of the land as to prevent Miguel from acquiring title by adverse possession, or that his relation to the land, or to its possession by Miguel, was such as to prevent the acts of Miguel from constituting adverse possession against him; and it may be added that by being on the premises the acts of Miguel, by which his hostile claim was asserted, would more readily be brought to his notice, and give him an opportunity of asserting his own claim in opposition thereto. Miguel's mother ceased to be his cotenant by her conveyance to him in 1874.

In giving to the jury the different forms of verdict which they might find, the court said to them: "The jury are instructed that, if their verdict be in favor of the defendants, the form of their verdict will be, 'We, the jury, find for the defendants'; if for the plaintiffs, their verdict will be, 'We, the jury, find for the plaintiffs for the recovery of the possession of the premises first described in the complaint, and for the sum of —— dollars damages for the withholding thereof by said defendants from said plaintiffs.'" It is now claimed that this was instructing the jury with respect to a matter of fact, and required the jury to give their verdict for the whole of the premises, and against both of the defendants, whereas it had been shown that Juan Jose Feliz had, prior to his death, conveyed a certain part of the premises to one Kirby. There was, however, no evidence that Kirby had ever been in possession of the land at any time after the death of Feliz. The court was not instructing the jury with reference to any contested matter of fact, but was merely directing them in regard to the "form" of their verdict. The defendants had not claimed in their answer any limitation upon the amount of land that the plaintiffs might recover, nor did they ask for any instructions with reference to such limitation. There was evidence before the jury tending to show the plaintiffs' right of recovery for the whole of the first parcel of land described in the complaint; and, if the defendants had considered that there was also evidence which tended to limit the plaintiffs' right of recovery to a portion of this tract, they should have asked from the court an instruction to the jury to that effect. But they were not at liberty to go to the jury upon the proposition that the plaintiffs had failed to establish any right of recovery, and, after receiving an adverse verdict, insist that the jury should have considered whether the evidence did not require a limitation upon the extent of this recovery in a respect not brought to their attention. There was evidence from which the jury were authorized to find against both of the defendants. Both of them had united in the ejection of Miguel from the land, and Majors testified that since that time both of them had been in possession of the land. Whether the defendant Maria had been in her grandmother's employ as a nurse, in her lifetime, was immaterial. Her grandmother had died long before the commencement of the action, and it was not claimed that her relation to her codefendant was at any time that of his servant or employé.

There was no error in excluding from evidence certain "statements" from the assessor's office. The statements were not signed by Miguel, nor was it shown that they were made under his direction, or with his knowledge. Neither does it appear that they were accompanied by an affidavit or oath purporting to have been made by him. The inventory and appraisement made in the estate of Juan Jose Feliz, in the year 1885, as well as the petition for a homestead by his widow in that year, could have no effect in determining whether the possession of the land taken by Miguel in 1871 was adverse. The order is reversed.

We concur: GAROUTTE, J.; VAN FLEET, J.

4 Cal. Unrep. 903

## WELLS v. LAW et al. (No. 15,535.)

(Supreme Court of California. Dec. 10, 1894.)

AMENDMENT OF PLEADINGS.

1. The action of the court in allowing plaintiff to amend by inserting matters not set out in the notice of amendment served on defendants is not reversible error, where defendants were not injured thereby.

2. In an action for breach of a written contract of employment, plaintiff may amend the complaint to show that her discharge before the time agreed on therein had caused a loss of certain profits, which, by a collateral oral agreement with defendant, she was entitled to receive from each customer, such loss being in the nature of consequential damages.

Department 2. Appeal from superior court, Alameda county; F. W. Henshaw, Judge.

Action by Alice Wells against Hartland Law and Herbert E. Law for breach of contract. Judgment for plaintiff, and defendants appeal. Affirmed.

John Flourney, for appellants. Gibson & Wood, for respondent.

PER CURIAM. Appeal from the judgment and an order denying a new trial. This action was brought to recover damages for the alleged breach of a written contract, which is set out at length in the complaint.

Plaintiff alleges: That the defendants were engaged in business at San Francisco under the name of the Viavi Company, the business consisting in the manufacture and sale of a nostrum or remedy known as "Viavi" and other preparations, and furnishing treatment by administering such preparations and by giving baths. November 17, 1891, defendants employed plaintiff and one Louise Keach in their said business, for the term of one year, on terms stated in the agreement. Plaintiff entered upon the performance of her contract, and, with the said Keach, was appointed by defendants as their agent in Alameda county. That, besides the consideration expressed in the agreement, the employés were to have the privilege of collecting for their own use from patients the sum of three dollars for each bath given in the treatment. That, with the consent of defendants, Mrs. Keach assigned to plaintiff her interest in the contract and business. That on the 29th of July, 1892, defendants took from plaintiff her business, and refused thereafter to furnish to her the remedies, or to permit her to conduct the business. That she thereby lost profits which she would have made under the contract, and the incidental profits from giving the baths. She recovered a verdict, and the defendants appeal.

1. After the defendants had answered, plaintiff, upon notice, asked leave to amend her complaint. The court granted leave to amend in the respects named in the notice, and also in respects in which no mention was made in the notice. It does not appear that defendants were injured by this order. Even on the trial, the amendments might have been on just terms. As no injustice was done to the defendants, we do not think they have any cause to complain.

2. The amendment complained of consisted in adding to the original complaint the allegation of the compensation for baths. Nothing is said in regard to this in the written contract. It is contended that this is adding to the written contract. Whether, by parol, an additional consideration can be established, under the circumstances, it is not necessary now to decide. It is not necessary to regard it in that light. It sets up an incidental advantage or profit which she was able to realize by reason of the contract, and which she lost by its breach on the part of defendants. It is in the nature of consequential damages. There was a very substantial conflict in the evidence upon all the issues in the case. Indeed, except as to the matter of damages, the preponderance seems very plainly in favor of the verdict. As to damages, no certain determination was possible. Plaintiff introduced evidence tending to show that her profits were regularly and rapidly increasing. What she would have realized is to some extent a matter of conjecture, but the case is one in which she was entitled to an estimate of probable profits.

There was no issue in the case in regard to the removal of the office. The circumstances attending the removal were probative facts, bearing upon the issue as to whether defendants had discharged plaintiff from their employ. Upon that issue the preponderance of the evidence was decidedly with the plaintiff.

Appellant attributes to the trial judge certain peculiar ideas in regard to the power and duty of a superior judge in granting new trials. It is said that the judge was of the opinion that he should not set aside the verdict of the jury, even when it was clear to his mind that the verdict was against the weight of evidence; that he therefore refused a new trial because he thought he had no jurisdiction. This court has frequently decided against the alleged views of the learned judge, and we find no evidence in the transcript of such fact, and it is disputed by respondent. We must presume he did his duty. The judgment and order are affirmed.

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**105 Cal. 20**

## JORY v. SUPREME COUNCIL, AMERICAN LEGION OF HONOR, et al.

(No. 15,565.)

(Supreme Court of California. Dec. 7, 1894.)

BENEFIT INSURANCE — SUBSTITUTION OF BENEFICIARY—EQUITIES IN FAVOR OF FIRST BENEFICIARY—ESTOPPEL.

1. Where the by-laws of a benefit insurance society allowed the insured to change the beneficiary in the certificate, on surrendering it and complying with certain rules, and the insured complied with all the other rules, but did not surrender the certificate, because the first beneficiary had possession thereof, and refused to give it up, equity will, as between the rival beneficiaries, consider the rules complied with, and the substitution made.

2. Where, by the rules of the insurer, the insured has a right to make a substitution of beneficiaries on surrendering the original certificate, equity will not allow a beneficiary who has possession of the certificate, and refused to surrender it, with intent to prevent such substitution, to profit by her own wrong in preventing a compliance with the rules.

3. If sound equities exist in favor of the original beneficiary of an insurance certificate, the insured is estopped to substitute a second beneficiary, whose status is purely that of a volunteer.

4. In the absence of contract, the payment of insurance assessments by the beneficiary is gratuitous, and creates no equities in his favor which are available against one afterwards substituted as beneficiary.

5. Where there was sufficient evidence of a demand for a return of the certificate, aside from the statements of the insured, the admission of such statements in evidence is not prejudicial.

Department 1. Appeal from superior court, city and county of San Francisco; Charles W. Slack, Judge.

Action by John Halsey Jory against the Supreme Council, American Legion of Honor, Harriet Mary Sophia Jory, and others to determine the ownership of a benefit certificate. Judgment for plaintiff, and defendant Jory appeals. Affirmed.

John H. Dickinson and Henry E. Monroe, for appellant. H. W. Hutton, for respondents.

GAROUTTE, J. The right of ownership to the proceeds of a $2,000 benefit certificate, issued by a mutual benefit society known as the "American Legion of Honor," forms the subject of this litigation. The society is not an active party to the litigation, having paid the money into court, and being entirely satisfied with the court's adjudication as to whom it belongs. The respondent and appellant are brother and sister, and the beneficiary certificate was taken out by the mother, Emily Kate Jory, and made payable upon her death to the daughter appellant, or any other member of the mother's family whom she might thereafter in her lifetime designate. The by-laws of the society provide that members may, at any time when in good standing, surrender their benefit certificates, and have new ones issued, payable to such beneficiary dependent upon them as they may direct, subject, however, to the provisions of section 2: "Such change to be made upon petition to the supreme secretary, signed by the member desiring to make the change, attested by the secretary of the subordinate council, and having the seal of the subordinate council attached, substantially in accordance with the form prescribed in this section. * * * The fee to be paid for a new certificate issued shall be one dollar, and must accompany the petition. No change of beneficiary shall be made in any other manner than herein prescribed, * * * provided that, in case of the loss or destruction of the old certificate, satisfactory evidence of such loss or destruction shall be produced, by affidavit or otherwise, before a new certificate be issued. * * * No act of a subordinate council in the admission of any member to membership in this order, and no act of any member done for the purpose of changing his or her beneficiary, shall be recognized by or deemed binding upon the supreme council, or as entitling the person admitted, or the new beneficiary named, to any benefits from this order, unless such acts shall be in strict accordance with the provisions contained in the laws and constitution prescribed by the supreme council, nor until such acts have been ratified and approved by the supreme council." Several years after this certificate was issued, the mother became desirous to change the beneficiary named therein, to wit, the appellant daughter, and to substitute therefor the respondent son; and in furtherance of such desire, and for the purpose of complying with the provisions of the laws of the society, she attempted to secure control of the original certificate, which was then in the keeping of her daughter appellant, in order that she might surrender the same to the society; but she was unsuccessful in this endeavor. Upon this question the court found the fact to be that "she [the daughter] refused to redeliver the same to the said Emily Kate Jory, although frequently requested so to do by her, as alleged in said amended complaint, but kept and concealed the same for the purpose of endeavoring to prevent her said mother from designating the plaintiff herein as the beneficiary thereunder, and securing the said $2,000 herself, and so kept and concealed it until after her mother's death, as alleged in the amended complaint on file herein." And this finding is supported by the evidence. Being unable to secure the original certificate, the mother regularly took all the other steps required by the laws of the order for the purpose of changing the beneficiary, and accompanied her application for a change with an affidavit stating the reason why the original certificate was not surrendered, and further stating therein that she made her son, the respondent herein, her sole beneficiary under said certificate. The society still refused to issue the new certificate, upon the ground that the original was neither lost nor destroyed, and yet had not been surrendered. Matters remained in statu quo until the death of the mother, when this litigation arose between the children, and was decided by the trial court in favor of the son.

Laying aside any question of interest in the original beneficiary certificate resting in the daughter by virtue of matters arising in parol between the mother and the daughter, we are clear that, as between the original beneficiary, the daughter, and the proposed new beneficiary, the son, the proceeds of this policy belong to the son. As between them, there was a substitution of beneficiaries in the eyes of a court of equity. If the Legion of Honor was here as an aggressive party, insisting, as against the claims of the son, upon a strict compliance with its by-laws before it could be compelled to take money from its treasury, and possibly a different question would be presented; but, as between these parties litigant, the court will administer justice from the standpoint of equity, and bring to the solution of this question those broad principles upon the basis of which equity always deals. The general rule unquestionably is that a change of a beneficiary cannot be made by the insured unless a substantial compliance with the laws and regulations of the society is had; yet courts of equity have recognized various exceptions to this general principle, and the facts of this case bring it squarely within one of the well-recognized exceptions. This exception is builded upon the principle that equity does not demand impossible things, and will consider that done which ought to have been done; and is embraced within the proposition that, when the insured complies with all the requirements of the rules for the purpose of making the substitution of beneficiaries with which he has the power to comply, he has done all that a court of equity demands. See Supreme Conclave v. Cappella, 41 Fed. 1, approved in McLaughlin v. McLaughlin (Cal.) 37 Pac. 865; Grand Lodge v. Child, 70 Mich. 164, 38 N. W. 1; Isgrigg v. Schooley, 125 Ind. 95, 25 N. E. 151; Marsh v. American Legion of Honor, 149 Mass. 512, 21 N. E. 1070. The present case comes squarely within this exception, and in principle is identical with some of the cases we have cited. For the purpose of changing the beneficiary, the insured complied in detail with every rule of the society, save the single one of surrendering the certificate, and this she was unable to do after using due diligence to that end. Impossibilities are not required, and if the certificate had been lost or destroyed, and thus the surrender made impossible, equity would have treated the surrender as duly made; and in legal effect the certificate was lost in this case. But there is another well-settled principle of equity equally fatal to appellant's claims. No person can take advantage of his own wrong. No man is allowed to come into a court of equity and reap beneficial results from his own iniquity. If Mrs. Jory had the right to make the change of beneficiaries, and did all that it was possible for her to do towards making such change, but was prevented by the acts of appellant from a consummation of her intentions, then appellant will not be allowed to derive any benefit from her fraudulent conduct. If a fraud of her own practicing prevented a legal substitution of beneficiaries, then, as against her, an equitable substitution will be held to have taken place. If the insured, Mrs. Jory, had a legal right to make a change of beneficiaries at the time she attempted so to do, then the maxims of equity which we have applied to the facts of the case dispose of this litigation fully and entirely. But, as a further ground of defense to the action, it is insisted by appellant that her mother had no such right. Appellant says she had a vested interest in the certificate, and rights under it which could not be taken away from her by a legal substitution of beneficiaries, even if such substitution had been made by the insured. Under this claim of the appellant the question as to an actual substitution would seem to be immaterial; for, if the insured had proceeded under the rules and laws of the order, and obtained a substitution of beneficiaries perfect in all its parts, still, as between the parties here litigating, it would not be conclusive as establishing title to its proceeds in the holder thereof. For we are in a court of equity, and administering justice to these parties according to their equities.

The principle here under consideration is the most recent growth of mutual benefit association law, a branch of the law which in itself is young in years; and we know of nothing in the law which deprives a person contemplating membership in a mutual benefit association from so contracting with the proposed beneficiary as that, when such certificate is issued, equities in favor of the beneficiary are born, of such merit that the insured member has no power to defeat them. The few authorities shedding light upon this question declare the rights of the beneficiary are such as to create a vested interest in the proceeds of the certificate. Smith v. Society, 123 N. Y. 85, 25 N. E. 197; Nix v. Donovan (City Ct. N. Y.) 18 N. Y. Supp. 435; Maynard v. Vanderwerker (Sup.) 24 N. Y. Supp. 932. Possibly this is not a correct declaration of the principle of law applicable to the conditions; for a second beneficiary might be substituted, wholly innocent of the contractual relations existing between the insured and the first beneficiary, and his substitution give rise to the creation of equities in his behalf all-controlling upon a judicial disposition of the rights of the parties concerned. If the original beneficiary's interest was vested, no subsequent conditions could possibly arise which would defeat his right; and, for this reason, we think it can hardly be termed a vested interest. The whole matter seems to be rather a question of equities, and the stronger and better equity must prevail. The illustration we have used does not arise in the present case, for we here have no clash of equities. The second beneficiary possesses no equities. He is a volunteer pure and simple. His status during the life of the insured is well described in Smith v. Society, supra, where the court said: "The designation was in the nature of an inchoate or unexecuted gift, revocable at any moment by the donor, and wholly within his control." We think a court of equity should declare the insured estopped from substituting a second beneficiary of the character here involved, whenever sound equities are extant in favor of the first beneficiary; and, such estoppel being in force against the insured, it is equally in force and may be successfully urged against the volunteer beneficiary. The respondent is a volunteer beneficiary, and it only remains for us to ascertain from the record what the appellant's equities are, as disclosed by the evidence. She claims by her answer that she and her mother entered into a mutual agreement whereby each should join a mutual benefit society and make the other a beneficiary under the certificates issued, and that said agreement was carried out. Appellant further alleges that she paid all initiation fees, dues, and assessments upon the benefit certificate taken out by her mother. If these moneys were paid out by appellant under and by virtue of a contract between the parties, and in pursuance of this agreement and scheme for mutual insurance, then she has equities which entitle her to recognition in a court of justice, for it would be gross imposition and fraud upon her to allow the insured to change her beneficiary under these circumstances. Though wrong and injustice form an unpleasant sight to a court of equity, yet that court will never close its eyes because the sight is an unpleasant one, but rather, with vision all the keener, will reach out its strong arm to protect the wronged and innocent party.

In this case, after hearing all the evidence, the court made its findings of fact, holding that appellant failed to prove either that there was a contract of mutual insurance entered into by the mother and the daughter, or that she, the daughter, paid the assessments, dues, etc., upon her mother's certificate, other than the small sum of $14. In the absence of a contract of some character inuring to the benefit of the beneficiary, the mere fact of payment of assessments by such a one is not sufficient to create equities in his favor, for the courts of the land say such payments are to be treated as gifts; and in the present case the basis of whatever rights to which the appellant may be entitled is the contract of mutual insurance. But the evidence of appellant upon both branches of her claim is weak, vague, and unsatisfactory. The mother, sister, and a younger brother were living together. They all earned more or less money by their labors, which for years was placed in a common fund, and all outlays for living expenses, payment of assessments upon these certificates, and incidental expenses were taken therefrom. It is not apparent that the appellant had any money of her own. She had no independent source of revenue, and after the mother's death the source from which the money to meet the assessments was drawn is not clearly located in her. As to the contract for a mutual insurance, the evidence is even more unsatisfactory than it is as to the source of the funds from which the assessments were paid; and, without entering into a detailed review of the evidence, we will say that the finding of the court in this regard is satisfactory to us. These matters are set up in the answer as an affirmative equitable defense to plaintiff's cause of action, and the burden rested upon her to prove them by a preponderance of evidence; and, upon a consideration of the insufficiency of the evidence to support the findings of fact, we are not prepared to say that the evidence even preponderates in her favor. The evidence bearing upon this branch of the case was confined almost entirely to the testimony of the parties interested, and their prior statements and admissions. The witnesses were before the court, and we think it pre-eminently a case where great deference should be shown to the judgment of the trial court upon the weight of evidence. For these reasons, we will not disturb the findings of fact, and appellant's claim of existing equities has failed for want of proof.

It is stated that the court committed an error in admitting in evidence statements made by Mrs. Jory, prior to her death, to the effect that she had asked appellant several times for the certificate, and that appellant would not give it up. Conceding the evidence objectionable, as being hearsay, still no harm to appellant arose by its admission. There is an abundance of other evidence in the record showing a demand upon her for the certificate, and substantially nothing to the contrary. While she may have formally denied in her answer the allegation of demand made in the complaint, and while she may also have stated at the trial that no demand was made upon her, the whole record is opposed to the statement, and the whole theory of her own case, both in pleading and evidence, is opposed to it; for her case rests upon the claim that her mother was not entitled to the certificate, but that it was her own separate property, of which she was entitled to the absolute and exclusive control. She does not state in her evidence that she would have given it up to her mother if it had been demanded, but, upon the contrary, it is conclusively shown, both by her pleading and evidence, that she would not have done so if a demand had been made. Under these circumstances, the statements of her mother as to a demand were not prejudicial, even conceding them to be erroneous. It is ordered that the judgment and order be affirmed.

We concur: HARRISON, J.; VAN FLEET, J.

105 Cal. 70

## WATSON v. EDWARDS et al. (No. 15,590.)

(Supreme Court of California. Dec. 12, 1894.)

MORTGAGOR — DEED TO MORTGAGEE—VALIDITY—TENANTS IN COMMON—EFFECT OF CONVEYANCE.

1. In order to sustain a deed by a mortgagor to the mortgagee of the mortgaged premises in satisfaction of the debt, a new consideration, passing from the mortgagee to the mortgagor, need not be shown.

2. Where tenants in common execute a trust deed of their land, and the trustee, in accordance with his powers, mortgages and then sells an undivided interest in the land, a purchase by one of the tenants in common from the trustee's grantee of such interest will not inure to the benefit of his former cotenants.

Department 2. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

Action by Elizabeth Anne Watson against George D. Edwards and others to establish a trust in land. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

Pierson & Mitchell and Stanley, Stoney & Hayes, for appellant. E. R. Taylor, for respondents.

McFARLAND, J. This action was brought to have it adjudged that plaintiff is the equitable owner of the undivided one-fourth of each and all of certain lots of land in San Francisco; that defendant Edwards holds the legal title to the said fourth of some of said lots in trust for plaintiff, and that defendant Joseph F. Clark so holds the legal title to the fourth of the rest of said lots; and that, after an accounting, and the payment of indebtedness found to be due from plaintiff, the said Edwards and Clark convey to plaintiff the said undivided fourth of said lots so held by them respectively. Other persons are made defendants as claiming some interest in the premises, or as being necessary parties. The court below gave judgment for defendants, and plaintiff appeals from the judgment. There was also an attempted appeal from an order denying a motion for a new trial, but, as the record shows, this latter appeal was not perfected.

The facts necessary to an understanding of the case are these: On November 20, 1870, the plaintiff, the defendant Mary E. Bucknall, and John C. Davis, who were brother and sisters, were the owners as tenants in common of certain lands, which included the said lots involved in this action; and Eugene L. Sullivan was an owner in common with them in a part of said lands, and was also the owner of certain other lands in San Francisco. On that day—November 20, 1870—the said plaintiff, Bucknall, and Davis conveyed to said Sullivan all their interests in said lands; and on the same day two other instruments in writing were executed by and between said four persons, by which it was declared that the lands above referred to, including the lands which said Sullivan held in severalty, should all be held by said four persons as tenants in common, each having an undivided one-fourth; that the title should remain in Sullivan, and he should have absolute management of the property; that he should have a power irrevocable to mortgage or to sell and convey any of said property "upon such terms and conditions * * * as he shall think fit." The property was incumbered at the time with a large indebtedness; and it was declared that Sullivan held the property in trust "to administer, bargain, sell, convey, mortgage, or otherwise incumber and dispose of the same, or any estate or interest therein," to discharge out of the rents and profits all indebtedness "now or hereafter to be a lien on the same," and at some future day to make division and partition among said parties. The other three were near relatives of Sullivan, and treated by him as his children, and he had been in possession of and had managed said property since the death of their father in 1850, and after the date of said instruments he continued in the possession and management thereof until his death, which occurred March 26, 1885. On January 23, 1879, and while the relations of said four persons with respect to said property were as above stated, and said trust still existed, the said Sullivan, in furtherance of the purposes of said trust, executed to defendant Joseph F. Clark a deed of conveyance of that part of said property which is involved in this action. The deed was upon its face absolute, and conveyed title in fee to Clark; but it was intended at the time as security for money borrowed by Sullivan, evidenced by a promissory note made by the latter to Clark, and Clark gave to Sullivan a paper writing called in the record a "defeasance," of even date, in which he promised to reconvey the property to Sullivan upon the repayment of said money. The deed was recorded, but the defeasance was not. Afterwards, Sullivan not having paid the interest, nor having kept the taxes on the land paid, Clark demanded payment, whereupon Sullivan informed Clark that he could not pay him in money, but would give him the land for the indebtedness. This Clark was reluctant to do, as he believed the land to be worth less than the amount of the indebtedness; but, being informed by Sullivan that he could get nothing else, he finally agreed to take the land for the debt. Thereupon Clark returned the promissory note to Sullivan, Sullivan surrendered to Clark the said paper writing or defeasance, and Sullivan was discharged by Clark of all said indebtedness. Thereafter said Clark, until his conveyance of the land as hereinafter stated, possessed said land as his own, and spent money upon the same, and Sullivan was not indebted to him in any sum of money, and made no claim to any part of said land. Clark was in the position of an innocent purchaser without notice. The money borrowed by Sullivan was not for his private purposes. Afterwards the defendant Mary E. Bucknall purchased from said Clark all the property that had been conveyed to him as aforesaid by Sullivan, except certain lots, which he retained. Mrs. Bucknall borrowed the money to pay for the land from defendant Edwards; and by agreement Clark conveyed the land to defendant Childs, who was to hold it as security to Edwards for the money borrowed by Bucknall. By further agreement Childs conveyed to Edwards, who was still to hold it as such security, but by consent the conveyance to Edwards was not recorded. Mrs. Bucknall paid the full value of the property at the time of her purchase and bought it for herself alone. The real contest in the case is between the plaintiff and Mrs. Bucknall as to the one-fourth of the land purchased by the latter from Clark, and between the plaintiff and Clark as to the one-fourth of the lots retained by Clark. There are only two questions in the case requiring special notice.

1. Appellant contends that he should have had judgment, because the original transaction between Sullivan and Clark was, in law, a mortgage, and that its character as a mortgage was not changed, and could not have been changed, by the subsequent acts of a surrender of the defeasance, the yielding up of the note, the discharge of the debt, etc.;

and that, in order to make such a transfer valid, there must be some new consideration from the mortgagee to the mortgagor. This contention cannot, in our opinion, be successfully maintained. A mortgagor may sell and convey all his right and interest in the mortgaged premises to the mortgagee where the transaction is fair, honest, and without fraud, and where no unconscionable advantage has been taken of his position by the mortgagee. It would be surprising if two men in their senses, and with their eyes open, could not make such a contract. The doctrine, "once a mortgage, always a mortgage," does not refer to future contracts. In Washburn on Real Property it is said that the character of a mortgage cannot be changed "by an agreement of the parties made at the time of the execution of the deed," and that "equity will not admit of a mortgagee embarrassing or defeating his right to redeem the estate by any agreement which he may be induced to enter into in order to effect a loan"; but that "this does not preclude any subsequent bona fide agreement in respect to the estate between the parties," and that "the mortgagee may always purchase the mortgagor's right of redemption, and thus acquire an absolute title." Volume 2 (5th Ed.) top paging 65, 66, §§ 23, 24. Section 2889 of the Civil Code does not change the rule. The case at bar is in principle exactly like the case of Green v. Butler, 26 Cal. 595. In that case Justice Sawyer, speaking for the court, after noticing a number of authorities to the point, says: "Independent of authority, no argument is necessary to show that upon principle a mortgagor has the same capacity to contract with reference to his interest in the mortgaged premises that he has with reference to any other property." The only difference between that case and the one at bar is that in the former case there was some consideration between the parties in addition to the mortgage debt; but the kind or character of the consideration can make no difference if it be, as in the case at bar, fair and adequate. There was no advantage taken of the mortgagor by the mortgagee. The latter was the reluctant party, and the transaction was pressed on him by the mortgagor. Whether or not by the respective surrenders of the note and debt and the defeasance the technical legal title passed to Clark is a question not important in this case. Both parties were estopped,—Clark from claiming the debt, and Sullivan from claiming any interest in the land. It has been held by some courts of sister states that "where a mortgagor voluntarily canceled the instrument of defeasance which he held, it gave the deed which it was intended to defeat the effect of an original absolute conveyance as between the parties." 2 Washb. Real Prop. § 24, and cases cited. Under the decisions in this state it may be assumed that in such a case the absolute title would not pass,—unless, at least, there had been a redelivery of the deed, or facts from which such redelivery should be inferred. But in the case at bar Clark had at least the apparent record title, and appellant is invoking the power of a court of chancery to compel the conveyance to him of such title. Equity, in determining whether it shall grant appellant's prayer, will not concern itself with the question whether or not the strict legal title passed. It is sufficient that it should have passed.

2. It is contended that the purchase of Mrs. Bucknall from Clark should inure to the benefit of appellant, because she and the appellant were original tenants in common and beneficiaries under the trust. But by the transactions above stated the trust, as to the land purchased by Mrs. Bucknall, had come to an end, and the land had ceased to be common property. She had as much right to buy it as any tenant in common has to buy land which had formerly been common, but which had, by the act of all the tenants in common, either in person or by an authorized agent, passed to a stranger. The findings are sufficiently full, and we do not think that they are in conflict with the facts admitted in the pleadings. We do not see that any further discussion of the case is required. The judgment is affirmed.

We concur: DE HAVEN, J.; FITZGERALD, J.

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4 Cal. Unrep. 905

## SHAIN v. DU JARDIN. (No. 15,582.)

(Supreme Court of California. Dec. 10, 1894.)

SALE—ACTION FOR PRICE — SUFFICIENCY OF EVIDENCE—ANSWER — DENIAL OF ALLEGATIONS OF COMPLAINT—INFORMATION AND BELIEF — FICTITIOUS FIRM NAME—EFFECT.

1. In an action by the assignee of R. & Co. for the price of goods sold by such firm to defendant, a witness stated that he was manager for R. & Co.; that he knew and had interviews and correspondence with defendant; that such firm sold him goods; that he was a customer of the firm before the witness became manager, and, without consulting the books, could not tell the extent of his purchases; that the balance due June, 1892, was $547; that he and defendant agreed on a balance of $497.30, which defendant agreed to pay in monthly payments; and that he afterwards paid $57. Plaintiff proved an assignment to him by F. under a power of attorney from R. & Co. to F., executed by Y., who was shown to be the sole partner of such firm. *Held*, that the evidence supported a judgment for $440.30 for plaintiff.

2. An answer denying the allegations of the complaint "as this defendant is informed and believes" does not constitute a sufficient denial thereof.

3. One person, or an association of persons, may do business under a firm name entirely distinct from the name or names of the person or persons composing the firm.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Action by Joseph E. Shain against L. Du

Jardin to recover for goods sold and delivered to defendant by Rice & Co., plaintiff's assignors. From a judgment for plaintiff, and from an order denying a motion for a new trial, defendant appeals. Affirmed.

F. Wm. Reade, for appellant. Jos. E. Shain, in pro. per.

SEARLS, C. This is an action to recover $440.30 for goods, wares, and merchandise sold and delivered by Rice & Co., assignors of plaintiff, to the defendant. The cause was tried by the court, without a jury, and written findings filed, upon which judgment was entered in favor of plaintiff. The appeal is from the judgment and from an order denying defendant's motion for a new trial. The sole point made by appellant is that his motion for a nonsuit should have been granted. The motion was based upon the ground that the proofs failed to establish the sale of goods, wares, and merchandise by Rice & Co. to defendant, or that there was evidence of the sale, delivery, or value of any goods. A single witness was called for plaintiff, who testified, in substance, that he was manager in San Francisco for Rice & Co., liquor dealers of Covington, Ky.; that he knew defendant, had interviews and correspondence with him. He said Rice & Co. sold defendant goods. He had been a customer of that firm before witness became manager, and, without consulting the books, could not tell the extent of defendant's purchases. The witness then stated that the balance due June, 1892, was $547; that defendant called at the office; they agreed upon the balance due as $497.30, and defendant agreed to make monthly payments until all was paid. He made one payment of $57, and nothing further. Plaintiff then proved an assignment of the claim of Rice & Co. to plaintiff, under a power of attorney from that firm to J. C. Fyfe, executed by John C. Yost, who was shown to be the sole partner of the firm of Rice & Co. Defendant offered no testimony. This uncontradicted testimony was sufficient to uphold the finding. It may well be doubted if, under the pleadings, any testimony was necessary as to the sale and delivery of the goods. The complaint was in the usual form, for goods, wares, and merchandise sold and delivered by Rice & Co. to defendant at his request, at an agreed price, amounting to $440.30, which defendant promised to pay, etc. The complaint is verified. The only attempt at an answer is as follows: "Now comes the defendant above named, and, for his answer to the complaint filed herein, alleges and sets forth that, as this defendant is informed and believes, he denies that the firm of Rice & Co. delivered goods, wares, or merchandise to this defendant amounting to the sum of four hundred and forty 30-100 dollars, or in any amount." To say that as one is informed and believes he denies a thing is not to deny it positively or upon information and belief, or a denial for want of information or belief.

The contention that Rice & Co. was a fictitious name, and for that reason they could not maintain an action, needs no extended comment. A single individual or an association of individuals may do business under a firm name entirely distinct from the name or names of the person or persons composing such firm. In the absence of fraud, and as between himself and those with whom he deals, a person may do business and execute contracts under any name he chooses to assume. Bell v. Publishing Co., 42 N. Y. Super. Ct. 567; Ex parte Snook, 2 Hilt. 566; People v. Leong Quong, 60 Cal. 107. If the defendant purchased goods from the assignor of the plaintiff, who was doing business under the name of Rice & Co., he cannot, in the absence of fraud, evade payment by showing that Rice & Co. was not the true name of the party from whom he purchased.

The judgment and order appealed from should be affirmed.

We concur: TEMPLE, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

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105 Cal. 87

## EISENHUTH et al. v. ACKERSON, Street Superintendent. (No. 15,581.)

(Supreme Court of California. Dec. 13, 1894.)

STATUTE—CONSOLIDATION ACT—REPEAL BY IMPLICATION—STREET-RAILROAD FRANCHISES—MODE OF GRANTING.

1. Worley's Consolidation Act, p. 16, § 68, which requires the mayor's approval of all resolutions and ordinances granting a privilege, was not repealed by Civil Code, div. 1, pt. 4, tit. 4 (entitled "Street-Railroad Corporations"), § 497, which provides that authority to lay railroad tracks in the streets of a city or town may be obtained from the trustees, council, or other body to whom is intrusted the government of the city or town, upon such terms as the city or town authority may provide, nor by any other provision of such title. McDonald v. Dodge, 31 Pac. 909, 97 Cal. 112, Jacobs v. Board, 34 Pac. 630, 100 Cal. 121, distinguished.

2. Civil Code, div. 1, pt. 4, tit. 3, c. 2 (which enumerates the powers of "railroad corporations" generally), § 470, providing that no railroad corporation can use any territory within any incorporated city or town unless the right to use it is granted by a two-thirds vote of the town or city authority from which the right must emanate, does not prescribe a mode of granting street-railroad franchises inconsistent with Consolidation Act, § 68, which requires the mayor's approval of resolutions or ordinances granting a privilege.

Department 2. Appeal from superior court, city and county of San Francisco; Eugene R. Garber, Judge.

Action by John W. Eisenhuth and others against W. W. Ackerson, superintendent of streets of the city and county of San Francisco, Cal., to enjoin defendant from obstructing or preventing the construction or operation of an electric railway on certain streets of such city. From an order discharging a former order on defendant to show cause, and from an order dissolving a temporary restraining order, plaintiffs appeal. Affirmed.

John H. Durst, H. S. Foote, and Louis F. Dunand, for appellants. Harry T. Creswell, for respondent.

PER CURIAM. On December 19, 1892, the board of supervisors, by a vote of 10 ayes to 1 nay, passed an ordinance purporting to grant to plaintiffs and their successors and assigns the privilege to construct and operate a street railroad in the city of San Francisco, extending over portions of some 18 different streets of said city, for the term of 50 years. In due time after this ordinance so passed the board of supervisors, it was presented to the president of said board (the mayor) for his approval, who within 10 days thereafter returned it to the board without having signed it, and with his written objections thereto, which objections were duly entered upon the journal of the board, and published as required by section 68 of the consolidation act. Thereafter, at a stated meeting of the board, one of the members thereof offered a resolution to pass said ordinance notwithstanding the said objections of the mayor, which resolution was negatived and lost by a unanimous vote of the 12 members of the board, whereby the said written objections of the mayor were sustained; and no further action has been taken upon said ordinance or objections. All the proceedings of the board and of the mayor in regard to the said ordinance were in strict compliance with the consolidation act, and were completed on the 6th day of February, 1893. On April 27, 1893, the plaintiffs commenced the construction of a double-track electric railway upon and along the route and streets designated in said ordinance, and had constructed about 200 feet of track on Broderick street when the defendant, in his official capacity as superintendent of streets of said city and county, stopped further progress in the construction of said railway, and ever since has prevented plaintiffs and their employés from continuing the construction thereof, and ordered plaintiffs to remove the track already laid, and threatened that unless they did so within three days he would tear up and remove the same; and further threatens to prevent the construction by plaintiffs of the railway, or any part thereof, on the route designated in said ordinance. The object of this action is to enjoin the defendant perpetually from obstructing or interfering with the construction or operation of said railway in accordance with said ordinance, and so to restrain him pending the action.

Upon the filing of the complaint, the court ordered defendant to show cause why he should not be so enjoined, and at the same time issued a restraining order to operate in the meantime and until further order. The matter upon the order to show cause was submitted to the court upon the complaint and an agreed statement of facts, including the facts above stated, whereupon the court discharged the order to show cause, and dissolved the temporary restraining order. From these orders the plaintiffs appeal. As already remarked, the proceedings by which the board of supervisors attempted to grant the privilege or franchise in question were had under and in strict accordance with section 68 of the consolidation act. So much of the sixty-eighth section as pertains to the grant in question is as follows: "Every ordinance or resolution of the board of supervisors providing for any specific improvement, the granting of any privilege, or involving the lease or other appropriation of public property, or the expenditure of public moneys (except for sums less than five hundred dollars), or laying tax or assessment, and every ordinance or resolution imposing a new duty or penalty shall, after its introduction in the board, be published, with the ayes and nays, in some city daily newspaper at least five successive days before final action by the board upon the same, and every such ordinance, after the same has passed the board, shall, before it takes effect, be presented to the president of the board for his approval. If he approves, he shall sign it; if not, he shall return it within ten days to the board, with his objections in writing. The board shall then enter the objections on the journals, and publish them in some city newspaper. If at any stated meeting thereafter two-thirds of all the members elected to the board vote for such ordinance or resolution, it shall then, despite the objections of the president, become valid. Should any such ordinance or resolution not be returned by the president within ten days after he receives it, it shall become valid, the same as if it had received his signature." Worley's Consolidation Act, p. 16. Unless that part of this section relating to the granting of privileges was repealed before the ordinance in question was vetoed by the mayor, there can be no plausible pretense that the ordinance ever took effect, or that the superior court erred in dissolving the restraining order, or in discharging the rule to show cause. Therefore, the principal and controlling question for decision, to which all others discussed by counsel are either subject or merely subsidiary, is whether or not that part of the above extract from the sixty-eighth section of the consolidation act requiring the mayor's approval of all resolutions and ordinances granting a privilege had been repealed before February 6, 1893, when the board of supervisors unanimously sustained the mayor's veto of the ordinance in question; since it must be admitted, and is admitted by appellants, that an ordinance granting a right to construct and operate a street railroad on the streets of San Francisco is an "ordinance granting a privilege" in the sense of section 68 of the consolidation act. The case of McDonald v. Dodge, 97 Cal. 112, 31 Pac. 909, cited by appellants, can have no proper application to this case. That case decides, by implication at least, that the street law of 1883 (Vrooman Act), as amended March 14, 1889, is inconsistent with, and therefore repealed, that part of section 68 of the consolidation act which requires the mayor's approval of "every ordinance or resolution of the board of supervisors providing for any specific improvement." But that decision does not touch nor in any way affect the provision of the consolidation act requiring the mayor's approval of all ordinances and resolutions granting any privilege. Nor does the decision or the opinion of any of the justices in the case of Jacobs v. Board, 100 Cal. 121, 34 Pac. 630, apply to this case, except the concession therein made that the veto power of the mayor is to be recognized in all cases where it is clearly granted. The question in that case was whether or not the mayor was authorized to veto an ordinance of the board of supervisors fixing rates to be paid for water in the city and county of San Francisco; and, upon a construction of the consolidation act in connection with section 1 of article 14 of the state constitution, it was decided that the approval of the mayor was not necessary to the validity of such an ordinance, inasmuch as the board of supervisors of the city and county of San Francisco was the legislative and governing body of the municipality, except for a few specified purposes, of which the fixing of water rates was not one. Speaking of the consolidation act, Mr. Justice McFarland, who wrote the leading opinion, said: "Under that act, the board of supervisors is the legislative department of the municipal government, although it is provided therein that the ordinances upon certain enumerated subjects shall not be effective unless approved by the mayor (whose office is created by said act), or unless, after his veto, nine members of the board shall vote therefor. Under the act, however, there are many things which the board may do without the concurrence of the mayor. * * * We do not deem it necessary to discuss the question whether, if we were to look to the consolidation act alone, the order No. 2,622 (fixing water rates) would require the approval of the mayor, although it is difficult to see that it would be embraced within any of the enumerated cases in which he is given the veto power by that act." Mr. Justice Harrison, in his concurring opinion, after placing his concurrence on constitutional grounds, said: "Even under the provisions of section 68 of the consolidation act, the approval of the mayor does not become essential to the validity of an ordinance fixing water rates. His approval is required to only certain classes of ordinances which are enumerated in that section. * * * It is sufficient to say, without further discussion, that an ordinance fixing water rates is not included in either of these classes." The chief justice, Beatty, said: "I concur in the judgment, upon the ground that the true construction of the constitution is that ordinances fixing water rates are to be passed as legislative acts of the particular municipality are generally passed, and not as they are passed in exceptional cases provided by act of the legislature." These extracts from the opinions of the justices show that the Jacobs Case has no bearing upon the case at bar, except in so far as it may be said to concede the power of the mayor to veto ordinances of the classes specified in section 68 of the consolidation act.

The principal point made by counsel for appellants, however, is founded upon section 497 of the Civil Code, under which they say the grant of the franchise in question was made, and which they claim to be so inconsistent with the power of the mayor to veto such grant as to repeal, by implication, that part of section 68 of the consolidation act which authorizes him to veto all ordinances and resolutions of the board providing "for the granting of any privilege." Section 497 of the Civil Code is the first section of title 4, pt. 4, div. 1, headed "Street-Railroad Corporations," and reads as follows: "Authority to lay railroad tracks through the streets and public highways of any incorporated city or town may be obtained for a term or years, not exceeding fifty, from the trustees, council or other body to whom is intrusted the government of the city or town, under such restrictions and limitations, and upon such terms and payment of license tax as the city or town authority may provide. In no case must permission be granted to propel cars upon such tracks otherwise than by horses, mules, or by wire ropes running under the streets and moved by stationary steam-engines, unless for special reasons, as hereinafter provided." But we perceive nothing in this section or in title 4 at all inconsistent with any part of section 68 of the consolidation act, since neither section 497 nor any other part of title 4 purports to provide or regulate the mode or manner in which the "authority" to lay street-railroad tracks in the streets of incorporated cities or towns shall or may be granted by the "trustees, council, or other body to whom is intrusted the government of the city or town." The sole object of title 4 was to authorize the governing bodies of incorporated cities and towns to grant the privilege of laying street railroads under such restrictions and limitations as are specified in that title. There was no necessity for providing the mode or manner of the grant, so long as the legislature was content with the modes already provided by the charters of the different cities and towns in the state, although the governing bodies of such cities and towns were differently constituted, and governed by charters prescribing different modes of municipal legislation. Any authorized mode of granting the privilege of constructing and operating street railroads fully answered all purposes of the Code provisions cited, without requiring all municipalities to grant that privilege in a uniform mode. If, as contended by counsel, section 497 of the Civil Code cannot operate uniformly on all municipal corporations without uniformity in the manner of passing ordinances granting the particular privilege for which it provides, then, indeed, is that section itself unconstitutional, since it fails to provide for such uniformity of manner, and leaves it to be governed by the charters of the different municipalities, whose modes of legislation are far from uniform in this respect. But we think that section is not wanting in uniformity of operation on the governing bodies of all incorporated cities and towns in the state, which governing bodies, however constituted, it authorizes to grant the privilege of constructing street railroads, without prescribing the manner in which the grant shall be made; and it does not purport to have any other operation or effect. For the purposes, and to the full extent, of thus authorizing such governing bodies to grant street-railroad franchises, section 497 of the Civil Code is a general law, and, by implication, repeals all prior laws inconsistent therewith; but, as above remarked, section 68 of the consolidation act is in no respect inconsistent therewith.

It is finally contended by appellants that, even if title 4 of the Civil Code does not prescribe the manner of granting street-railroad franchises, section 470, under title 3 of that Code, does prescribe a mode inconsistent with that prescribed by section 68 of the consolidation act. Title 3 is headed "Railroad Corporations," and is divided into three chapters, entitled as follows: "I. Officers and Corporate Stock." "II. Enumeration of Powers." "III. Business, how Conducted." Section 470 of title 3 is as follows: "Section 470. No railroad corporation must use any street, alley or highway, or any of the land or water, within any incorporated city or town, unless the right to so use the same is granted by a two-thirds vote of the town or city authority from which the right must emanate." This section is in chapter 2, devoted to the enumeration of the powers of railroad corporations generally; whereas title 4, in which is found section 497, is devoted exclusively to street railroads; nor does title 3 purport to enumerate, define, restrict, or enlarge the powers of municipal corporations, or to prescribe or regulate the manner in which municipal corporations shall legislate or otherwise govern. Surely, section 470 detracts nothing from the veto power of the mayor of the city and county of San Francisco, which power does not depend upon the number of votes by which an ordinance or resolution passes the board of supervisors; for he may veto and thereby compel a reconsideration of an ordinance passed by unanimous vote of all the members of the board. And it may not be impertinent, under this head, further to observe that the grant of the franchise in question in this case was not to a corporation of any kind, but to natural persons; and that it does not appear that any railroad corporation has any interest in the grant. We perceive no error in the action of the lower court, and therefore affirm the orders appealed from.

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104 Cal. 684

## N. P. PERINE CONTRACTING & PAVING CO. v. QUACKENBUSH. (No. 15,549.)

(Supreme Court of California. Dec. 4, 1894.)

PAVING CONTRACT—OPENING OF BIDS—IRREGULARITY — REQUIREMENTS AS TO MATERIAL — LIEN THEREUNDER — JUDGMENT OF FORECLOSURE — CONTRACT TO PAY "IN GOLD COIN."

1. A complaint, in an action to foreclose an assessment lien, which alleges that bids to do the work for which the lien is claimed were to have been received until a certain day; that the bids were in fact opened, examined, and declared on the day before, and, in pursuance thereof, that plaintiff was awarded the contract,—is demurrable.

2. A requirement in a paving contract that the material to be used shall be bituminous rock does not render such contract void, as preventing property owners from doing the work themselves, as provided in St. 1889, p. 162, though all the modes of preparing such paving material are covered by patents.

3. The judgment rendered in the foreclosure of a lien for paving under a contract providing for payment "in gold coin," entered into under authority conferred by statute, need not be paid in gold coin unless the statute specified that the contract should be so written, being clearly within Act March 12, 1880 (3 Deer. Ann. Code, p. 300; St. 1880, p. 8), which provides that legal-tender notes of the United States shall be legal tender for any debt.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; D. J. Murphy, Judge.

Action by the N. P. Perine Contracting & Paving Company, a corporation, against Thomas Quackenbush, to foreclose a street-assessment lien upon certain of defendant's property. There was judgment for plaintiff, from which, and an order denying him a new trial, defendant appeals. Reversed.

J. M. Wood, for appellant. Parker & Eells, for respondent.

HAYNES, C. The plaintiff, a corporation, brought this action to foreclose a street-assessment lien upon defendant's lot. Defendant interposed a general demurrer to the complaint, which was overruled without argument. An answer was afterwards filed, a trial had, and findings and judgment were for the plaintiff; and this appeal is from the judgment, and also from an order denying defendant's motion for a new trial. The only point now made upon the demurrer is that the complaint shows that bids were to be received until 4 p. m. of January 16th, and that the bids were opened, examined, and declared by the board on the 15th, and in pursuance thereof they awarded the contract to the plaintiff.

Respondent contends that the date of opening the bids, stated in the complaint, is a clerical error, and that this is apparent from the allegation in paragraph 7 "that on the 16th day of January, 1892, and prior to 4 o'clock p. m., various sealed proposals to do said work were delivered to the clerk of said board of supervisors; that the plaintiff herein signed and handed in to said clerk one of the said sealed proposals," etc. There is an inconsistency in these dates, and, if it could be said that these inconsistencies created an uncertainty, merely, we could have little difficulty in reaching a conclusion. But the date at which plaintiff's proposal was filed was immaterial, provided only that it was before 4 p. m. of the 16th. There is no doubt or uncertainty that bidders had until that time to hand in their proposals, nor can there be any doubt that the board could not legally act upon the proposals until the time limited for receiving them had passed. The allegation of the time at which they were opened, canvassed, and declared was material. Nor is it denied that if the proposals were in fact canvassed and declared on the 15th, and the contract based upon such action, the proceeding was void. The demurrer was therefore well taken, and should have been sustained.

It is contended, however, that the defendant put in evidence upon the trial the proposal of the plaintiff, and that said proposal bore date of January 16th. But no evidence was offered or received inconsistent with the averment that the proposals were opened on the 15th, unless it is assumed that the date of the plaintiff's proposal was the true date; and the plaintiff cannot insist, in the face of its own averment, that such was the true date, and that the other is erroneous. If the plaintiff had put in evidence, without objection from the defendant, which showed that the proposals were in fact opened and canvassed on the 16th instead of the 15th, the error would have been cured, but no evidence of that character was introduced by either party. The judgment must therefore be reversed, but in view of an amendment by the plaintiff, and another trial, some questions that will doubtless be again presented should be noticed.

The specifications required the paving to be done with bituminous rock prepared for use "by either steaming, hot air, or other process, but in no case must the material be reduced or melted by any process which would burn it." Appellant contends that all the known processes for melting the rock are covered by patent, except that in which coal tar is used, and that the superintendent of streets would not permit the use of the last-named method. Whether there is any other process by which the rock can be prepared than those covered by patents, we need not inquire. It is conceded by appellant that the plaintiff proved that, upon the payment of a royalty to the patentees, any one could obtain a license to use the patented methods, and appellant proved that there were at least two methods patented by different persons. His argument is that, the available methods of using bituminous rock for paving purposes being covered by patents, the requirement that this material shall be used prevents the owners of three-fourths of the frontage of the lands to be assessed from contracting to do the work themselves, under section 5 of the act of 1889. St. 1889, p. 162. Appellant relies upon Pavement Co. v. Painter, 35 Cal. 699. That case does not sustain appellant, though some expressions used in the opinion give color to his claim. By an act approved April 2, 1866 (St. 1865-66, p. 720), it was provided that, whenever a majority of the owners in frontage should petition the board of supervisors of the city and county of San Francisco for the construction of the Nicholson pavement, they should order it to be done. In that case the owners did not so petition, but nevertheless the board ordered the Nicholson pavement to be used, and it was held that their proceedings were void. Sanderson, J., said, in the course of the opinion, in substance, that where there can be but one bidder, and where the owners are prohibited by heavy penalties from doing the work, to advertise for sealed proposals, and open, examine, and declare them, "would be to play as broad a farce as was ever enacted behind the footlights." But elsewhere in the same opinion the same learned justice said: "It is true that the third section [St. 1862, p. 391], which confers the power to pave, does not restrict the board to any kind of pavement, and if the question turned exclusively upon that section the board would have the power to contract at its election for any kind in use." As no act, such as the Nicholson pavement act, restricts the powers of the board to order the bituminous rock pavement, we may adopt the language of Sanderson, J., last above quoted, as applicable to this case, and as correctly declaring the law. Besides, in this case the specifications did not confine bidders to one patented process, nor exclude processes not patented, nor were the owners excluded from using the patented processes, but had the liberty to use them upon payment of a royalty of one dollar per ton of the rock treated. Appellant's contention would effectually exclude all methods of paving which were patented, even though such method, because of its superiority, or even because of its cheapness, would be specially advantageous to the owners of lots liable for the expense of paving, as well as the municipality charged with its maintenance.

Appellant further contends that the provision in the contract requiring the work to be paid for in gold coin of the United States invalidated the contract, that the statute does not authorize the board of supervisors to invite bids or award contracts on a gold-coin basis, and that in fact the bids were not invited nor the contract awarded upon such basis. Whatever may be the force and effect of a private contract to pay in gold coin, or of a judgment rendered upon such contract, specifying that it shall be paid in gold coin, we think it clear that in the case at bar, where the defendant is not a party to the contract, and is connected therewith and bound thereby only by force of the statute, the judgment should not specify the kind of money in which it should be satisfied, unless the statute so specifies. The proceeding to improve the street and to charge defendant's property therefor is adversary in its character, and the provisions of section 667 of the Code of Civil Procedure do not apply. It is clearly a liability which may be discharged by payment in any kind of money which is by law a legal tender for the payment of debts, and is within the act of our legislature approved March 12, 1880 (3 Deer. Ann. Code, p. 300; St. 1880, p. 8).[1] This, however, does not affect the validity of the contract in all other respects, and a general judgment for the sum due under the coutract would be valid. The judgment and order appealed from should be reversed, with leave to the plaintiff to amend its complaint as it may be advised.

We concur: SEARLS, C.; TEMPLE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, with leave to the plaintiff to amend its complaint as it may be advised.

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105 Cal. 77

## MULLIN v. CALIFORNIA HORSESHOE CO. (No. 15,599.)

(Supreme Court of California. Dec. 12, 1894.)

INJURY TO EMPLOYE — DANGEROUS MACHINERY— CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

1. Plaintiff, a boy 16 years old, after working in defendant's factory 6 months, was ordered by the foreman to mount a ladder 20 feet high, and hold a belt weighing 40 pounds over a revolving shaft, which he did against his will, and without having received instructions as to the danger of the place; and he was injured by falling against the shaft, through the turning of a loose plank on which he was standing. *Held*, that the question whether plaintiff was negligent was for the jury.

2. In order to prevent plaintiff from recovering damages for injury so caused, it must appear that he not only knew, or had the means of knowing, of the unsafeness of the place or machinery, but also that he knew, or ought to have known, of the danger to which he was exposed.

3. It is the duty of an employer to furnish his employés a suitable and safe place to work in, and suitable and safe machinery to work with; and he cannot escape liability for failing so to do by delegating such duty to another, even if such person, in other respects, is a fellow servant.

Department 2. Appeal from superior court, city and county of San Francisco; Charles W. Slack, Judge.

Action by Charles Mullin, a minor, against the California Horseshoe Company, a corporation, to recover damages for personal injuries. From a judgment of nonsuit, and from an order denying a new trial, plaintiff appeals. Reversed.

Shadburne & Herrin, for appellant. W. S. Goodfellow, for respondent.

PER CURIAM. This is an action to recover damages for personal injuries sustained by the plaintiff. The answer denied that the defendant was in any way responsible for the injuries complained of, and alleged that they were caused by the plaintiff's own negligence. It was proved at the trial that the plaintiff was employed by the defendant to work in its horseshoe shop in November, 1891, and that he continued to work there until he was injured on June 13, 1892, at which time he was 16 years of age. When he was employed he was taken by the foreman, Ingram, to one of the machines for making horseshoes, and was told that the machinist would show him what to do, and to obey whatever the machinist told him. There were four machines in the shop, and three boys were employed on each machine, —the furnace boy, the bender boy, and the press boy. The machinist, Brunig, had general supervision of the boys, and directed and ordered them about. He put the plaintiff to work as a press boy, and directed him generally about his work until he was injured. The machines were worked by belts which ran up over a large revolving shaft that extended through the building, and was operated by steam power. This shaft was about 20 feet above the floor, and to reach it one had to go up a ladder, the lower end of which rested on the floor, and upper end against one of the stringers of the building. Lying across the stringers were a few loose planks, which were not nailed down, and were easily moved. One end of one of the planks rested on one of the uprights of the ladder, and was raised a little above the stringer. The belt which ran the machine on which plaintiff was working was old, and had broken many times. It broke twice in the forenoon of the day, when plaintiff was injured, and then the machinist went up and fixed it. It broke again in the afternoon, and the machinist directed the plaintiff to go up and hold the belt while he fixed it. The plaintiff had never before been sent up to hold the belt, and was given no instructions about the danger of the place to which he was sent. He did not want to go, but was ordered quite positively to go, and thereupon took the belt, weighing 40 or 45 pounds, on his shoulders, and started up the ladder. When he got to the top of the ladder he stepped off upon one of the planks, and walked along to the shaft where he was to hold the belt. The shaft was running at full speed, and he put the ends of the belt over it, and dropped them down, and then started back on the plank to go down, when the machinist hallooed to him, "Go back and hold that belt." He then went back, and held the belt up from the shaft in a loop. He held it there for about 10 minutes, when the machinist called out to him, "Wait; I am going to get some lacing." He became tired standing there and holding up the belt, and moved his foot on the plank, when it turned over, and he fell forward upon the shaft. His right arm was caught between the belt and shaft, and torn completely off at the elbow, and it became necessary to amputate it near the shoulder. He was also otherwise badly bruised and injured. The plank that turned over, and caused plaintiff to fall, was the one that rested at one end on one of the uprights of the ladder, and over which he walked in going first from the ladder to the shaft. He noticed how the plank was supported when he went up and got off the ladder, and also that it shook a little when he went along over it. The case was being tried before a jury, and at the conclusion of the plaintiff's evidence the defendant moved for a nonsuit, and the court granted the motion. A judgment of nonsuit was accordingly entered, from which, and from an order denying a new trial, the plaintiff appeals.

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[1] An act in relation to the currency of the United States, providing that legal-tender notes shall be received at par "for all debts, dues and demands between citizens of this state."

We think the court erred in granting the nonsuit. The law is settled beyond controversy that it is the duty of an employer to furnish a suitable and safe place for his employé to work, and suitable and safe appliances and machinery for him to work with; and this duty cannot be delegated to another, so as to exonerate the employer from liability to an employé who is injured in consequence of the omission to properly perform the act or duty, whether that other is a superior officer, agent, or servant, or a subordinate or inferior agent or servant. In either case, in respect to such act or duty, the person who undertakes or omits to perform it is the representative of the employer, and not a mere fellow servant with the one who is injured; and, when it is claimed that the injured employé was himself guilty of such negligence as to bar him from recovering damages for his injuries, it must appear that he not only knew, or had the means of knowledge, of the unsafeness of the place, appliances, or machinery, but also that he knew, or ought to have known, of the danger to which he was himself personally exposed. Sanborn v. Trading Co., 70 Cal. 261, 11 Pac. 710; Gisson v. Schwabacher, 99 Cal. 419, 34 Pac. 104; Elledge v. Railway Co., 100 Cal. 282, 34 Pac. 720; Nixon v. Lead Co., 102 Cal. 458, 36 Pac. 803. Whether the plaintiff was guilty of such negligence as would prevent his recovery was, under the facts in this case, a question for the jury. Sanborn v. Trading Co., supra; Ingerman v. Moore, 90 Cal. 410, 27 Pac. 306. Here it is evident that the place to which the plaintiff was sent to hold the belt was unsafe; and, to show that the defendant knew of such unsafeness, the plaintiff offered to prove that others had been injured in the same place, and in the same way, before, but the court excluded the evidence. The plaintiff was a boy, had never been sent up to that platform before, and before going was not cautioned or told that any danger attended the work assigned him, and, so far as appears, he had not at that time heard of any previous accidents there. We do not think, therefore, that it can be said to be established by the evidence that the plaintiff knew, or ought to have known, of the danger to which he was exposed. This being so, the issues should have been submitted to the jury. It follows that the judgment and order must be reversed, and the cause remanded for a new trial. So ordered.

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4 Cal. Unrep. 891

## BOARD OF EDUCATION OF CITY AND COUNTY OF SAN FRANCISCO v. BLAKE et al. (No. 15,641.)

(Supreme Court of California. Dec. 3, 1894.)

LIENS OF MATERIAL MEN — RETENTION OF PART OF CONTRACT PRICE—NOTICE TO OWNER—WHEN GIVEN.

1. A board of education is not subject to garnishment.

2. Under Code Civ. Proc. § 1184, providing, in regard to mechanics' liens, that the owner shall retain a certain percentage of the contract price for 35 days after the completion of the work, and that the material men, etc., may at any time serve notice on the owner of their claim for material furnished or labor performed, whereupon the owner shall retain sufficient of the money due or to become due the contractor to satisfy such claims, the notices may be served after the expiration of the 35 days, provided there are funds due the contractor still in the hands of the owner.

3. A county deposited money due a contractor in court, and two creditors of the contractor, one only of whom had a lien on the fund, together with the contractor, were ordered to interplead for the same. The contractor failed to set up any claim to the fund. *Held*, that the balance of the fund left after satisfying the creditor's lien should be paid to the other creditor to satisfy a judgment held by him against the contractor, instead of to the contractor.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; James E. Murphy, Judge.

Action by the board of education of the city and county of San Francisco against John Blake and others to compel defendants to interplead and litigate their claim to a certain fund deposited in court. From a judgment for defendant J. D. De Gear, defendants the Kennedy & Shaw Lumber Company and others appeal. Modified.

William H. Jordan, for appellants. Bert F. Miller, for respondent.

HAYNES, C. Defendant Blake erected an addition to a school building under a contract with the plaintiff, and completed the same September 14, 1892, at which date there remained unpaid $829.45 of the contract price, which, by the terms of the contract, was not payable until 35 days after the completion of the work, as required by the statute, a sum insufficient to pay all the subcontractors and material men in full. Nine days after completion appellants commenced an action at law against Blake, the contractor, and served process of garnishment upon the board of education. Afterwards De Gear and other claimants (who afterwards assigned to him) served upon the board notices of their several claims, as provided by section 1184 of the Code of Civil Procedure,[1] some of these notices being served before the expiration of the 35 days, and others after such expiration. After these notices were all served, respondent De Gear also commenced an action against the contractor, and garnished the board of education, and both appellants and respondent obtained their several judgments against the contractor. The board of education thereupon commenced this action, paid said sum remaining in its hands into court, and obtained an order requiring the several defendants to interplead, and litigate their respective claims thereto. The defendants (except the contractor, who made no claim) interpleaded, and the cause was submitted upon facts agreed, and findings were filed and judgment entered awarding De Gear $601.26, the amount of his claim, including the assigned claims, and $6.50 costs, but making no disposition of the remainder of the fund. From this judgment appellants have appealed upon the judgment-roll.

In addition to the foregoing, the court specially found that appellants did not at any time serve upon the board of education any notice in writing of their claim, other than said notice of garnishment. So far as appellants are concerned, they proceeded against Blake as general creditors without any reference to the fact that their claims were for materials furnished for the building erected for the plaintiff; and the question is, therefore, whether a general creditor, under the circumstances of this case, can, by an ordinary action at law against the contractor, and garnishment served upon the board of education, acquire any right to the funds in its hands to the exclusion of respondent, or any right to share in the fund to the prejudice of respondent. In the recent case of Skelly v. School Dist. (Cal.) 37 Pac. 643, it was held that a school district is not subject to garnishment. That case, therefore, disposes of any claim appellants could make upon the fund so far as it is based upon the garnishment. The effect of the service of notices of their claims by respondent and his assignors is also settled by Bates v. Santa Barbara Co., 90 Cal. 543, 27 Pac. 438. It was there held that a written notice of his claim, served by the mechanic or material man upon the county under section 1184, Code Civ. Proc., made it the duty of the county to retain sufficient funds to answer such claim; that the county thereupon became liable as upon garnishment or assignment; that it is a form of equitable subrogation regulated by statute; that the right of the parties giving the notice does not depend upon their right to a lien; and that "the right to control and direct the funds remaining in the hands of the owner is as distinct and independent as the right to file and enforce a lien." The statute required that this fund should be held by the board for 35 days after the completion of the work for the benefit of those who performed labor or furnished materials to the contractor, and who should serve the notice provided by section 1184, Code Civ. Proc. A payment within that time, either to the contractor or under a garnishee process to a creditor of the contractor, could not diminish this fund. The board was, during such period, a statutory trustee of the fund for the benefit of the mechanic or material man who should comply with the requirements of law, and for that reason also not subject to garnishment; and not being, then, subject to garnishment, no right to the fund was acquired by appellants as against those who by pursuing the statute acquired or perfected their right thereto. Appellants claim, however, that as against those claims of which notice was served after the expiration of the 35 days they should be preferred; that the right of subcontractors and material men to serve notice of their claims expired when the last payment became due. It is true the board might have safely paid to the contractor at the expiration of the 35 days any money in its hands not required to pay claims of which notice had theretofore been served; but we think such notices may properly be served so long as the fund remains in the hands of the owner of the building, and that, if it were otherwise, appellants, having failed to acquire a right to the fund under the provisions of the Code relating to mechanics' liens, cannot complain.

As to appellants' contention that they should have been awarded the remainder of the fund (said to amount to $221.69), we think it should be sustained; not, however, upon the ground that the right to it was acquired by the garnishment, but because the board voluntarily paid the money into court, and required appellants to interplead concerning it. They already had their judgments against Blake, who was a party to the suit, and who made no objection to such application of the fund, and he was the only party who could object. The money must be paid either to Blake or the appellants, and we think Blake's failure to contest the right of appellants justifies a judgment in favor of the latter for the remainder of the fund. The judgment appealed from should therefore be modified so as to award the remainder of the fund in the hands of the court to appellants, but without costs, and, as modified, that the judgment be affirmed; appellants to pay the costs of this appeal.

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[1] Code Civ. Proc. § 1184, provides, in regard to mechanics' liens, that the owner shall retain a certain percentage of the contract price for 35 days after the completion of the work, and that the material men and subcontractors may serve notice on the owner of their claims for material furnished or labor performed, whereupon the owner shall retain sufficient money to satisfy such claims.

We concur: BELCHER, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is modified so as to direct the payment of any balance that may remain of the funds in the hands of the court to appellants according to their several rights, but without costs; and, as modified, that the judgment be affirmed, at the cost of appellants.

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105 Cal. 36

## PEOPLE v. EPPINGER. (No. 21,099.)

(Supreme Court of California. Dec. 7, 1894.)

CRIMINAL LAW—FORGERY—SIGNING FICTITIOUS NAME—INFORMATION—EVIDENCE.

1. Where an information alleges the specific acts constituting an offense under Pen. Code, § 476, imposing a penalty on every person who makes, with intent to defraud, a fictitious bill, note, or check purporting to be the act of a person who has no existence, the mere fact that the words "forge" and "forgery" are used in the information will not make the charge one under section 470, defining "forgery."

2. An information, under Pen. Code, § 476, imposing a penalty on one who makes, with intent to defraud, a fictitious bill, note, or check purporting to be the bill, note, or check of some nonexistent bank, corporation, partnership, or individual, knowing the writing to be fictitious, which charges that the instrument purported to be signed by H. & Co., whereas there was no such "individual" in existence, is defective, because it does not appear that the name signed is that of an individual, and there is no allegation that it purported to be that of an individual.

3. On a trial for making a fictitious instrument in writing, under Pen. Code, § 476, a city directory may be admitted to show that there was no person in the city of the name signed to the instrument.

4. On such a trial, evidence of a police officer that he unsuccessfully made inquiries for a person bearing the name signed is competent.

5. Evidence of the teller of a bank on which a check was drawn that no person of the name signed thereto had an account with the bank is prima facie evidence that the check was fictitious.

Department 1. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

W. L. Eppinger was convicted of making a fictitious check, and appeals. Reversed.

Clement, Cannon, Kline & Stradley, for appellant. Atty. Gen. Hart, for respondent.

HARRISON, J. An information was filed in the superior court of the city and county of San Francisco against the defendant, charging him with "forgery, committed as follows: The said W. L. Eppinger, on the 13th day of November, A. D. eighteen hundred and ninety-three, at the said city and county of San Francisco, state of California, with intent to defraud, did make and forge a certain fictitious instrument in writing for the payment of money, purporting to be signed by M. Howell & Co., and which said instrument in writing was and is in the words and figures following, to wit: 'San Francisco, Nov. 13, 1893. No. 48 Clearing House, No. 2. The Bank of British Columbia, San Francisco, Cal.: Pay to W. L. Eppinger or bearer $36.00. Thirty-six $\frac{}{100}$ dollars. M. Howell & Co.' And on the back thereof was indorsed the name 'W. L. Eppinger,'—whereas, in truth and in fact there was no such individual as M. Howell & Co. in existence, as he, the said W. L. Eppinger, then and there well knew, and that the said instrument in writing was fictitious. * * *" And upon the trial thereof he was convicted and sentenced to the state prison for the term of 14 years.

Section 476 of the Penal Code of this state makes special provision for the offense of making or passing a fictitious instrument in writing, and a distinction is thus made between the forgery of a check upon an existing person and the making and passing of a fictitious instrument purporting to be the check of a person who has no existence. In People v. Elliott, 90 Cal. 586, 27 Pac. 433, it was held that section 470 of the Penal Code does not include the matters contained in section 476, and that the act of making or passing a fictitious check can only be prosecuted when brought within the requirements and conditions of the latter section. As the specific acts constituting the offense with which the defendant is charged are set forth in the information with sufficient clearness to show that the prosecution is under this section, the additional designation of the offense as "forgery" is immaterial. Forgery is a statutory offense, and the charge against the accused must be found within the terms of the statute. While, by the criminal law of England, the making of a fictitious check would be punishable as a forgery, the provisions of section 476 of the Penal Code show that it was the intention of the legislature of this state to render the making or passing of a fictitious instrument a distinct offense, with a designated punishment, and the prosecution in the present case is accordingly had under that section.

An indictment or information must contain matter which shows on its face that a crime has been committed by the accused. If the matters charged in the indictment or information are as consistent with the innocence of the accused as with his guilt, the presumption of his innocence will overcome the accusation of guilt, and the accused is not to be subjected to a trial of the charge. The essence of the offense created by the provisions of section 476 is the making, with an intent to defraud another, of an obligation of some "bank, corporation, copartnership or individual," when in fact there is no such obligor in existence; but the mere charge of making and passing a check with the averment that there is no "corporation" in existence of the name by which the check purports to have been signed does not state an offense, within the provisions of this section, unless it is also averred that the name signed to the check purported to be the name of a corporation. If the name signed to the check is as apparently that of a corporation as of a partnership, it is necessary to allege which of the two it purports to be, and that the one so alleged has no existence; and an information equally fails to state an offense if it avers that there is no "individual" of the name signed to the check, unless the name by which the check purports to be signed is apparently that of an individual, or it is alleged that such name purports to be that of an individual. The allegation that the check was fictitious adds nothing to the statement of the crime unless the statutory particulars in which it is fictitious are also alleged. The statute designates four classes of obligors whose signature may be attached to a fictitious instrument, and, unless the signature purports to be that of one of these classes, it is not within the provisions of the statute. Moreover, the defendant has the right to be informed which of these classes of obligors is claimed to have been assumed by him. The information in the present case does not aver that the name of "M. Howell & Co.," signed to the instrument, purports to be that of an individual; and, as such signature is not presumptively or in legal contemplation that of an individual, the subsequent averment that there is no such "individual" as M. Howell & Co. does not charge an offense, within the terms of section 476. M. Howell & Co. may be the name of either a partnership or a corporation, or it may be the name under which an individual does the business of a bank; and, for the purpose of charging an offense against the accused, the information would have been equally defective if it had alleged that there was no partnership in existence by that name, and had not also alleged that there was no corporation in existence by that name. If it be assumed that the averment in the information that there is no such individual in existence as M. Howell & Co. sufficiently alleges the fictitious character of the instrument, there was no evidence in support of this averment, the only evidence of the fictitious character being that there was no such "firm" in existence. There was no evidence offered tending to show that there was no corporation or partnership by that name, or that M. Howell & Co. was in any other respect a fictitious name, or that there was no individual doing business by that name. But, conceding that in common parlance the term "firm" is equivalent to "partnership," if that was the fictitious character of the instrument which the defendant was to be tried for making and passing, it should have been so charged in the information. The charge in the information would have been as well sustained by proof that there was no corporation by that name as by proof that there was no firm by that name. In either case the actual charge which is made in the information would not be sustained by the proofs.

The city directory, showing therefrom that this name did not appear therein, was competent for the purpose of proving that there was no such firm as M. Howell & Co. (State v. Hahn, 38 La. Ann. 169); and it was also competent to prove by the police officer that he had made inquiries for such a firm without success (People v. Sharp, 53 Mich. 523, 19 N. W. 168). The character of the directory and the extent of the inquiries might affect the weight, but not the competency, of the evidence. The testimony of the teller in the bank on which the check was drawn, that no firm by the name of M. Howell & Co. kept or had any account in his books, was prima facie evidence of the fictitious character of the check. Rex v. Backler, 5 Car. & P. 118; Rex. v. Brannan, 6 Car. & P. 326; 3 Greenl. Ev. § 109.

The judgment and order are reversed, and cause remanded to the superior court.

We concur: GAROUTTE, J.; VAN FLEET, J.

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105 Cal. 52

## GREEN v. BERGE et al. (No. 15,545.)

(Supreme Court of California. Dec. 10, 1894.)

ADJOINING OWNERS—RIGHT OF LATERAL SUPPORT—LIABILITY FOR WITHDRAWAL—OWNERS AND CONTRACTORS.

1. Plaintiff had judgment against one of two defendants, and appealed from a judgment for costs in favor of the other. *Held*, that respondent's codefendant was not an adverse party, on whom notice of the appeal must be served, since his interest was not in conflict with a reversal of the judgment from which the appeal was taken.

2. Under Civ. Code, § 832, making it unlawful for the owner of land to remove the lateral support of adjoining land without taking reasonable precautions to sustain it, such owner cannot escape liability for a failure to take such precautions after excavating on his

own land by showing that the work was done by a contractor.

3. Where the owner of land hires a contractor to excavate therein, and no precaution for the lateral support of adjoining land is taken, as required by Civ. Code, § 832, both owner and contractor are liable to the adjoining owner for a subsequent falling of his land.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Action by Annie Green against Peter A. Berge and Albert E. Buckman. Plaintiff had judgment against defendant Berge, and defendant Buckman had judgment against plaintiff for costs, and plaintiff appeals. Modified.

Alexander D. Keyes, for appellant. J. C. Bates, for respondent.

TEMPLE, C. This appeal is from a portion of the judgment upon the judgment roll. The action was brought to recover damages for excavating upon a lot adjoining plaintiff's lot, so negligently that the ground constituting a portion of plaintiff's lot fell into the excavation of its own weight. Berge was the owner of the lot upon which the excavating was done, and Buckman performed the work under a contract. The case was tried without a jury, and, among other facts, the court found that on the 14th of May, 1891, Berge entered into a contract with Buckman, in writing, whereby, for a stipulated price, Buckman agreed to grade his lot; that in the contract nothing was said in regard to the duty of supporting the bank towards plaintiff's lot; that Buckman performed the work to the satisfaction of Berge, and in all respects in a careful, skillful, and workmanlike manner; that the work was completed on the 14th day of August, 1891, and on that day was accepted by Berge, who then gave Buckman a writing in which he stated that the work was done to his satisfaction; that Berge did not, after the completion of the work, provide for any lateral support to plaintiff's land, which, by the excavation, had been deprived of its natural support; that in the month of December a great part of the earth of plaintiff's lot, solely by its own weight, and by reason of its said lack of lateral support, gave way, and fell into the excavation, to the injury of plaintiff in the sum of $1,000. Thereupon the court gave judgment in favor plaintiff against Berge for $1,000, but also ordered judgment in favor of Buckman against plaintiff for his costs. Plaintiff appeals from that part of the judgment which is in favor of Buckman, and now contends that, upon the findings, she is entitled to a joint judgment against both defendants for the amount of damage found by the court.

1. Respondent makes a preliminary objection to the jurisdiction of this court to entertain the appeal, on the ground that the notice of appeal was not served on the codefendant of appellant. "An appeal is taken by filing with the clerk of the court in which the judgment or order appealed from is entered a notice stating the appeal from the same, or some specific part thereof, and serving a similar notice on the adverse party or his attorney." Is appellant's codefendant an adverse party? The appeal cannot result in a modification of the judgment against him. If the appeal be successful, the only possible result would be either that a new trial would be awarded as to the appellant, or a joint judgment would be entered against both defendants in lieu of the present judgment against Berge. This would in no way affect the liability of Berge upon the judgment, though it might give him the advantage of a codefendant. This is not an adverse interest. This question was decided in Senter v. De Bernal, 38 Cal. 637, where it was said, quoting from Thompson v. Ellsworth, 1 Barb. Ch. 627: "The adverse party * * * means the party whose interest in relation to the subject of appeals is in conflict with the reversal of the order or decree appealed from, or the modification sought for by the appeal." This case has been often referred to with approbation since, and, indeed, it would be difficult to reach any other conclusion.

2. It is contended by the respondent—and this appears to be the view taken by the lower court—that the duty of sustaining the land of the adjoining owner rested upon the lot owner who caused the natural support of the land to be removed; that Buckman had a right to presume that Berge would perform his duty. He undertook to do a part of the work only, and there was nothing unlawful in what he did. If there was anything unlawful, it was on the part of the lot owner who did the excavating, but did not take measures to support the adjoining land. The land did not cave in until the work had been completed and accepted. The lot owner could then have added the support, and Buckman had a right to presume he would do so. It was found that the work was done in a careful manner, and that there was nothing in the mode of doing the work which increased the liability of the land to slide into the excavation. This view seems plausible, but, stated in another way, it does not have that appearance. Buckman removed the natural support of the soil. This support was an incident to plaintiff's ownership. It was not lawful to do this except by the owner of adjoining land, nor then except by taking reasonable precautions to sustain the land. Civ. Code, § 832. No such precautions were taken, and the work was therefore unlawful, and caused the injury. The authorities sustain this view. In Dalton v. Angus, L. R. 6 App. Cas. 740, the lord chancellor said: "The action was brought by reason of the falling of the plaintiff's house through the excavation of the adjoining land of the commissioners in the course of certain work executed for them by the appellant, Dalton, under a con-

tract, and for Dalton by subcontractors. The commissioners disputed their liability for the acts of Dalton, and Dalton disputed his liability for the acts of his subcontractors. The same point arose under very similar circumstances in Bower v. Peate, 1 Q. B. Div. 321, and was decided adversely to the contention of appellants. It follows from that decision (as to the correctness of which I agree with both the courts below) that, if the plaintiffs are entitled to recover at all, they are entitled to recover against both the commissioners and Dalton." In Aston v. Nolan, 63 Cal. 269, the work of excavating was done under a contract similar to the contract in this case; that is, it was a contract for excavating, which contained no provisions in regard to supporting the land of the adjoining lot. It was held that the contractor was liable, and that, since the contract implied that the work should be done in a lawful manner,—that is, in taking reasonable care to support the earth of the adjoining lot,—the owner of the lot was not liable. Some would be disposed to question that decision so far as it holds that the lot owner could thus relieve himself from the duty he owed to his coterminous owner. That point, however, is not involved here. The case is authority for the proposition that the contractor is responsible. Independently of the statute, the adjoining lot owner who caused the excavation to be made would be responsible for any damage which might result, irrespective of the question of negligence in making the excavation. Gilmore v. Driscoll, 122 Mass. 199; Foley v. Wyeth, 2 Allen, 131; Carlin v. Chappel, 101 Pa. St. 348; Richardson v. Railroad Co., 25 Vt. 465. Here the only neglect necessary to give a cause of action is the neglect to furnish the support required by the statute (Aston v. Nolan, supra; Conboy v. Dickinson, 92 Cal. 600, 28 Pac. 809); and, of course, to make the excavation otherwise must be negligence. A landowner has an interest in adjoining land for the lateral support of his soil. This is a limitation upon the rights of landowners. Whoever deprives him of this support for his land, otherwise than as the statute has prescribed, performs an unlawful act. The general rule is that all who unite in such acts are wrongdoers, and are responsible in damages. Respondent knew, or should have known, that to make the excavation without supplying the support was unlawful. Having participated in it, he cannot avoid responsibility by pleading that he did the work under a contract. Except the case of Aston v. Nolan, supra, all the authorities I have been able to find hold that the landowner who causes such an excavation to be made cannot relieve himself of responsibility by any contract he could make. Cooley, in his work on Torts, speaking of the exceptions to the rule that the master is not liable for the negligence of an independent contractor, or the servants of such contractor, says: "He must not contract for that the necessary or probable effect of which would be to injure others, and he cannot by any contract relieve himself of duties, resting upon him as owner of real estate, not to do or suffer to be done upon it that which will constitute a nuisance, and therefore an invasion of the rights of others." In a note to this he cites the case of such an excavation as an instance. But, admitting that Aston v. Nolan goes too far, I do not see how that will relieve Buckman. It makes it a case where both are wrongdoers, and both responsible. I think the judgment should be modified so as to make it a joint judgment against both defendants.

We concur: SEARLS, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is modified so as to make it a joint judgment against both defendants.

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105 Cal. 41

## LICHTENBERG v. McGLYNN et al. (No. 15,783.)

(Supreme Court of California. Dec. 10, 1894.)

DECEDENT'S ESTATE—SUIT ON CLAIM — EVIDENCE —ADMISSIONS.

1. The holder of a claim against a decedent's estate can recover only the amount for which the claim was presented, and rejected by the executors or by the judge of the superior court.

2. Evidence of admissions by deceased that in a settlement with one who owned property jointly with him he had allowed such person a certain sum to be paid plaintiff for services rendered by him in trying to effect a sale of the property, is insufficient to establish the value of services rendered by plaintiff for decedent himself.

Department 1. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Action by William Lichtenberg against McGlynn and others, as executors of the estate of James M. Donahue, deceased, to recover for services rendered decedent. From a judgment in favor of plaintiff the executors appeal. Reversed.

Stanly, Hayes, McEnerney & Bradley and Chas. F. Hanlon, for appellants. Lindley & Erckhoff, for respondent.

HARRISON, J. The defendants are the executors of the last will and testament of James M. Donahue, deceased, and, after letters testamentary had been issued to them, the plaintiff presented to them a claim against the estate of their testator, which they rejected, and thereupon he began this action for the purpose of having the validity of his claim established. The claim was properly verified March 13, 1891, as follows: "Estate of James M. Donahue, deceased, to Wm. Lichtenberg, Dr. Nov. 20, 1890. To services rendered by said William Lichtenberg for said deceased, at his special instance, within two years next preceding his death, in and about effecting loans and sales for account of said deceased, $15,000." In his complaint he alleges "that within two years before his death said James M. Donahue became justly indebted to plaintiff in the sum of fifteen thousand dollars for certain work, labor, and services rendered and performed by plaintiff for defendant, and at his special instance and request, during said period of time"; and the court made a finding of fact in the terms of this allegation, and rendered judgment in favor of the plaintiff. The defendants moved for a new trial upon the ground that the evidence was insufficient to sustain the findings of the court, and upon its denial have appealed to this court.

The holder of a claim against the estate of a deceased person can bring an action therefor against the executors only after it has been first presented to such executors. Code Civ. Proc. § 1500. If his claim is rejected, either by them or by the judge of the superior court, he must bring a suit for the purpose of establishing its validity against the estate. In such action he can recover only upon the claim which has been so presented and rejected, and is not entitled in that action to recover against the executors for any other cause of action. As the plaintiff alleged in his complaint that the claim which he presented to the defendants was "for the services so as aforesaid rendered and performed by him," and the court so finds, we must assume that its findings were based upon evidence solely in support of the services named in the claim which was presented. We are of the opinion, however, that the evidence is insufficient to sustain these findings of the court. In order to sustain his claim it was necessary for the plaintiff to show that he had rendered services for the deceased within two years prior to his death; that these services had been rendered at the special instance of the deceased; that they were of the value of $15,000, or that they were rendered under an agreement, either express or implied, that he should be paid $15,000 for them. It may be that the failure to make greater proof results, as suggested by plaintiff's counsel, from the statutory inability of the plaintiff to testify in his own behalf; but this does not relieve him from the necessity of producing sufficient evidence to establish his cause of action. His incompetency to testify may be his misfortune, but the defendants' obligation is not thereby varied, and they are entitled to demand such proof before they can be called upon to pay to the plaintiff the money which is in their hands as trustees for the beneficiaries of their testator. The record fails to show that the plaintiff at any time within two years prior to the death of Donahue rendered any services to him, or for his benefit. The evidence tending to show any request for services from the plaintiff to Donahue is very meager, and fails to establish any agreement between them for services to be rendered. It appears that in May, 1888, Donahue was desirous of either selling or bonding the San Francisco & North Pacific Railroad, in which he was heavily interested, and that he proposed to the plaintiff to go to Europe with him for that purpose. The plaintiff expressed his disinclination to accept this proposition when it was made to him, but desired to take the matter under consideration. Donahue was about to go to Los Angeles, and on the day that he left for that place sought a further interview with plaintiff, but failed to obtain it; and it does not appear that the plaintiff ever accepted Donahue's proposition, or that Donahue from that time had any interview or correspondence with him. Prior to going to Los Angeles, Donahue stated to Justin P. Moore the nature of the arrangement that he desired to effect with the plaintiff, viz. that the plaintiff should accompany him to New York, and that they should go from New York together to Paris, and endeavor to raise the money, either by placing bonds or by selling his entire interest in the road; and after he reached Los Angeles he telegraphed Moore that he would go directly from that place to New York, and for the plaintiff to meet him in the latter city. There is no evidence, however, that Moore saw the plaintiff at any time after Donahue left, or that he at any time communicated to him Donahue's wishes, or any proposition on his behalf, or had any interview with him in reference thereto. The plaintiff did not leave California for New York until July, and did not meet Donahue in New York, or elsewhere. Donahue went east direct from Los Angeles in May, and while in New York effected a sale of his interest in the road, and returned to San Francisco in October of the same year. While he was in New York he made inquires for the plaintiff, and found that he had gone to Europe at the suggestion of Von Shroeder, where he remained until August, 1889. Von Shroeder was the husband of Donahue's sister, who was also interested in the road, and accompanied the plaintiff to New York, defraying his expenses thither. The plaintiff did not accomplish anything for Donahue either in New York or in Paris, and there is no evidence that he attempted in either place to render him any services. There is some evidence that in the year 1887 Donahue requested the plaintiff to negotiate a loan of $50,000 for him, but it is not shown whether the plaintiff did anything thereunder, and any claim for services rendered under this request was barred by the statute of limitations prior to the death of Donahue.

It is not claimed that there was any agreement by Donahue for the amount of compensation to the plaintiff, and the value of the services rendered by him was sought to be shown by certain admissions of Donahue. These admissions consisted of statements by him that in a settlement with Von Shroeder he had allowed Von Shroeder $15,000, to be paid by him to the plaintiff for the services which he had rendered in his efforts to secure the money in Europe; and that Donahue had also said that if Von Shroeder did not pay the commission he would himself pay it. This evidence is, however, insufficient to establish the value of any services rendered for Donahue. Von Shroeder and Donahue were both interested in the sale of the road, and the plaintiff had gone to New York with Von Shroeder, and at his request had gone from there to Europe. Donahue had himself effected the sale in New York for the benefit of both Von Shroeder and himself, and his statement that in a settlement with Von Shroeder he had allowed that sum of money to be paid to the plaintiff fails to establish that that was the value of any services rendered by the plaintiff to Donahue. If the plaintiff had not rendered any services to Donahue, Donahue's admission of their value would not be binding upon him or upon his executors. If he had rendered services for Von Shroeder and Donahue at the instance of Von Shroeder, the foregoing statements of Donahue would not establish the value of any services rendered for Donahue individually; and, if the obligation to pay the plaintiff was that of Von Shroeder, Donahue's verbal agreement to pay it would be invalid. The judgment and order are reversed.

We concur: GAROUTTE, J.; VAN FLEET, J.

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104 Cal. 554

## In re MURPHY'S ESTATE. (No. 15,770.)

## WOLSELEY et al. v. MURPHY et al.

(Supreme Court of California. Nov. 30, 1894.)

WILL—WHAT CONSTITUTES—TWO INSTRUMENTS CONSTRUED AS ONE—FINDINGS.

1. The fact that two instruments executed on the same day by deceased, for the purpose of disposing of her property, without anything to show which was executed first, differ in respect to the persons to receive the property on the possible death without issue of the persons who were given a life estate therein, does not show such a conflict as to prevent the probate of either, but in such case both instruments should be probated together as a will.

2. An instrument reciting that the writer writes "this letter" to her children, that they may know what distribution to make of her property on her death, and stating that "I wish it plainly understood that I desire" all my property to be divided in a certain manner, is a valid will.

3. Where certain findings of the trial court are mere inferences from other findings established by the evidence, the former may be reviewed without bringing up the evidence.

Department 2. Appeal from superior court, Alameda county; T. W. Henshaw, Judge.

Contest of a will, in the matter of Anna L. Murphy, between Mary H. Murphy and others, proponents, and Anna T. Wolseley and others, contestants. There was a judgment for contestants, and proponents appeal. Reversed.

George D. Metcalf, A. A. Moore, W. W. Foote, and Myrick & Deering, for appellants.

The law requires that such an interpretation be given to wills as will prevent intestacy, rather than bring it about. State v. Robinson, 57 Md. 501; Houser v. Ruffner, 18 W. Va. 244, 256; Booth v. Booth, 4 Ves. 403; In re Shillaber, 74 Cal. 144, 15 Pac. 453; In re Estate of Wood, 36 Cal. 75; Clarke v. Ransom, 50 Cal. 595; Warner v. Willard, 54 Conn. 470, 9 Atl. 136; Higgins v. Dwen, 100 Ill. 554; Smith v. Smith, 17 Grat. 268; Gourley v. Thompson, 2 Sneed, 387; Saxton v. Webber, 83 Wis. 617, 53 N. W. 905; Appeal of Boards of Missions, 91 Pa. St. 507; Miller's Appeal, 113 Pa. St. 459, 6 Atl. 715; Given v. Hilton, 95 U. S. 591, 594; Bernasconi v. Atkinson, 17 Eng. Law & Eq. 103; In re Skerrett's Estate, 67 Cal. 585, 8 Pac. 181.

On probating a will, the court has nothing to do with the construction of its provisions. In re Fleetwood, 15 Ch. Div. 594; Barnes v. Vincent, 5 Moore, P. C. 201–212; McArthur v. Scott, 113 U. S. 385, 386, 5 Sup. Ct. 652; Jolliffe v. Fanning, 10 Rich. Law, 200; Prater v. Whittle, 16 S. C. 40, 46; Lilly v. Tobbein, 103 Mo. 477, 15 S. W. 618; Graham v. Burch, 47 Minn. 171, 49 N. W. 697; In re Merriam, 136 N. Y. 58–60, 32 N. E. 621; Cox v. Cox, 101 Mo. 168, 13 S. W. 1055; Besancon v. Brownson, 39 Mich. 388; In re McLaughlin, 1 Tuck. 79; In re Cobb, 49 Cal. 600; In re Soher, 78 Cal. 477–482, 21 Pac. 8.

Several documents may be probated together as one will. Lemage v. Goodban, 1 Prob. & Div. 62, 63; Dempsey v. Lawson, 2 Prob. Div. 98, 106, 107, 108; Clarke v. Ransom, 50 Cal. 595; In re Estate of Skerrett, 67 Cal. 585, 8 Pac. 181; In the Goods of Graham, 3 Swab. & Tr. 69, 71; Geaves v. Price, Id. 71; In the Goods of Budd, Id. 196; In the Goods of Leese, 2 Swab. & Tr. 442; In the Goods of Nickalls, 4 Swab. & Tr. 40; In the Goods of Morgan, L. R. 1 Prob. & Div. 323; In the Goods of Petchell, L. R. 3 Prob. & Div. 153; Perkins v. Jones, 84 Va. 358, 4 S. E. 833; Pepper's Estate, 148 Pa. St. 5, 23 Atl. 1039; Knox v. Knox, 95 Ala. 495, 11 South. 125; In re Forman's Will, 54 Barb. 274; Lyon v. Fisk, 1 La. Ann. 444; Stoddart v. Grant, 1 Macq. 169.

Wilson & Wilson and Garber, Boalt & Bishop (Hall & Earl, of counsel), for respondents.

McFARLAND, J. Anna L. Murphy, deceased, died at London, England, on March 30, 1891. She was a widow at the time of her death, and her heirs at law were her three sons, Eugene K. L. Murphy, Samuel J. Murphy, and Daniel T. Murphy; her married daughter, Anna L. Wolseley; and her three unmarried daughters, Mary Helen Murphy, Frances Josephine Murphy, and Mary Margaret Isabella Murphy,—all of legal age. She left property in Alameda county, Cal. On June 20, 1891, Victor H. Metcalf filed a petition in the superior court of said county, in which he set forth that said deceased left two certain written instruments, each dated May 13, 1890, which he alleged to be her will, and prayed that they be admitted to probate as such will. He also averred that the heirs competent to administer had requested in writing that he be appointed administrator of the estate of the deceased, and prayed that he be so appointed. Such proceedings were thereafter had that on July 20, 1891, said two instruments were regularly admitted to probate by said court as constituting the last will of said deceased, and said Metcalf was appointed administrator with the will annexed, and duly qualified as such. Afterwards, on July 19, 1892, within the year prescribed by the Code, the said Anna T. Wolseley, Samuel J. Murphy, and Daniel T. Murphy filed in said court a petition to revoke the said probate of said will. The grounds on which the petition was based were that said two instruments "do not, nor does either of them, constitute the last will and testament of said Anna L. Murphy"; that they were never signed, executed, declared, etc., by the deceased as her will, or attested as required by law; that they were not intended by her as her will, or regarded by her as a completed will; and that they were only a memorandum to be submitted to her attorney for advice, from which a will was to be made in the future. Afterwards contestants filed an amended petition in which they alleged the additional grounds that said instruments were procured by fraud and undue influence, and set up at length and in detail the facts that said deceased was of unsound mind, and was fraudulently procured to make said instruments by the controlling and undue influence of certain of said unmarried daughters, who made false representations to her about the conduct of the contestants, etc. Issues of fact were raised by answers to these petitions, and the whole case was tried by the court without a jury. After the evidence had all been taken, the contestants again made an amendment to their petition, by averring that it could not be shown which of said instruments was, in point of time, last executed, and "that said two documents are wholly inconsistent and irreconcilable, each with the other, and cannot and do not together constitute a last will." This last amendment was made more than two years after the probate of said instruments as the last will of the deceased. The court made findings in which it found all the material issues of fact against contestants, and in favor of the proponents of the will. That is, the court found that on May 13, 1890, the deceased duly executed each of said instruments as a holographic will; "that both of said documents were not, nor was either of them, simply or only a memorandum to be submitted to an attorney," etc., "but that each of said instruments was at the time it was executed as aforesaid intended to be and was the will of said deceased"; that at the time of their execution, "and continuously thereafter, until the time of her death, the said Anna L. Murphy was of sound and disposing mind and memory, free from duress, menace, fraud, or undue influence of every character, and she was fully competent to make a last will and testament; and the said documents were not made and executed under any fraud, imposition, or undue influence of her daughters Mary Helen Murphy and Frances Murphy, or either of them, or of any person whatever, but were made and executed as the free and voluntary and uninfluenced act and deed of said Anna L. Murphy." The court, however, decided the case in favor of contestants and revoked the probate, on the ground stated in the aforesaid last amendment of contestants, viz. that the said two instruments are inconsistent and irreconcilable. The court found, under the heading of "Facts," "that said two documents are wholly inconsistent and irreconcilable, each with the other, and it cannot be shown from the evidence which, in fact, of said two documents, was executed last, and that no act of said deceased subsequent to the execution of said documents, or either of them, has explained them"; and that "it is impossible to ascertain the relative chronological position of said two conflicting documents." And under "Conclusions of Law" the court found that, "said two documents being wholly inconsistent and irreconcilable each with the other, neither one nor both has been proved to be the will of the deceased; that by reason of the foregoing said Anna L. Murphy died intestate; that the probate of said instruments heretofore granted herein must be annulled and revoked." Judgment was accordingly rendered, revoking the probate, and proponents appeal from the judgment upon the judgment roll.

As the court finds that the two instruments were executed on the same day, and that there is no evidence to show which was, on said day, executed last, it is evident that the questions presented to this court are to be determined upon consideration of the said instruments themselves. Counsel for both sides have argued the case with great industry and ability; and in their briefs they have presented many authorities, both English and American, and have quoted copiously therefrom. We do not deem it necessary, however, to notice here many of the cases cited. They will no doubt appear in the official report of the case. We will give here merely the results of a consideration of the authorities, and of the principles which we think applicable.

One of said instruments is as follows: "London, England, May 13, 1890. Being in perfect health and in full possession of all my faculties, yet knowing the uncertainty of life, I write this letter to my children, that they may know what to make distribution of all my property when I die. Therefore I wish it plainly understood that I desire all of which I am possessed at my death, whether real estate or personal property, of whatever description, to be equally divided between my three daughters, Mary Helen Murphy, Frances Josephine Murphy, Mary Margaret Isabella Murphy. Should either of these three daughters die, I wish her portion to be divided between the two surviving daughters. In case these daughters they all die without children—I wish the children of my eldest son, Eugene Kelly Murphy, the entire property they may leave to inherit share and share alike—Eugene Besson Murphy, Mabel Murphy, Charles Murphy. Anna L. Murphy, 12 Charles street, Berkeley square. May 13, 1890, London, England." The following is the other instrument: "May 13, 1890, London, England. Being in perfect health and in full possession of all my faculties, yet knowing the uncertainty of life, I write this letter to my children, that they may know what distribution I wish made of all the property of which I may be possessed when I die. Therefore I wish it plainly understood that I desire all the property that I possess at my death, either real estate or personal property, jewels, pictures, plate, glass, furniture, carriages, my gas shares, all and whatever description, everything that I possess, to be divided equally between my three daughters, Mary Ellen Murphy, Frances Josephine Murphy, Mary Margaret Isabell Murphy. Should either of these three daughters die, I wish her portion to be divided between the two surviving daughters. In case either or all of these daughters die without children, I wish the children of my eldest son, Eugene Kelly Murphy, to inherit from my portion that I leave the three daughters whatever they may leave when they die. I wish these children of my eldest son, Eugene, to have share and share alike of whatever my three daughters may leave of what I have given them, both personal and real estate. Anna L. Murphy, 12 Charles street, Berkeley square. May 13, 1890, London."

Upon first glance, these two instruments seem to be substantially the same. Upon closer inspection, however, there is to be seen the shadow of a possibility that at some uncertain future period of time, if some events should happen, which may never happen at all, there might be some difficulty in determining where, under these instruments, certain contingent remainders would vest. It is contended that under one of the instruments, upon the death without issue of the daughters named in the instruments, what they "may leave" of the property would go to the three named children of Eugene Kelly Murphy,—Eugene Besson, Mabel, and Charles,—while under the other it would go to all of the children of Eugene Kelly, including any others who might be thereafter born, and living when the remainders should take effect in possession. (Although the question is perhaps not affected by it, still it appears that Eugene Kelly Murphy has since died, and therefore can have no other children; so, as a matter of fact, the question can actually never arise.) The contention of respondents is that because, if the said daughters should die childless, and if there should be children of Eugene Kelly other than the three named, and if there should be a contention between said children as to said remainders, a court could not determine in whom said remainders vested, therefore the whole will is to be held void, and the three daughters are to lose the properties and estates which by the will are devised to them. There is also another inconsistency contended for by respondents, in this: that under one of the instruments there is a conditional limitation in favor of Eugene's children upon the death childless of either of the three daughters, while under the other instrument the limitation is dependent upon the death of all the daughters without children. These are the two main grounds of alleged inconsistencies in the two instruments, although there is something said about differences in cross limitations to the survivors of the three daughters, etc.

We are satisfied that the contention of respondents as to the total invalidity of the two instruments as a will cannot be successfully maintained, and that upon the findings the petition for the revocation of the probate should have been denied. It is not necessary for us to determine here—what a court may never be called upon to determine —whether or not there are any such inconsistencies in the two instruments as those contended for by respondents. They refer only to future contingencies which may never happen, and in no way affect the question whether or not the said two instruments constitute a will, entitled as such to be probated, and the latter question is the only one here involved. When a proponent presents to a probate court one or more instruments claimed by him to constitute the will of a deceased person, and asks to have the same probated as such will, the only question legitimately before the court is whether or not such instrument or instruments constitute the will of such deceased person. In determining that question the court has ordinarily nothing to do with the construction of the proposed will. This court, in Re Cobb, 49 Cal. 600, used this language: "The instrument offered being evidently of a testamentary character, upon application to admit it to probate the inquiry is only as to the mental condition of the testatrix,—whether she was acting under duress, menace, fraud, or undue influence, whether the will was duly executed, and the like. The other questions attempted to be raised by the objections filed in the case concern the construction to be placed upon the will, and cannot be considered until it shall have been admitted to probate." It may be conceded, for the purposes of the case at bar, that under peculiar circumstances a court, in determining whether a certain instrument is entitled to probate, may look somewhat into the body of the instrument; but this exercise of the power of construing is admissible only as necessarily incidental to the determination of the question, Will or no will? For instance, a will is generally defined to be the disposition of property to take effect after the death of the testator; and it has been held in one or two cases that an instrument in the form of a will, and duly executed, which does not dispose of any property, is not a will,—as where the instrument merely expressed a desire that certain heirs should be disinherited. Coffman v. Coffman, 85 Va. 459, 8 S. E. 672. There are decisions contrary to this, and it has been held that an instrument in which an executor is appointed without any disposition of property should be probated as a will. But assuming the rule to be as held in Coffman v. Coffman, supra, we find, upon looking into the instruments before us, that the rule has no application here. There is no lack here of a disposition of property. By the instruments in question, and by each of them, all the property of the testatrix is given to the three daughters in fee, with a possibility of the fee being defeated after their deaths, and upon the happening of remote contingencies. Respondents admit that these instruments give to the three daughters estates for life in all property of the deceased, and this admission is determinative of the case in favor of appellants. Can an estate for life be defeated by an uncertainty as to what may come after the death of the tenant? Counsel say that the testatrix did not intend to give them an estate for life. But she clearly intended to give them an estate greater than an estate for life,—an estate which included an estate for life. If by the language which she used she failed to devise a greater estate, but did devise an estate for life, the latter estate was surely created, and is in all respects a perfect estate. We are not to be considered as holding that only a life estate was created. We are putting the case in a light most favorable to respondents, and, looking at it in that light, we see clearly that the two instruments, taken together, constitute the will of the deceased, anl that its probate should not be disturbed. The instruments are of even date, and were executed on the same day, and should be taken together to be the testatrix's will, unless, in the language of the Code, they are "wholly inconsistent." Instead of being wholly inconsistent, they are, in most of their material parts, substantially identical. Those parts of them claimed to be inconsistent relate to questions which may never arise,—to contingencies which may never happen. If such questions should ever arise, courts might find but little difficulty in disposing of them. At all events, they are not here now demanding solution. Devises of large properties and estates should not be defeated by acute speculations about what might possibly occur after the deaths of the devisees.

The following sections of the Civil Code are applicable to the case at bar: Section 1320: "Several testamentary instruments, executed by the same testator, are to be taken and construed together as one instrument." Section 1326: "Of two modes of interpreting a will, that is to be preferred which will prevent a total intestacy." Section 1296: "A prior will is not revoked by a subsequent will, unless the latter contain an express revocation, or provisions wholly inconsistent with the terms of the former will; but in other cases the prior will remains effectual so far as consistent with the provisions of the subsequent will."

The foregoing views make it unnecessary to consider appellants' point that the amendment to respondents' petition, upon which the case was decided, was made two years after the probate of the will, and therefore should not have been considered.

Respondents suggest that, as the record contains only the judgment roll, certain findings must be taken as warranted by evidence not before us. But the findings show clearly the theory on which the decision was made, the facts upon which the theory rested, and that there was no evidence to explain those facts. These facts were that the two instruments were executed on the same day, and that there was nothing to show which of the two was executed last. Upon these facts the court held that the instruments were wholly inconsistent with each other, and that, as it cannot be determined which was executed last, therefore neither the two together, nor either one of them, was the will of the deceased. All the other findings upon the subject are mere inferences from the facts above stated. It was therefore wholly unnecessary for appellants to bring up any evidence; their appeal rests upon the facts found.

Respondents have a motion pending to dismiss the appeal upon the ground that the notice of appeal was not served upon the administrator of Eugene K. L. Murphy, deceased. The motion must be denied. It is doubtful if he was a person necessary to be served, as it appears that said Eugene was not hostile to appellants, but was in sympathy with them. If, however, it was necessary to serve his representative, we think that the evidence shows such service. The motion to dismiss the appeal is denied, and the judgment is reversed, with directions to the superior court to enter judgment against the contestants, and denying the petition for the revocation of the probate of the will.

We concur: DE HAVEN, J.; FITZGERALD, J.

105 Cal. 84

## SOUTHERN PAC. R. CO. v. SUPERIOR COURT OF SAN FRANCISCO et al. (No. 15,939.)

(Supreme Court of California. Dec. 13, 1894.)

BILL OF EXCEPTIONS—REFUSAL TO SIGN—WHEN PROPER.

After verdict against it, defendant gave notice of motion for new trial, and filed a bill of exceptions. It also filed an affidavit that, after deliberating on their verdict, the jury asked for instructions as to whether they could find for plaintiff without interest, and recited what occurred, including the instructions given and the verdict rendered. The motion for a new trial was denied. *Held*, that the trial judge properly refused to settle another bill of exceptions containing such affidavit, and a statement that it, the judgment roll, the bill of exceptions, and the notice of motion for new trial were presented and used at the hearing of such motion, and that the motion was denied in the absence of its attorneys.

Department 1.

Petition by the Southern Pacific Railroad Company for a writ of mandamus to compel John Hunt, judge of the superior court of San Francisco, to settle a bill of exceptions. Denied.

Maxwell, Dorsey & Soto, for petitioner. J. C. Bates, for respondents.

PER CURIAM. Motion to compel the respondent to settle a bill of exceptions. After a verdict had been rendered against the petitioner, it gave notice of its intention to move for a new trial, and caused to be settled and filed with the clerk a bill of exceptions which it had prepared, and also filed an affidavit made in its behalf, stating "that after the court had instructed the jury, and the jury had retired to deliberate upon their verdict, the said jury returned into court, when the following occurred: The foreman of the jury, addressing the court, said: 'The jury would like to be instructed, if they find for the plaintiff, they can find without interest or not.' Mr. Bates, counsel for plaintiff, being present, then stated to the court, in the hearing of the jury: 'The plaintiff will be satisfied without interest.' The court then, addressing the jury, said: 'The law entitles the plaintiff to interest at seven per cent. per annum upon any amount that you may award him, if you award him anything since 1879, but he says he is willing to give up interest. Therefore, if you award him a verdict, you need not award interest upon it.' Thereupon the jury again retired, and after deliberation returned with a verdict in favor of the plaintiff, awarding him $1,580.98, without interest." After its motion for a new trial was denied, it presented to the trial judge for settlement another bill of exceptions containing the foregoing affidavit, with the statement that it, together with the judgment roll, the bill of exceptions, and notice of intention to move for a new trial, had been presented and used at the hearing, and that the motion had been denied in the absence of its attorneys. The judge declined to settle the proposed bill of exceptions, and the present application is brought to compel him to do so.

The matters set forth in the affidavit were instructions of the court to the jury, and, if deemed by the defendant to be erroneous, constituted "error at law occurring at the trial," and should have been excepted to and embodied in the bill of exceptions provided for in section 650, Code Civ. Proc. Upon an appeal from an order granting or denying a new trial, the notice of intention to move for a new trial is not a part of the record on appeal, and need not be included in a bill of exceptions, unless the opposite party insists that it is insufficient. Pico v. Cohn, 78 Cal. 386, 20 Pac. 706. As an appeal may be taken from the order denying a new trial, it is deemed to have been excepted to, and need not be embodied in a bill of exceptions. As reference may be made on the hearing of the motion for a new trial to the pleadings in the case (Code Civ. Proc. § 660), for the purpose of ascertaining the issues and determining the correctness of the court's rulings (Bode v. Lee, 102 Cal. 586, 36 Pac. 936), it will be presumed that such reference was made; and, as the judgment roll is a part of the record to be used on appeal from the order denying the new trial (Code Civ. Proc. § 661), the fact that such reference was made need not be presented by a bill of exceptions. The judge, therefore, correctly declined to settle the proposed bill. The motion is denied.

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105 Cal. 99

## SOUTHERN CALIFORNIA LUMBER CO. v. McDOWELL, Sheriff. (No. 19,468.)

(Supreme Court of California. Dec. 15, 1894.)

REDEMPTION FROM EXECUTION SALE — RIGHTS OF ASSIGNEE.

1. The right of a judgment debtor to redeem land sold under the judgment is not affected by the fact that he did not have title to the land, nor that he had conveyed part of it after the judgment was entered.

2. One who, after land is sold under judgment, receives from the judgment debtor a conveyance of all his interest in the land, "for the purpose of having the certificate of redemption of said property from said sale issued in his name," is a "successor in interest," within Code Civ. Proc. § 701, allowing redemption by such successor, though after the entry of the judgment, and before the sale, the judgment debtor had conveyed part of the land to another person, and had never had title to the rest of the land.

Commissioners' decision. Department 1. Appeal from superior court, San Diego county; George Puterbaugh, Judge.

Mandamus by Southern California Lumber Company to compel S. A. McDowell, sheriff of San Diego county, to execute to him a deed of land sold under execution. Judgment was rendered for defendant, and plaintiff appeals. Affirmed.

H. J. Stevens, for appellant. Harry L. Titus, for respondent.

VANCLIEF, C. Proceeding by writ of mandate against the defendant in his official character as sheriff of the county of San Diego, to compel him to execute to plaintiff a deed of certain real property, to wit, block 71 of Ocean Beach, in the city of San Diego, with the building thereon, said block consisting of 54 lots, numbered serially from Nos. 1 to 54, inclusive. It appears that on December 1, 1888, the plaintiff obtained a decree of the superior court against the Ocean Beach Hotel Company, a corporation, foreclosing a lien upon said block and appurtenances for the sum of $297.10 and costs, amounting to about $75. After the entry of this decree, to wit, on March 5, 1889, the Ocean Beach Hotel Company, by a grant deed, conveyed lots numbered 1 to 19, inclusive, of said block to the San Diego Eastern & Terminal Railway Company, a corporation. Afterwards, on February 24, 1890, in execution of said decree of foreclosure, the defendant, as sheriff of said county, officially sold the whole of said block to plaintiff in one parcel for the sum of $451.40, subject to redemption, and delivered to plaintiff a certificate of such sale in due form. Before the expiration of the period for redemption, to wit, August 25, 1890, the Ocean Beach Hotel Company executed to E. J. Swayne "a conveyance of all its interest in and to the property described in said petition (the whole of block No. 71), for the purpose of having the certificate of redemption of said property from said sale issued in his name." On August 30, 1890, Swayne, as successor in interest to the Ocean Beach Hotel Company, paid to defendant $730.86 for the purpose of redeeming the whole of block No. 71, and defendant accepted the same for that purpose, and issued to Swayne a certificate of redemption. It further appears, however, that the Ocean Beach Hotel Company never owned more than the first 19 lots of the series of 54 of which the block is composed, which 19 lots it purchased from Carlson and Higgins on December 1, 1888, and sold as aforesaid to the San Diego Eastern & Terminal Railway Company. The plaintiff refused to accept the redemption money deposited with the sheriff by Swayne, on the ground that Swayne was not the successor in interest of the Ocean Beach Hotel Company, and therefore not entitled to redeem. But the court found that Swayne was successor in interest of the hotel company, and that as such he had made a valid redemption, and thereupon dismissed the proceeding.

Counsel for appellant contends that Swayne was not successor in interest of the hotel company in the sense of section 701 of the Code of Civil Procedure, which provides that property sold subject to redemption may be redeemed "by the judgment debtor, or his successor in interest in the whole or any part of the property." As affecting the right of the hotel company (the judgment debtor) to redeem the whole block, the admitted fact that the hotel company had never obtained title to more than 19 of the 54 lots of which block 71 is composed, is immaterial. The plaintiff had obtained a decree of the superior court against the hotel company ordering the whole block to be sold by the sheriff; had purchased the whole block at the sheriff's sale under that order, as the property of the hotel company, in satisfaction of its alleged lien thereon; and by virtue of such purchase now, by this suit, demands of the sheriff a deed of the whole block. Under this state of facts, the plaintiff will not be heard to object to the redemption on the ground that the hotel company never owned the whole block (Lorenzana v. Camarillo, 45 Cal. 125); nor is it a valid objection to a redemption of the whole block by the judgment debtor (hotel company) that, before such redemption, it had sold a part (19 lots) of the block to the San Diego Eastern & Terminal Railway Company (Yoakum v. Bower, 51 Cal. 539; Eldridge v. Wright, 55 Cal. 531). Therefore, conceding, as we must, that the hotel company had a sufficient interest in the property to entitle it to redeem the whole block, notwithstanding its conveyance of the 19 lots to the San Diego Eastern & Terminal Railway Company, it must follow that it (the judgment debtor) could convey or assign such interest to Swayne, "for the purpose of having the certificate of redemption of said property from said sale issued in his name," as expressed in the deed to Swayne, and thereby authorize and entitle Swayne to make the redemption in his own name as he did. I think Swayne was the successor in interest of the judgment debtor in the sense of section 701 of the Code of Civil Procedure, and as such properly redeemed the property; and that the judgment should be affirmed.

We concur: TEMPLE, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment appealed from is affirmed.

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(108 Cal. 463)

## In re GARRITY'S ESTATE.[1]

Appeal of BUCKLEY. (No. 15,732.)

(Supreme Court of California. Dec. 14, 1894.)

EXECUTORS—ALLOWANCE TO WIDOW—PETITION—SETTLEMENT — SUPPLEMENTAL INVENTORY OF PERSONALTY—APPRAISEMENT —WHEN NECESSARY — LIFE TENANT — POSSESSION OF PERSONAL ESTATE—DECREE OF DISTRIBUTION.

1. Under Code Civ. Proc. § 1466, which confers on the court power to make reasonable allowance out of the estate for the maintenance of the family, the court may make such allowance without first setting apart a homestead, as authorized by section 1465, and determining that it is insufficient for the widow's support.

2. The son of the widow may petition for the allowance to her, though he is also the executor.

3. Where the executor disposes of certain personal property without including it in the inventory, in accordance with the expressed wish of the decedent, and, on final settlement, makes a supplemental inventory of such property, the court may determine its value, and it need not be appraised as other property of the estate.

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[1] Rehearing granted.

4. Where testator gives "all" his property to his wife to hold and to "enjoy" for life, and to others the residue "remaining upon the termination of the life estate," the wife is entitled to the possession of the personal estate without security, in the absence of adverse showing by the remainder-men.

5. A decree of distribution directed the personal estate to be delivered to the widow, "provided $100 of said distribution shall have been heretofore received by T., and that $15 has been received by J." *Held*, that such proviso was improper, since such a decree is intended to be a final, and not a contingent, disposition of the property.

Department 1. Appeal from superior court, Contra Costa county; Joseph P. Jones, Judge.

Distribution of the estate of C. C. Garrity, deceased. From the decree, Elizabeth Buckley appeals. Modified.

Reddy, Campbell & Metson, for appellant.
John B. Mhoon, for respondent.

HARRISON, J. C. C. Garrity died, testate, June 4, 1890. His will was admitted to probate in the superior court of Contra Costa county, and letters testamentary thereon issued to James Garrity, November 24, 1890; and on January 7, 1891, the executor filed an inventory of the estate, which was appraised at $24,681.36. By his will the testator made certain legacies, amounting to $2,500, and gave to his wife "all and singular my property, real, personal, and mixed, of every kind and character, wheresoever situated, to have, to hold and to enjoy for the term of her natural life only, and not otherwise"; and in a subsequent item gave to three of his children, of whom the appellant is one, "all and singular, the rest, residue, and remainder of my estate and property, real, personal, and mixed, of every kind and character, and wheresoever situated, remaining upon the termination of the life estate hereinbefore granted and bequeathed to my said wife." The entire estate was community property, and, after paying the debts and expenses of administration, there remained in the hands of the executor certain real estate, which was appraised in the inventory at $13.040; certain personal property, consisting chiefly of farming implements, appraised at $188; and the sum of $8,068.74 in money, which was on deposit in the bank at the testator's death. January 23, 1892, the executor filed a supplemental inventory, setting forth that he had received from the testator two watches and a gold chain, and had disposed of them in accordance with certain instructions of the testator, given prior to his decease. November 17, 1892, a petition for a family allowance to the widow was filed on her behalf by the executor, which was contested by the appellant; and, after a hearing thereon, the court made an order allowing the sum of $50 per month, amounting to $1,500. This allowance was paid by the executor, and allowed to him in the settlement of his final account. December 3, 1892, the court made a decree of distribution, by which it distributed one-half of the real estate to the widow in fee as the survivor of the community, and the other undivided one-half to her for the term of her natural life, and, after directing the payment of the legacies out of the money in the hands of the executor, distributed to her in her own right, as the survivor of the community, one-half of the balance of said money, and one-half of the other articles of personalty; and the other half of said articles and the remaining sum of money, viz. $1,834.37, were distributed to her, to hold and enjoy during her life, and at her death to the three children. From the orders making the family allowance, settling the final account, and from the decree of distribution, Elizabeth Buckley has appealed.

1. It is claimed by the appellant that the court could not make an order for a family allowance to the widow under section 1466, Code Civ. Proc., unless there had been previously set apart to her the property authorized by section 1465; and it had been determined that the property thus set apart was insufficient for her support; that as the inventory showed that there was property of the estate out of which a homestead might have been set apart to the widow, and as no application had been made therefor, the court had no jurisdiction to make the order of family allowance. The right of the family to an allowance for its support is not, however, contingent upon a previous order setting apart a homestead for its use. Whether a homestead be set apart or not, section 1466 confers upon the court the power, in its discretion, to "make such reasonable allowance out of the estate as shall be necessary for the maintenance of the family according to their circumstances during the progress of the settlement of the estate." The circumstances and condition of the family, as well as those of the estate, may be such that the court would more wisely exercise its discretion in making a pecuniary allowance for the support of a family out of the estate than in setting apart to it a homestead; and, if the widow is content with such allowance without having a homestead set apart to her, it would seem that the other heirs ought not to complain. A homestead is primarily the place of abode for the family, and it might be that although, if one were set apart, they would thus be furnished with an abiding place, they would not receive a sufficient income for their support, and the expense of maintaining the homestead would be disproportionate to their necessities; while, on the other hand, the widow might be better cared for by receiving an allowance sufficient for her support, and residing elsewhere than upon a portion of the property of the estate. It was not requisite that the widow should herself petition for the allowance. The order could be made upon a petition by any one in her behalf, and the fact that the executor was also her son should not prevent a petition made by him on her behalf from receiving the same con-

sideration by the court as though he had not held that office. The allowance to the executor in the settlement of his account of the amount which he had been directed to pay to the widow as a family allowance is not objected to, except as the allowance itself was objected to. As that allowance is sustained, the credit to the executor of the amount paid under the order was properly allowed by the court.

2. At the hearing, upon the settlement of the final account, the appellant made the objection that the watches and chain mentioned in the supplemental inventory were not accounted for in said account, and thereupon evidence of their value was taken by the court. It is recited in the bill of exceptions that, after hearing this evidence, the court rendered its decision, "charging the executor with fifty dollars as the value of said watches and chain, to which decision contestant then and there excepted." No exception was taken to this decision upon the ground that the value was not correctly found by the court, nor is it urged here that the court erred in this respect; but it is claimed that the watches should have been appraised as other property, and that the court could not, without such appraisement, determine their value. The record is not very clear as to the action of the court in this matter, but we think it sufficiently appears therefrom that the court charged the executor with $115, as the value of these watches and chain. The account, as rendered by him, shows the sum of $10,053.74 in his hands; and, in its order settling the account, the court charges him with $10,168.74 in his hands at the date of the filing; and in connection with the finding of the court that, since the rendition of said account, nothing has been received by the executor, it must be held that $115, the difference between these two sums, is the amount for which the executor was charged as the value of the watches and chain. There was evidence before the court from which it could have found their value; and, in the absence of any assignment of error in this respect, its conclusion must be accepted as correct, whether it be assumed to be $50, as recited in the bill of exceptions, or $115, as appears from a comparison of its order of settlement with the account as rendered. As the executor had disposed of the watches, the court was authorized to take evidence of their value for the purpose of ascertaining the amount with which he should be charged, and was not required to appoint appraisers for that purpose.

3. It is contended by the appellant that the widow was not entitled to the possession of the personal property, in which she was given only a life estate, but that the superior court, instead of distributing the property directly to her during the term of her life, should have directed that it be converted into money, and invested in some securities from which she should be entitled to receive only the income thereof during her lifetime, and at her death the securities should be delivered to the children. In England, and in some jurisdictions within the United States, the administration of an estate is regarded as a continuing trust, and the executor as a trustee for all the parties interested in the estate, for the purpose of carrying into effect the various provisions of the will; and in these jurisdictions the rule prevails that when personal property, consisting of money or securities, is given to one for life, with a remainder to another, the executor, as a trustee for both, shall convert the property into interest-bearing securities, and pay the income thereof to the legatee for life, and, after his death, deliver the securities to the remainder-man. Howe v. Earl of Dartmouth, 7 Ves. 137; Howard v. Executors, 16 N. J. Eq. 486; Covenhoven v. Shuler, 2 Paige, 132. At an early day in England it was the rule in chancery that the life tenant, before he could demand the delivery to him of property bequeathed to him for life, should give security to the executor; but as early as the time of Lord Talbot, in 1734, this rule had been modified to such an extent as to require the life tenant merely to deliver to the remainder-man an inventory that the property was held by him for life only. Slanning v. Style, 3 P. Wms. 336. See, also, Foley v. Burnell, 1 Brown, Ch. 279; Wescott v. Cady, 5 Johns. Ch. 349. This rule has been made applicable in this state only to a bequest for life of specific legacies. Civ. Code, § 1365. If the will is silent concerning the disposition of the corpus of the legacy during the continuance of the life estate, the general rule in equity is that the legatee for life is not entitled to demand from the executor the possession of the legacy, unless he gives security to the executor, and that the remainder-man may require that the tenant for life, before receiving the property bequeathed to him, shall give such security; but, in order that the remainder-man may demand that such security be given, he must make it appear that there is some danger that the estate will be impaired or suffer waste if left in the possession of the life tenant. In re Camp, 126 N. Y. 377, 27 N. E. 799; Story, Eq. Jur. § 604; Langworthy v. Chadwick, 13 Conn. 42. The rule is one of equity, established by courts for the protection of the remainder-man, in the absence of any direction in the will; but the rule thus established must yield to the terms of the will, and if it appears, from a proper construction of the will, that it was the intention of the testator that the property should be placed in possession of the life tenant without security, such intention will be carried out. It is to be assumed that the testator intended the life tenant to have the full enjoyment during his lifetime of the property bequeathed to him, and that this enjoyment shall not be im-

paired, except for the protection of the remainder-man. The testator has the right to make the life tenant the trustee of the property bequeathed, without requiring any security from him; and very slight indications in the will will be construed as showing that the testator intended the life tenant, rather than the executor, to be the trustee, subject, of course, to the general rules applicable to the obligations of a trustee to his cestui que trust. If the testator has not required such security to be given by the life tenant, courts are not authorized to require it, in the absence of any showing of danger or liability of waste; otherwise the will of the testator that the life tenant shall enjoy the property will be frustrated. There is nothing, however, in the rules of procedure in this state, or in the will under consideration, which authorized such a procedure in the distribution of an estate. The administration of an estate in this state is conducted under the direction of the superior court, mainly for the purpose of securing to the creditors payment of their claims; and after this purpose has been accomplished, in the absence of any express provisions in the will, the estate is to be distributed to the beneficiaries under the will in accordance with its terms, and the executor is entitled to be discharged from any further duties. The provisions of the will become merged in the decree of distribution, and the terms of this decree become the measure of the rights of the several beneficiaries. Sitting as a court in probate, the function of the superior court is limited to a judicial determination that the estate of the testator is to be transferred to the beneficiaries as the testator has provided in his will; and the court is not authorized to add to its terms or qualify those provisions. There is no provision in our statutes authorizing the court to direct a conversion of the testator's property, or requiring the legatee for life to give any security before receiving his legacy. If the legatees in remainder deem it necessary that their rights in the property shall be protected or preserved, they must seek such relief from the equity arm of the superior court.

A consideration of the terms of the will before the court leads to the conclusion that it was the intention of the testator that his widow should have the possession of the property bequeathed to her without being required to give any security for its preservation. If he had intended that, upon the death of his widow, his children should receive the entire estate given to her, or that she should receive only the income thereof, it is reasonable to suppose that he would not have qualified the character of the estate which he gave to them; but the language used by him in the bequest to them indicates that such was not his intention. After giving to her for the term of her natural life "all" of his property, of every character, he gives to the three designated children the rest, residue, and remainder of his estate and property remaining upon the termination of the life estate granted to the widow. Instead of giving to them the same property and estate by way of remainder, after the termination of the life estate, he expressly limits the property given to them to the "rest, residue, and remainder" thereof, that may be "remaining" after the termination of the life estate. These terms imply that there was a distinction in his mind between the property given by him to his widow and that which the children would receive at her death, and his use of the word "residue" shows that it was within his contemplation that some of the property received by her might not be in existence at her death to be received by the children. Some effect must be given to these words, and they receive their natural construction by holding that it was his intention that the possession of the property should be delivered to her at the distribution of his estate. This construction also consists with the terms in which the estate was given to her. He had given the property to her "to have, to hold, and to enjoy for the term of her natural life"; and, in the absence of any limiting clause, the use of these words would imply a right to the possession of the property in order that she might "enjoy" it. In Flanagan v. Flanagan, 8 Abb. N. C. 413, the testator, after giving to his widow the use of certain property during her life, disposed of "the portion left" of said property, and it was held that the words "the portion left" implied a right to the possession, and even the disposition, of the property. In Markley's Estate, 132 Pa. St. 352, 19 Atl. 138, the testator gave a life estate in all his property to his widow, and directed that, at her death, the "residue" should go to his children; and the action of the executor in delivering the property to the widow without any security was sustained by the court. In Downing v. Johnson, 5 Cold. 229, it was held that, under a provision in the will giving a life estate to the widow, she was entitled to its possession, and that the testator's disposition of "the balance of my property which may be on hand at the death of my wife" implied a right in the widow to consume the property given to her. In Warren v. Webb, 68 Me. 133, the testator gave a life estate in all his property to his widow, "and after her decease said estate and property, or the residue and remainder thereof, to be legally divided to and among my children." It was held that the widow was entitled to the possession of the estate, and that the language used in the will implied that it might be diminished while in her hands. See, also, In re Woods, 35 Hun, 60; Champion v. Williams (Sup.) 12 N. Y. Supp. 697; Smith v. Van Ostrand, 64 N. Y. 278; Sutphen v. Ellis, 35 Mich. 446; Houser v. Ruffner, 18 W. Va. 244; Burleigh v. Clough, 52 N. H. 267; Starr v. McEwan, 69 Me. 334. The appellant did not make any showing before the superior court that there was any danger of loss if the property should be delivered to the widow, nor did she present to that court any reason why the property should not be so delivered; but has appealed directly from the decree of distribution, upon the theory that it is the invariable duty of the court to cause the property to be converted and direct that the life tenant shall receive the income only.

4. In the decree of distribution the court added to the clause distributing the personal estate to the widow the following: "Provided that the sum of one hundred dollars of said distribution shall have been heretofore received by Thomas Garrity, and that the sum of fifteen dollars has been received by James Garrity." No reason is assigned for inserting this condition in the decree of distribution, and we are of the opinion that it should not be included therein. The decree of distribution is intended to be a final disposition of the estate, and not contingent upon the establishment at some future time of the existence of such condition. If, as is suggested by the respondent, the money thus referred to represents the value of the watches, as his executor was charged for that value in his account there would be no occasion for inserting this proviso. The executor has not, however, appealed from the decree, and the rights of the appellant are not affected by this clause.

The superior court is directed to modify the decree of distribution by striking therefrom the foregoing proviso, and, as so modified, the decree is affirmed. The orders for a family allowance and settling the account are also affirmed; and the costs of this appeal are to be borne by the appellant.

We concur: GAROUTTE, J.; VAN FLEET, J.

105 Cal. 184

## HARMON v. SAN FRANCISCO & S. R. R. CO. et al. (No. 15,450.)

(Supreme Court of California. Dec. 22, 1894.)

CONFLICTING EVIDENCE—REVIEW ON APPEAL.

A finding not against the weight of evidence will not be disturbed.

Commissioners' decision. Department 2. Appeal from superior court, Marin county; F. M. Angelotti, Judge.

Action by S. H. Harmon against the San Francisco & San Rafael Railroad Company and others. Judgment for defendants. Plaintiff appeals. Affirmed.

H. A. Powell, for appellant. Charles F. Hanlon and Stanly, Hayes, McEnerney & Bradley, for respondents.

SEARLS, C. This is an action to foreclose a mechanic's lien upon the San Francisco & San Rafael Railroad, extending from Point Tiburon to San Rafael, in the county of Marin, taken to secure the sum of $39,770.83, less about $7,000 paid on account thereof, claimed to be due the plaintiff for lumber, timber, etc., furnished by him as a subcontractor to one M. MacDonald, an original contractor, and used in the construction of said railroad. There was another action brought by the Gordon Hardware Company (a corporation) to foreclose a lien upon the same property. The two actions were consolidated, tried together, and judgment entered by the court in favor of the defendants, from which judgment, and from an order denying his motion for a new trial, S. H. Harmon, plaintiff in the first-mentioned cause, appeals.

The case involves but two questions of importance. The first relates to the time within which the lien was filed after the work was completed. The complaint avers the completion of the work on the 8th day of June, 1884, and the filing by plaintiff of his notice of lien as a subcontractor on the 18th day of June, 1884. The answer of the defendant railroad company negatives the allegations of the complaint in this behalf, avers the work to have been completed on or about May 5, 1884, "and that the plaintiff did not, within thirty days after the completion of said railroad, and the work mentioned in said contract, file for record," etc., his claim, etc. The court found that the contract under which plaintiff furnished supplies was completed May 8, 1884, "and that the plaintiff, Harmon, did not, within thirty days after the completion of said railroad and the work mentioned in said contract, file for record with the county recorder of Marin county any claim containing a statement of his demands," etc., and then proceeds to find that plaintiff's claim was filed June 18, 1884, long after the expiration of the 30 days after the completion of said railroad and of all work done or required to be done under said contract, etc. These findings are challenged by appellant, upon the ground that they are not supported by evidence, etc. In order to a better understanding of the drift of the evidence it is proper to state that on the 23d day of October, 1882, the defendant railroad company entered into a written contract with M. MacDonald, by the terms of which the latter agreed to construct the excavations, embankments, tunnels, piers, culverts, rubble walls, bridges, etc., on the line of the proposed railway from San Rafael to Point Tiburon in the county of Marin, at certain agreed prices, which aggregated say $242,240.66, of which amount 20 per cent., or say $48,452.20, was to be reserved by defendant until the time for filing liens by subcontractors should expire. Monthly payments were to be made upon progress estimates by defendants' engineer up to 80 per cent. of the work performed. The defendant railroad company also reserved the right in its discretion to pay off any debt of the contractor for labor or materials which might be or become a lien on the railroad, or any part thereof, and to deduct the sums so paid from the amount due the contractor. The work under the contract was to be completed November 1, 1883, and a bond for the faithful performance of the contract in accordance with its provisions was required and given in the penal sum of $50,000. Reference to this bond, and other facts not concerning the first question involved or the defendant corporation, will be made hereafter.

That plaintiff's lien as a subcontractor was filed for record June 18, 1884, was not disputed at the trial. There was a substantial conflict in the evidence as to the time when the MacDonald contract and the railroad were completed. That the road was substantially completed prior to April 28, 1884, is established beyond question. On the last-named day the first passenger train ran over the road, and on the following 4th day of May an excursion party went over the road, and thenceforward regular passenger trains, under a fixed schedule, ran several times a day. The last spike had been driven April 10th preceding. The contention of appellant was that certain rock taken from tunnel No. 1 had been deposited off the railroad right of way and upon the land of one Porter, which the contractor was required to return to the right of way, and which was in fact returned, and not completely done until say June 2, 1884. S. C. Walsh, a witness on the part of plaintiff, testified that the last work was done under the contract June 2, 1884, in removing the rock to the right of way; that he received orders from May 17th from Zook, defendant's engineer, to remove it, and sent a letter to a man named Bird, who was left upon the ground, who, with a man named McMahon, removed it, consuming about 10 days. This witness testified that all work except this rock had been completed, and the men, except two, had been discharged, on or before May 10, 1884. C. K. Bird corroborated Walsh as to the time of removing the rock, and that he and McMahon, who had been acting as watchmen over the tools and property left on the line of road, did the work. On the other hand, David Porter, the owner of the land upon which the rock was deposited, testified as to giving notice for its removal, and that subsequently he went over from San Francisco to the land by steamer to San Quentin, thence by buggy to the land and back, being driven by Robert Warden, who was his farmer on the ranch, and found the rock had been removed. The date he did not remember, but did remember that he went and returned by steamer. It was further shown by two witnesses that the steamers ceased running to San Quentin April 25 or 26, 1884. Robert Warden testified to driving Porter to the ranch, and that the rock was removed in "the fore part of April"; that he left the ranch April 14th, and it had then been removed. Felix Sands had been in the employ of the contractor at tunnel No. 1, and superintended depositing the rock; ceased work April 12th, and was then employed by defendant as bridge tender near the tunnel; saw the rock removed by Bird and McMahon, and was certain it was before trains began running on the road (April 28th). H. C. Whiting testified the rock was removed before the trains ran on the road. Corbaley testified to the same effect, as did some other witnesses.

Upon the whole it must be said that the weight of testimony is to the effect that the rock was removed before April 28, 1884, and as this was the last work shown to have been done under the contract (if it be conceded as being done under the contract, of which there is grave doubt), and, as the road was then completed, it follows that the finding of the court is amply supported by the evidence, and that the notice of lien of plaintiff was not filed within the time prescribed by the statute to constitute a lien on the railroad of the defendant railroad company, and is conclusive of plaintiff's right to a foreclosure.

There is another branch of the case in which the court finds in favor of the defendants, and which is equally conclusive against the plaintiff. The five specifications of insufficiency of evidence not noticed, and the errors of law assigned upon the admission and rejection of evidence, relate to such other branch. To discuss it intelligently would require a lengthy statement of facts, and occupy much space, and hence, as no error is perceived in the action of the court below in its disposition, it is not deemed necessary to dwell upon the matter here. The judgment and order appealed from should be affirmed.

We concur: VANCLIEF, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

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105 Cal. 126

## PEOPLE v. BAIRD. (No. 21,107.)

(Supreme Court of California. Dec. 20, 1894.)

CRIMINAL LAW—APPEAL—OBJECTIONS TO EVIDENCE.

On trial for forgery of a note, where, to show a guilty intent, other alleged forged notes were admitted in evidence on proof of extrajudicial confessions by defendant that they were forged by him, and the only objection made was that the notes were incompetent, immaterial, and irrelevant, the objection that sufficient foundation for their admission was not laid cannot be made for the first time on appeal.

Department 2. Appeal from superior court, Fresno county; S. A. Holmes, Judge.

One Baird was convicted of forgery, and appeals. Affirmed.

Seth Mann, W. H. Hatton, and Goucher, Jacobs & Jones, for appellant. Harris & Vickery, Atty. Gen. Hart, W. D. Tupper, and Firman Church, for the People.

DE HAVEN, J. The defendant was indicted for the crime of forgery, the indictment alleging that he did on or about August 20, 1891, "fraudulently, falsely, and feloniously," "make and forge a certain promissory note," bearing date June 20, 1891, and which promissory note is set out in the indictment. The defendant was convicted of the offense charged, and appeals from the judgment and an order denying his motion for a new trial.

Upon the trial the district attorney, for the purpose of showing guilty intent upon the part of the defendant, offered in evidence various other alleged forged notes, 31 in number, bearing different dates, between May 29, 1891, and June 19, 1891, together with proof that they were uttered by the defendant during the latter month, and near its close. The only evidence tending to show that these notes were forgeries consisted of proof of the extrajudicial admissions of defendant to that effect. The defendant objected to the admission in evidence of one of the notes referred to, dated May 29, 1891, upon the ground that he was under indictment for its forgery, and that the note itself was not an act "done at or about the time of the alleged transaction in this case"; and that the same was "incompetent, immaterial, and irrelevant, because the date of this note is May 29, 1891, and it being still further removed than the date of the other note [referring to the note of June 1, 1891, previously admitted in evidence] from the alleged date of this transaction; and also that it is not embraced in any of the issues of this case, and is incompetent, immaterial, and irrelevant for any purpose whatever." The objection was overruled, and the note admitted in evidence. Substantially the same objection and similar rulings were made in reference to the other offered notes. These rulings constitute the main ground upon which it is claimed that the judgment should be reversed, and we do not deem it necessary to notice in this opinion the other points suggested by the appellant.

It is argued here in behalf of the appellant that the court erred in admitting these notes in evidence, because it was not proven that they were forgeries, the testimony in relation to the admissions of defendant not being sufficient for that purpose; and, in support of this proposition, counsel for appellant refer to the general and well-settled rule that extrajudicial confessions of a defendant are not of themselves sufficient to establish the corpus delicti; and, to further sustain their contention, counsel cite section 111 of volume 3 of Greenleaf on Evidence, in which, after stating that, upon a trial for uttering a forged instrument, evidence that the defendant about the same time had uttered other forged instruments of the same description is admissible for the purpose of showing guilty knowledge, that author says: "But, where such other instruments said to be forged are offered in proof of guilty knowledge, there must be strict proof that they are forgeries." And this seems to have been so held in Rex v. Forbes, 7 Car. & P. 224. Conceding that under this rule the proper foundation was not laid for the introduction of these notes in evidence, because there was no proof, aside from the extrajudicial admissions of defendant, tending to show that they were forgeries, still they were not objected to upon this ground in the court below, and such an objection cannot be successfully made for the first time on appeal in this court. The case at bar is in this respect the same in principle as that of Crocker v. Carpenter, 98 Cal. 421, 33 Pac. 271. In that case the defendants had objected in the trial court to the admission of certain unverified answers (filed for them in another action by their attorneys therein) in evidence, upon the general ground that they were incompetent, irrelevant, and immaterial. The objections were overruled, and on appeal to this court the defendants argued that this ruling was erroneous, because it was not shown that they had any knowledge of the contents of such answers when filed; and, in sustaining the judgment of the lower court, this court said: "If the defendants desired to object to the offered evidence upon the ground that the proper foundation for its admission had not been laid, because it had not been shown that the facts stated in said answers were inserted with the knowledge of defendants, the objection should have been specifically pointed out, and called to the attention of the court and the opposing counsel. If this specific objection had been made, it is possible that it could have been removed by further evidence upon the part of plaintiff showing such knowledge, but the general objection that the offered evidence was incompetent was not sufficient. When such a general objection is overruled by a trial court, the party against whom the ruling is made cannot be permitted for the first time to urge in the appellate court the particular objection, which, if it had been openly urged in the trial court at the time of the ruling complained of, might have been easily cured. This is not laying down a merely technical rule. It is one which has its foundation in the proper consideration of what is due to the court and adverse counsel in the trial of a case." See, also, on this point, Elliott's Appellate Procedure (sections 769, 770). So, in this case, if the specific objection now urged had been made in the lower court, it is quite possible that such objection might have been obviated by additional evidence tending to show that the offered notes were forgeries, but the general objection that such notes were incompetent and irrelevant as evidence was not sufficient to indicate that defendant objected to their introduction because the proper foundation for their admission in evidence had not been laid by more strict proof that they were forgeries. Judgment and order affirmed.

We concur: McFARLAND, J.; FITZGERALD, J.

(105 Cal. 202)

## PACIFIC LAND ASS'N et al. v. HUNT, Judge. (No. 15,918.)

(Supreme Court of California. Dec. 22, 1894.)

MANDAMUS TO JUDGE.

A mandamus will not lie to compel a trial judge to settle a bill of exceptions, where the instrument submitted as such bill does not show an attempt to present a fair and bona fide statement of the case.

Department 2.

Mandamus by Pacific Land Association and others to compel Hon. John Hunt, Judge, to settle a bill of exceptions. Petition dismissed.

A. Everett Ball, for petitioner. Wilson & Wilson, for respondent.

PER CURIAM. This is a petition for a writ of mandate to compel the respondent to settle what is claimed to be a bill of exceptions. We agree with the respondent that the instrument submitted does not show an attempt to present such a fair and bona fide statement of the case as entitles it to be considered and settled as a bill of exceptions. The prayer of the petitioner is denied, and the petition dismissed.

(105 Cal. 114)

## GOLDEN GATE LUMBER CO. et al. v. SAHRBACHER. (No. 15,625.)

(Supreme Court of California. Dec. 15, 1894.)

BUILDING CONTRACT — BREACH BY CONTRACTOR— FURNISHING INFERIOR MATERIAL.

1. Nonpayment of an installment due under a building contract is such a breach of the contract as will justify the contractor in leaving the work.

2. A contractor who abandons work for nonpayment of an installment due under the contract may recover on a quantum meruit.

3. Where a building contract calls for laths 1¼ inches wide, and for No. 1 rustic, and the best quality of joist and studding, and the contractor supplies laths 1½ inches wide, No. 2 rustic, and a second quality of joist and studding, there is such a substantial breach of the contract as will warrant the owner in refusing to pay the contract price.

4. A building contractor is not excused for failure to furnish the quality of material contracted for by the fact that the work done was a fair average job for that class of building.

5. The refusal of the court, in a suit to foreclose a mechanic's lien, to hear oral argument, is a proper exercise of its discretion.

Department 1. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Action by the Golden Gate Lumber Company and others against Charles Sahrbacher to foreclose a mechanic's lien. Judgment was rendered for plaintiffs, and defendant appeals. Reversed.

Davis Louderback, for appellant. Parker & Eells, for respondents.

GAROUTTE, J. Plaintiffs recovered judgment as material men and subcontractors foreclosing liens upon the building of defendant, and this appeal is taken from the judgment and order denying the motion for a new trial. The contract price was $4,000, payable in four equal installments as the work progressed. The first payment was due when the building was framed, and the second payment when the brown coat of mortar was on. In due time the contractor received his first installment of the contract price, and when the brown coat of mortar was on demanded payment of the second installment. The owner refused to make the second payment, and thereupon the contractor declined to proceed further with the work, and the building was subsequently finished by third parties. Nonpayment of an installment of the contract price when due is such a breach of the contract as to justify a contractor in leaving the work and recovering upon a quantum meruit. Porter v. Reservoir Co., 100 Cal. 500, 35 Pac. 146. Was the contractor entitled to receive the second installment of money? In other words, was the second installment due? And the answer to that interrogatory is solely dependent upon a determination of the fact as to whether or not the contractor had progressed with the building according to the plans and specifications, to the extent of having placed the brown coat of mortar thereon. If he had done so, he had the legal right to stop work when the second installment was not forthcoming; but if he had not performed the contract according to its terms at the time he demanded the second installment, then it was not due, and he was not justified in leaving the work; and if he left the work without cause it was an abandonment of the contract, as contemplated by section 1200 of the Code of Civil Procedure, and the plaintiffs' rights in this action will be measured by the provisions of that section. Upon an examination of the evidence, we conclude that the contractor failed to comply with the terms of his contract in substantial particulars, and, having committed breaches of the contract, he was not justified in leaving the work as he did leave it. It follows from this conclusion that the finding of the court that the contractor had duly performed all the terms and conditions of said contract upon his part, up to the 10th day of March, 1892, fails for want of support in the evidence.

Appellant's counsel claims that the contractor failed to perform his contract in many respects, and we particularize at least two of these alleged breaches as fully shown by the evidence; and we further consider them substantial and material departures from the plans and specifications. The contract called for laths 1¼ inches wide, and laths 1½ inches wide were used. The contract called for No. 1 rustic and the best quality of joist and studding; the contractor used second quality of joist and studding, and No. 2 rustic. Such is the evidence of defendant's witnesses, and opposing counsel have directed our attention to nothing in the record to the contrary. While the record is voluminous, our reading of it has produced nothing to show a compliance with the contract in these respects, and the contractor himself while upon the witness stand did not testify to the contrary. Plaintiff introduced the evidence of carpenters and architects to the effect that, as far as the work had progressed at the time the contractor left the building, it was a fair, average job for that class of building. But we do not think this kind of evidence met the issue made. The question at issue was not as to whether it was a fair, average job for that class of building, but was, did the contractor furnish the kind of laths and the quality of lumber that he was called upon to furnish by the terms of the contract? And, if he did not, was such breach of the contract a substantial one? There is a wide difference between first and second class lumber, both as to the price and quality; and, as appears by the evidence, there is likewise a substantial difference as to the laths. A contractor should live up to his contract, and when he has covenanted with the owner that a certain quality of lumber shall be placed in the building the owner is entitled to have that kind of lumber placed therein. Deeming these breaches of the contract substantial and material, it is unnecessary to notice other alleged violations of its terms, for we conclude that the contractor abandoned his contract before completion, and that the rights of lien claimants must be admeasured according to the provisions of section 1200 of the Code of Civil Procedure. For this reason it becomes unnecessary to determine whether or not the provisions of that section would apply to these lien claimants, if the contractor had fully and entirely carried out the terms of the contract up to the time the second installment of the contract price was due.

Upon the conclusion of the evidence the court declined to hear an oral argument of the case, but gave the attorneys the privilege of filing briefs. Appellant insists that he had a legal right to orally argue the case to the court. We have no doubt that the court, in the exercise of its discretion, had the right to decline to hear oral argument. We also think the objections to the liens untenable; and the percentage of $95.50 allowed by the court as costs was fully justified by the following cases: Whitaker v. Haynes, 49 Cal. 596; Packard v. Wilson, 72 Cal. 124, 13 Pac. 220; Fanning v. Leviston, 93 Cal. 186, 28 Pac. 943. It is ordered that the judgment and order be reversed, and the cause remanded for a new trial.

We concur: HARRISON, J.; VAN FLEET, J.

105 Cal. 192

## WHITNEY et al. v. DODGE. (No. 15,498.)

(Supreme Court of California. Dec. 22, 1894.)

CONFLICT OF LAWS — PERPETUITIES—PUBLIC POLICY.

1. The disposition of personal property is governed by the law of the domicile of the owner, and a trust of personal property, created by a will which is valid by the law of a foreign state which was testator's domicile, may be enforced in California, though the will would be invalid under the latter's statute relating to restraints on the power of alienation.

2. Where the public policy of a foreign state as well as California is against perpetuities, and the only difference is that in the former the suspension of the power of alienation may, in certain cases, extend longer than is permitted in the latter, the courts of the latter will not refuse, on the ground of public policy, to enforce a trust created by the will of a resident of such foreign state which is valid there, though it would be invalid in California under the statute against perpetuities.

Department 2. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

Action by George G. Whitney and Winnie A. Durgin, infants, by James P. Sweeney, guardian ad litem, against Josephine H. Dodge, to enforce a trust, and for removal of defendant as trustee. From an order sustaining a demurrer to the complaint, and from a judgment for defendant, plaintiffs appeal. Reversed.

T. M. Osmont, for appellants. Joseph Leggett, for respondent.

McFARLAND, J. This action is for an accounting by defendant as a trustee of an alleged trust fund, and her removal as such trustee. A general demurrer to the amended complaint was sustained, and judgment was rendered for defendant. From the judgment, plaintiffs appeal, and the question is whether or not the complaint states facts sufficient to constitute a cause of action.

From the complaint it appears that one Jones Dyer, who was a resident of and domiciled in the state of Pennsylvania, died in the city of Philadelphia, in said state, on the 15th day of July, 1860, leaving a last will and testament. By said will he gave to the respondent herein, who was his daughter (to take effect after the death of his wife, Lydia Dyer), $12,000 in state bonds of the state of Maine, in trust for certain uses and purposes. The trust was that respondent should devote the interest and dividends of the bonds to the support and education of one Alice S.

Knight, a granddaughter of the testator, until she should be 21 years old, and afterwards said Alice was to receive said interest and dividends during the period of her natural life. In case said Alice should die leaving lawful issue, then her children should receive said interest and dividends until the youngest thereof should be 21 years old, when the corpus of the fund should be equally divided between such children. The said will was duly probated in Pennsylvania. In 1866 the said Lydia Dyer, surviving wife of the deceased, died; and in August, 1867, the respondent received and accepted said bonds in trust as aforesaid. The said Alice S. Knight was married twice during her lifetime and died in February,1876, leaving the two appellants herein her sole and lawful issue. The latter were not born until after the death of the testator. The respondent, having accepted said fund in trust as aforesaid, and received all the said interest and dividends, has appropriated and converted said trust fund to her own use, and now denies and repudiates said trust, and refuses to account to appellants for any part thereof. Under the laws of Pennsylvania the said provisions of said will were valid,—those laws permitting the suspension of the power of alienation for the period of lives in being and 21 years afterwards. The foregoing are the only material averments of the complaint necessary to be here stated, and for the purposes of the demurrer they must, of course, be taken as true. Respondent contends that the complaint does not state a cause of action, because the provisions of said will upon which appellants rely were void under the laws of California; and that, therefore, they cannot be here enforced.

1. Counsel for appellants has argued with great learning, ability, and ingenuity that the said provisions of said will would be valid under the laws of California if the testator had been domiciled and the will had been made here, and if no consideration of the law of comity or the law of domicile were involved in the case. It is sufficient to say on this point that the learned counsel has not convinced us that his position is tenable, or that the said provisions of the will as to the children of Alice Knight born after the death of the testator are not within the limitations of sections 715 of our Civil Code, which provides that "the absolute power of alienation cannot be suspended by any limitation or condition whatever for a longer period than during the continuance of the lives of persons in being at the creation of the limitation or condition." (Of course, in case of a will, the "creation of the limitation or condition" takes place at the death of the testator.) We will assume, therefore, that if the will had been made in this state, by a person domiciled here, it could not have been here enforced.

2. But it does not follow that respondent can escape the obligations of a trust touching personal property created in another state, and perfectly valid there, by removing into this state, where such a trust, if created here, would not have been valid. It is the clearly established general rule, arising out of considerations of justice and the principle of comity, that the disposition of personal property is governed by the law of the domicile of the owner. The rule is well stated, and many authorities to the point cited, in the opinion of Mr. Justice Ross in Estate of Apple, 66 Cal. 432, 6 Pac. 7. Story, Confl. Laws, p. 538, after having given various accounts of the origin of the rule, says: "But be the origin of the doctrine what it may, it has so general a sanction among all civilized nations that it may now be treated as a part of jus gentium. Lord Loughborough has stated it with great clearness and force in one of his most elaborate opinions. 'It is a clear proposition,' said he, 'not only of the law of England, but of every country in the world where law has the semblance of science, that personal property has no locality.' The meaning of that is, not that personal property has no visible locality, but that it is subject to the law which governs the person of the owner. With respect to the disposition of it, with respect to the transmission of it, either by succession or by the act of the party, it follows the law of the person. The owner in any country may dispose of his personal property. If he does, it is not the law of the country in which the property is, but the law of the country of which he was a subject, that will regulate the succession." Of course the law of any one state or nation does not ex proprio vigore extend beyond its own territory; and any state would have the rightful power to provide that the rule above stated should not prevail within its jurisdiction. But the rule is part of the general law of every state in which it has not been abrogated either by express legislative language, or the enactment of statutes which work such abrogation by necessary implication. In the absence of such abrogation, the rule is not to be considered as imposed by foreign power upon the state in which it is invoked, but as part of the law of such state. Story says: "The same doctrine was recognized by Lord Chief Justice Abbott on another occasion. 'Personal property,' said he, 'has no locality, and even with respect to that it is not correct to say that the law of England gives way to the law of a foreign country, but that it is part of the law of England that personal property should be distributed according to the jus domicilii.' The same doctrine has been constantly maintained both in England and America, with unbroken confidence and general unanimity." Confl. Laws, p. 539. The rule is founded on the most substantial principles of justice and right. A man is presumed to know the law of his own state or country upon the subject of the disposition of per-

sonal property, but not the law of all states or countries; and if he make such disposition thereof as is valid in his own state it ought in fairness to be recognized in another state into which the property might be brought. Story says: "If the law rei sitae were generally to prevail in regard to movables, it would be utterly impossible for the owner in many cases to know in what manner to dispose of them during his life or to distribute them at his death, not only from the uncertainty of their situation in the transit to and from different places, but from the impracticability of knowing with minute certainty the law of transfers inter vivos, or of testamentary dispositions and successions, in the different countries in which they might happen to be. Any change of place at a future time might defeat the best-considered will, and any sale or donation might be rendered inoperative from the ignorance of the parties of the law of the actual situs at the time of their acts. These would be serious evils, pervading the whole community, and equally affecting the subjects and interests of all civilized nations." Confl. Laws, p. 537. The rule in question is fully recognized in section 946 of our Civil Code, which provides that: "If there is no law to the contrary in the place where personal property is situated, it is deemed to follow the person of the owner, and is governed by the law of his domicile." It is true, as stated by counsel for respondent in his very able brief, that a law of another state, upon any subject, which conflicts with the public policy of this state, will not be recognized here. And this principle is sought to be applied in the case at bar, upon the ground that the policy of this state is against perpetuities, and that the provisions of the will under review are in conflict with that policy. But the public policy of Pennsylvania, and of every American state so far as we have observed, is also against perpetuities. What is a perpetuity? It is a word "applied to attempts to invest money or restrict the alienation of land in such way as forever to retain it for the benefit or in the enjoyment of the persons of a particular line of descendants." Abb. Law Dict. To prevent such a thing is within the settled policy of both Pennsylvania and California, and the only difference between the laws of the two states on the subject is that in the former the suspension of the power of alienation might, in certain cases, extend to a somewhat longer period than would be permitted in the latter. But this difference is not sufficient to work by necessary implication the abrogation of the well-recognized rule as to personal property above stated. All statutes must be construed with reference to well-known general principles and rules of law existing at the times of their enactment. The recent case of Cross v. Trust Co., 131 N. Y. 330, 30 N. E. 125, is very similar to the one at bar. There a trust in personal property was created by a will made by a resident of Rhode Island, which was valid there, but which would have been invalid under the statutes of New York concerning perpetuities if made in the latter state. The whole question is elaborately discussed, and the conclusion reached that the lex loci domicilii governed the case, and was not overcome by any consideration of conflict with the public policy of New York touching the matter of perpetuities. The court, among other things, said: "The only material difference in the law of the two states on this subject is that in each a different rule is adopted for measuring the period within which absolute ownership may lawfully be suspended. Granting that in most cases this period might be longer in Rhode Island that in New York, have we any right for that reason to declare the dispositions of this will void? If so, then a person desiring to make a will must not only know the law of his domicile, but also the law of every other country in which his personal estate may happen to be at his death, and our courts will become the resort of dissatisfied heirs or legatees, seeking to nullify wills valid by the laws of the place where the persons who made them were domiciled." We might add to this category persons who should go with trust funds to another state for the purpose of avoiding the will and the trust.

Respondent contends that the provisions of the will in question contravene the express provisions of certain cited sections of our Code. We do not construe those sections as either expressly or impliedly abrogating the above-stated rule as to personal property. They must be construed in connection with section 946, above quoted, and the general law upon the subject. It may be said, generally, that it would not be within the scope of a just and enlightened public policy to allow a trustee with trust funds in his hands, received under a will perfectly valid in another state, to avoid the trust, appropriate the funds to his own use, and defeat the beneficiaries, by the simple device of coming to this state, and bringing the funds with him. We do not know that these are the facts in the case at bar, but they are alleged in the complaint, and we are here dealing with the averments of the complaint alone. Our conclusion is that the demurrer should have been overruled. The judgment appealed from is reversed, and the cause remanded, with direction to the court below to overrule the demurrer to the complaint.

We concur: DE HAVEN, J.; FITZGERALD, J.

(4 Cal. Unrep. 912)

## PATENT BRICK CO. v. WISSINGER.

(No. 15,654.)

(Supreme Court of California. Dec. 20, 1894.)

REVIEW ON APPEAL.

Where the evidence is conflicting, the judgment will not be disturbed.

Department 2. Appeal from superior court, city and county of San Francisco.

Action by the Patent Brick Company against J. W. Wissinger. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Cameron H. King, for appellant. Roger Johnson and D. H. Whittemore, for respondent.

McFARLAND, J. Judgment went for plaintiff in the superior court, and defendant appeals. Appellant contends for a reversal of the judgment and order denying a new trial, upon two grounds: (1) That the evidence was insufficient to justify the finding that there was not an account stated between the parties; and (2) that it was insufficient to justify the finding that there was a balance of $3,365.24 due from appellant. These contentions are very fully and well presented in the brief of counsel for appellant; and it is there very strongly argued that the case at bar does not come within the rule which obtains in cases where there is a substantial conflict of evidence. But, after an examination of the record, we are satisfied that there was such a substantial conflict as brings the case within said rule. A statement of the evidence here would serve no useful purpose. One asserted error of law in ruling out a certain question asked a witness is referred to in the brief, although apparently not much relied on. Considering the other evidence in the case, it was unimportant whether the question was allowed or not. Judgment and order appealed from are affirmed.

We concur: DE HAVEN, J.; FITZGERALD, J.

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(4 Cal. Unrep. 915)

## BLYTH et al. v. TORRE et al.[1] (No. 15,526.)

(Supreme Court of California. Dec. 14, 1894.)

MECHANICS' LIENS — MEMORANDUM OF CONTRACT —SUFFICIENCY OF DESCRIPTION—ESTOPPEL.

1. A memorandum of a contract for a building costing over $1,000, filed in the recorder's office, in which the only description of the property and of the work to be done is that "the building is to be a frame building," is fatally defective.

2. A material man is not estopped from enforcing his lien because he is on the contractor's bond to the owner to secure him from loss on account of the default or negligence of the contractor.

Department 1. Appeal from superior court, city and county of San Francisco; J. C. Hebbard, Judge.

Consolidated action by Henry Blyth and others against Luigi Torre and others to foreclose mechanics' liens. From the judgment, plaintiff Blyth appeals. Reversed.

E. H. Wakeman, for appellant. Tilden & Tilden and McGee & Cavagnaro, for respondents.

GAROUTTE, J. This action is brought to foreclose a number of mechanics' liens, and Henry Blyth appeals from the judgment. A written contract was entered into between Luigi Torre and Antonio Raffo, the owners of certain land, and a contractor, Gardiner, for the erection of a building thereon. The contract was for an amount in excess of $1,000, and was not filed in the recorder's office, but a memorandum thereof was so filed. The contractor failed to pay the laborers, material men, etc., and this action was brought by various lien claimants. Blyth, appellant, as the assignee of Blyth and Trott, material men, is a party plaintiff. His claim for relief, as evidenced by his complaint, is based upon the idea that the memorandum of contract filed in the county recorder's office is void in failing to contain those matters required by the statute. It is alleged that it neither contains a statement of the general character of the work to be done, nor does it describe the property to be affected. The defendants, by their answer, claim the sufficiency of the memorandum, and as an affirmative defense allege that plaintiff Blyth was a surety upon the contractor's bond in the sum of $1,900, and by the terms of which bond he guarantied that the contractor would faithfully perform the conditions of his contract, and that he would save and keep these defendants safe and harmless from all liens that might be filed on account of any claim against the contractor, not exceeding the sum of $1,900. Defendants further allege that liens in large amounts had been filed against the building, and by reason of the conditions of the bond aforesaid plaintiff was estopped from filing, asserting, or enforcing any lien against the property. The trial court held the memorandum of contract sufficient in law, and also held that plaintiff was estopped from prosecuting this action for a foreclosure of his lien, upon the grounds relied upon by defendant. The action was a consolidated action, and other lien claimants recovered judgment, but their interests are not here involved. We think the memorandum of contract fatally defective in attempting to state the general character of the work to be done. As a compliance with this provision of the statute the memorandum says: "The building is to be a frame building." While the law requires no description in detail of the general character of the work to be done, still it requires more than is here found. This statement is too general. To say that the building is to be a stone building or a brick building or a frame building entirely fails in essentials to give that notice to the public which the law contemplates. By consulting the memorandum of contract it would be impossible to say whether the building is to be a diminutive cottage, or a large public caravansary, or whether the contract price is at all in proportion to the character of the building to be erected. In Willamette Steam Mills Lumbering & Manuf'g Co. v. Los Angeles College Co., 94 Cal. 235, 29 Pac. 629, it was held that a memorandum of contract describing the building as "three stories high" is void; likewise a "two-story building, 51 by 25." Butterworth v. Levy, 38 Pac. ——. See, also, Dunlop v. Kennedy, 102 Cal. 443, 36 Pac. 765.

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[1] Rehearing granted.

We think the lower court's position unsound as to the estoppel. The necessary facts to constitute an estoppel do not arise in this case. Plaintiff has a cause of action which he is entitled to litigate, and this bond, given to the owner to secure him from loss against the default or negligence of the contractor, in no way bars him from coming into court with his cause of action. The bond is simply to indemnify the owner against damage, and until his damage has been alleged and proven in some appropriate action it can avail him nothing. If he has not been damaged, he has no right of action upon the bond; and, if no right of action upon it, it is valueless to him, even for the purpose of an estoppel. The case appears to have been considered as though the presentation of the bond in open court at the trial ipso facto estopped plaintiff from taking any other step in the prosecution of his action, and this, too, regardless of the amount of the bond, as compared either to the amount of plaintiff's claim or the amount of defendants' damage. If defendants' damage is nothing, or trifling in amount, plaintiff should not be deprived of all remedy; or, if plaintiff's indemnifying bond is trifling in amount, as compared to his claim of lien, the doors of the courts should not be shut against him. In other words, the principle of estoppel is not involved, but it is rather a question of a cross complaint or set-off. The defendants, in answer to plaintiff's action to foreclose his lien, may set out the bond, prove their damage, and establish plaintiff's liability thereon, and the rights of both parties be thus fully and equitably adjudged. Such was the course pursued in Blyth v. Robinson (Cal.) 37 Pac. 904, and such is undoubtedly the proper course. For the foregoing reasons, the judgment is reversed and the cause remanded.

We concur: HARRISON, J.; VAN FLEET, J.

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105 Cal. 143

## ZELLER v. JORDAN et al. (No. 15,775.)

(Supreme Court of California. Dec. 21, 1894.)

GIFT—WHAT CONSTITUTES.

1. The apprehension of death from some present disease or impending danger is essential to the validity of a gift causa mortis.

2. Delivery of a check, drawn on a fund in bank, under an agreement that the payee is not to use it until after the death of the maker, is not a sufficient delivery of the fund to constitute a gift inter vivos.

Department 2. Appeal from superior court, city and county of San Francisco; Jas. M. Troutt, Judge.

Action by H. J. Zeller against one Jordan and others. From a judgment for defendants, plaintiff appeals. Affirmed.

F. J. Castelhun, for appellant. Hepburn Wilkins, E. B. Martinelli, and W. S. Goodfellow, for respondents.

DE HAVEN, J. Action to recover from the defendant, the German Savings & Loan Society, the sum of $19,807.74, deposited with said defendant by Sophia Steineke, who afterwards became the wife of plaintiff, and is now deceased. The defendant Jordan is the executor of the last will of the said Sophia, and is made a party to this action by reason of the fact that he claims said deposit as a part of the estate of his said testator. The Superior court rendered judgment in his favor, and the plaintiff appeals. The plaintiff alleges in his complaint that his deceased wife, in the month of January, 1886, "in consideration of the love and affection she had and bore unto plaintiff, and also for other good considerations her thereunto moving, made an assignment in writing" of her demand against the German Savings & Loan Society, arising out of the deposit before referred to, and that he "has ever since been, and still is, the lawful owner thereof, and of all accrued dividends thereon." The action was tried by the court without a jury, and the court found that the deceased never assigned to plaintiff, by way of gift or otherwise, her said demand against the German Savings & Loan Society; and the only question necessary to be considered on this appeal is whether this finding of the trial court is sustained by the evidence.

1. It appears from the evidence that the deceased wife of plaintiff was subject to epilepsy, and died in March, 1893. The immediate cause of her death is not shown. There was also evidence tending to prove that, between the years 1883 and 1886, she signed and delivered to the plaintiff an undated check drawn by her in his favor on the German Savings & Loan Society for the sum of $18,807.24, with interest, and to be charged to her account as a depositor with that bank. The pass book representing the deposits so drawn against was not delivered to plaintiff, and under the rules of the said defendant bank, which were printed in said pass book, deposits entered therein could only be withdrawn by an order accompanying the pass book. The plaintiff was the only witness examined in relation to the making of the check, and he testified that, at the time it was signed and delivered, his wife was not confined to her bed, and was well, and further said: "The check was given to me in consideration of love and affection. That was the reason

for getting it. That was the only consideration. It was the understanding between me and my wife, at the time this check was signed, that I would not use the check or present it until after her death, and nothing was to be done with it until after my wife died. I was not to touch anything in that book of that money until after my wife's death." The check was not presented to the defendant bank until some time after the death of plaintiff's wife. It is clear to us that, under this evidence, the finding of the court that there was no completed gift or assignment to plaintiff of the fund in controversy must be sustained. We do not find it necessary to pass upon the question whether a bank check uncollected in the lifetime of the drawer, and unaccompanied by a delivery of the pass book, which, under the depositor's contract, must be presented with the order for a withdrawal of the deposit, is effectual as a donatio causa mortis. There was here nothing in the nature of such a gift. "A gift in view of death is one which is made in contemplation of the fear or peril of death, and with intent that it shall take effect only in case of the death of the giver." Civ. Code, § 1149. "To constitute a donatio causa mortis, the gift must be made in contemplation of the near approach of death by the donor." Daniel v. Smith, 64 Cal. 349, 30 Pac. 575. In some cases it is said: "The rule of law, in such cases of gifts made in prospect of death, demands for their validity that the proof shall show the existence of a bodily disorder, or of an illness which imperils the donor's life, and which eventually terminates it." Williams v. Guile, 117 N. Y. 349, 22 N. E. 1071. But perhaps the law upon this point is more accurately stated in Ridden v. Thrall, 125 N. Y. 579, 26 N. E. 627, as follows: "The gift must be made under the apprehension of death from some present disease, or some other impending peril, and it becomes void by recovery from the disease or escape from the peril. It is also revocable at any time by the donor, and becomes void by the death of the donee in the lifetime of the donor." The evidence here entirely fails to show that the deceased delivered the check referred to under any belief of or apprehension of the peril of death from any existing disease, and for this reason its delivery cannot be sustained as a gift in view of death. "A gift mortis causa, made while the donor is in full health, or while suffering from a disease that in reasonable expectation will not produce death in the near future, is invalid. Thus, a deposit made in a bank while the donor was in full health or medium health, 'payable also to A. in case of the death of' the donor, was held to be an invalid gift." Thornt. Gifts, § 28.

2. And the evidence also fails to show a gift inter vivos. "A gift inter vivos, to be valid, must take effect at once, and there must be nothing to be done essential to the validity; and, if it is to take effect in the future, there is no gift, but only a promise to give. So a gift to take effect at the death of the donor is void." Thornt. Gifts, § 76. In other words, to constitute such a gift, there must be an immediate transfer of the title, and the donor must relinquish all present right to or control over the thing given. The donor here retained her dominion over the fund against which the check was drawn, and the check was delivered to the plaintiff, under an agreement that he was not to use or present it until after the death of the wife, or, as stated by the plaintiff in his testimony, "I was not to touch anything in that book of that money until after my wife's death." Judgment and order affirmed.

We concur: McFARLAND, J.; FITZGERALD, J.

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105 Cal. 109

## MENZIES et al. v. WATSON et al. (No. 15,756.)

(Supreme Court of California. Dec. 15, 1894.)

ENTRY OF JUDGMENT—MOTION TO CORRECT DATE—EVIDENCE.

1. On motion to correct the date of the entry of a judgment as made in the judgment book, movant's witness testified that, a few days after such date, he went to the clerk's office, to obtain a copy of the judgment; that being unable to find the judgment, he asked several of the clerks about it, without result; that he looked in vain through a judgment book into which judgments were being copied; and that he did not remember whether there was a judgment roll, or whether the judgment had been docketed. The deputy clerk testified that the date written in the judgment book as the date of the entry of the judgment was not necessarily the date of its actual entry. *Held*, that the evidence did not show that the date was incorrect.

2. The fact that the court erroneously excluded certain evidence cannot be considered on appeal in determining the sufficiency of the evidence.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

Action by Stewart Menzies and others against Henry James Watson and others. There was a judgment for plaintiffs, and defendants moved to correct the date of the entry of the judgment. From an order denying the motion, defendants appeal. Affirmed.

Mastick, Belcher & Mastick, for appellants. Henry N. Clement, for respondents.

TEMPLE, C. This is an appeal from an order made after judgment. It is a proceeding after judgment to correct an alleged mistake as to the date of the entry of the judgment. The record does not show how the alleged error affects any rights of the moving party, but it is stated in the briefs that the defendants, having taken an appeal from the judgment, were confronted in this court by a motion to dismiss the appeal, on the ground that it was taken more than one year after the judgment was entered. The judgment purports to have been entered December 6, 1892. The appeal was taken December 8, 1893. The moving party does not pretend to know when the judgment was actually entered, but claims that it was not before December 10, 1892. The motion was based principally upon the affidavit of H. A. Massey, who was a clerk for Mastick, Belcher & Mastick, who were the attorneys for defendants. His affidavit is broad enough, perhaps, to entitle the defendants to the relief demanded; but the affiant was also called as a witness at the hearing of the motion, and his cross-examination shows that he did not know all the matters stated in his affidavit to be true. He was sent to the clerk's office "to obtain copies of the findings in said cases and of the judgments therein, if he should find that such judgments had been entered." He went there, as it otherwise appeared, on the 8th of December, 1892. He found the findings, but could not find the judgment. He inquired and was sent to the room where judgments are copied into the judgment book. He asked several clerks there about it, but they knew nothing of it. He was finally directed to a certain copyist, who was copying judgments into the judgment book, and together they looked through the book, and found that the judgment had not been copied there. He did not look through more than one judgment book to see whether the judgment had then been recorded. He did not remember whether there was a judgment roll, or whether the judgment was docketed. He did not remember whether the register showed that the judgment had been entered on the judgment roll filed. The judgment roll was apparently filed on the 5th, or, at least, that is what the register shows. On that day the judgment appears to have been docketed. All this is in direct violation of plain provisions of the statute. Code Civ. Proc. § 668, provides that judgments shall be entered in the judgment book. There is no other "entry" of judgments mentioned in the Code. After this entry, and not before, the judgment roll can be made up and filed. Id. § 670. After this, and not before, the judgment can be docketed, and a judgment lien created. Id. § 671. But the testimony of the deputy clerk and the copyist shows a state of things still more surprising. The deputy in charge of this part of the work in the clerk's office testified that the date of the record in the judgment book and the date of the filing of the judgment roll and of the docketing of the judgment are not necessarily the true dates, and were not intended to show such date. The deputy says: "In no case, however, does the date indorsed at the foot of the record of judgment in said judgment book necessarily indicate the date at which the clerical work of writing such judgment in said judgment book was done; and in many cases judgments were actually written into said judgment book at a later date than that so indorsed thereupon." And it seems the register and the docket are kept with a like disregard of truth as to dates. In the whole range of the duties of the clerk there is none more important than the duty of keeping a true history of the time when this "clerical" work was actually done. Under our practice, it is the initial point of many rights. To willfully make a false certificate as to these matters is a violation of official duty. In this case it is quite possible, if the truth could be ascertained, that defendant has not lost his right of appeal. But, unfortunately for him, he has not been able to show it. The deputy and the copyist were unable to remember when the judgment was actually entered, although both confessed that, notwithstanding all the official entries which were designed to show when it was done, it may have been entered later. As the burden was upon the moving party, it must be held that he has not made out his case. Quite possibly, he is a loser through this vicious practice in the clerk's office. The explanation of the practice seems to be that the deputy knew that a deed was deemed to be recorded when filed for record, and he thought a judgment should be deemed entered when the attorney ordered it to be entered. But he is working under a very different statute, and one which plainly makes the date of the actual entry of the judgment the material matter. Even under that view it is difficult to see where he acquired his idea as to the filing of the judgment roll and the docketing of the judgment.

The counsel for the appellants say that the learned judge below declined to consider other evidence, because he was of the opinion that the record evidence was of such a high nature that he could not go behind it. The record does not show this, and, even if it did, we could not consider the evidence as though this were a trial court. If the learned judge did take that view of the matter, however, I am not sure that he has not reason on his side. The matter of the date of the actual entry of the judgment is so important that perhaps public policy would require that the certificate shall be held conclusive, except, of course, when the clerk may be sued for damages for having made a false entry. Whether this be so or not is not essential here, and the matter is not decided. However we consider the evidence, we can but find that the moving party has failed to make a case. The order should be affirmed.

We concur: VANCLIEF, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

105 Cal. 102

## HYDE v. BOYLE et al. (No. 15,504.)

(Supreme Court of California. Dec. 15, 1894.)

WRIT OF RESTITUTION—REVERSAL OF ORDER—EFFECT—EJECTMENT—FORM OF RELIEF—TAXATION OF COSTS—REVIEW ON APPEAL.

1. On reversal of an order for a writ of restitution on a judgment for the recovery of land, one previously evicted under the writ is entitled to the removal from possession of all who entered under the writ, and of all who subsequently entered under them.

2. The decision of the trial court on conflicting evidence will not be disturbed.

3. In an ordinary action of ejectment, the fact that plaintiff's title is derived through a purchase under mortgage foreclosure does not entitle him to the relief proper in case he had sought a writ of assistance under the decree of foreclosure.

4. An order denying a motion to retax costs will not be reviewed where no copy of the order or of the cost bill is in the transcript, and it is not shown that the transcript is not correct.

Department 1. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Action by William Ford against Robert Boyle, Benjamin S. Green, and others to recover possession of land. Henry C. Hyde, as assignee in bankruptcy for Ford, was substituted as plaintiff, and recovered judgment against defendant Green. A writ of restitution was issued on the judgment, under which certain tenants of R. S. Thornton were evicted. Thornton thereupon moved to set aside the order allowing the writ to issue, and to set aside an order adjudging such tenants guilty of contempt for violating it. An order denying the motions was reversed on appeal (93 Cal. 1, 29 Pac. 247), and Thornton thereafter applied for a writ of restitution, which was granted. From an order denying a motion to recall the writ and vacate the order for its issuance, and from an order denying a motion to retax costs, plaintiff and C. P. Robinson (as assignee of plaintiff's interest) and others appeal. Affirmed.

T. M. Osmont, for appellants. Edward F. Fitzpatrick, B. B. Newman, and Fox, Kellogg & Gray, for respondents.

HARRISON, J. This action was commenced August 12, 1873, by William Ford against Robert Boyle, Benjamin S. Green, and five others, for the possession of certain land in San Mateo county. The defendants other than Green answered the complaint, and upon a trial of the action a judgment of nonsuit was entered in their favor August 12, 1881. August 22, 1881, the plaintiff caused a judgment to be entered in his favor against the defendant Green, whose default for want of an answer had been entered October 10, 1873. Prior to the entry of these judgments, Ford had been adjudged a bankrupt, and Henry C. Hyde, who had been appointed his assignee in bankruptcy, was substituted as plaintiff in the action. Green died in 1882, and on the 20th of November, 1888, an ex parte order of the superior court was made upon an application on behalf of the plaintiff for the issuance of a writ of restitution upon the judgment against Green. The writ was issued, and on the next day was placed in the hands of the sheriff, who on the 23d of November, 1888, returned the same with his indorsement thereon that he had executed it according to its terms. Certain tenants of the respondent Thornton were evicted under the writ, and afterwards reentered upon the lands; and on the 11th of March, 1889, the superior court made an order adjudging them guilty of contempt, and directing that an alias writ of restitution issue. April 23, 1889, the respondent Thornton moved the said court to set aside its order of November 20, 1888, ordering a writ of restitution; also its order of March 11, 1889, adjudging his tenants guilty of contempt, and directing the issuance of an alias writ. This motion was denied May 24, 1889, and from this order Thornton appealed. Upon that appeal the order was reversed, and the superior court was directed to vacate and set aside the orders referred to in his motion. Hyde v. Boyle, 93 Cal. 1, 29 Pac. 247. After the remittitur had been filed in the court below, that court made an order March 1, 1892, vacating and annulling its previous orders of November 20, 1888, and March 11, 1889, in accordance with the directions of this court, and also all orders and proceedings based thereon, and, upon the application of Thornton, made an order March 25, 1892, for the issuance of a writ of restitution, directing and commanding the sheriff to remove all persons in possession of the land and premises described in said writ under the order made and entered on November 20, 1888, and to place Thornton in the quiet and peaceable possession thereof. Under this order a writ of possession was issued, and placed in the hands of the sheriff for execution March 26, 1892; and on April 8, 1892, the appellants herein moved the court for an order recalling the writ and vacating the order for its issuance, and directing that a writ of restitution upon the judgment in the action be issued in their favor, as the successors in interest of the plaintiff therein. This motion was denied, and from the order denying the same the present appeal has been taken.

The lands involved in this proceeding have been in litigation for upwards of 20 years, during which time many actions and proceedings have been instituted between the respective claimants thereto, from which appeals have in some cases been taken, so that the history of the litigation is not entirely unfamiliar to the court.

In their application to vacate the order restoring Thornton to the possession of the lands from which he had been evicted under the writ of restitution issued November 20, 1888, the appellants state as the grounds therefor "that no persons are in possession of any of the lands in said writ described, who entered under the writ of restitution issued herein on the 21st day of November, 1888, and executed on the 23d of the same month; that R. S. Thornton has no right, title, or interest in or to said premises, nor any right to the possession; and that the execution of said writ issued on the 26th of March, 1892, would be an abuse of the process of the court." Upon the reversal of the orders for the writs of restitution, Thornton was entitled to be restored to all that he had lost by virtue of these orders, and to be placed in the same position as he was prior to the execution of the writ. This would require the removal of all persons who had been placed in possession of the land by virtue of the writ, as well as all others who had come in under them after that date. The sheriff returned that he executed the writ of restitution of November 21, 1888, "by placing C. P. Robinson, the assignee of the plaintiff therein, by his agent, Mr. T. M. Osmont, in the quiet and peaceable possession of the premises therein described." Hannah Green, one of the appellants, states in her affidavit that the writ was executed as to her by her attorning to C. P. Robinson, and that she signed a memorandum acknowledging the rights of Robinson to the possession of the premises; that Robinson had conveyed all his title to the premises to T. M. Osmont, and that for more than two years last past (that is, prior to April 6, 1892, the date of her affidavit) she had occupied the premises by the consent, leave, and license of said Osmont. The court was thus authorized to find that she had come into possession of the land under Robinson, who had been placed there by the sheriff by virtue of the writ, and that her possession was that of Robinson through Osmont. Although she also claimed to have been in possession of the premises for a period antedating the commencement of the action in ejectment, yet, on the other hand, Thornton claimed that for a long time next prior to the execution of the writ her possession was as his tenant. If in fact she was in possession of the premises as a tenant of Thornton at the time the writ was executed, her eviction was the eviction of Thornton, and he was entitled to be restored to the possession.

The right of a plaintiff, in whose favor a judgment for the recovery of land has been rendered, to dispossess, under a writ of restitution, not only the defendants in the action, but all persons who have entered under them subsequent to its commencement, is not questioned on this appeal. But in the present case the main, and almost the only, question which the court below was called upon to determine, was whether Thornton had entered under Green after the commencement of the action in 1873, and whether the other occupants of the land were tenants of Thornton. Upon both of these propositions there was a very sharp and decided conflict in the affidavits, and the action of the court in denying the motion of the appellants must be affirmed upon the ground that the decision of the trial court upon conflicting statements of fact will not be reviewed by this court. But even if the conflict in the affidavits had been less marked, and only such as to create an uncertainty in the mind of the judge, he was not required to grant the motion of the appellants, but would have been justified in requiring that their respective rights to the land should be presented to a jury, before which the witnesses might appear in person, and be subjected to a cross-examination upon their statements. There are many circumstances presented by the affidavits herein which would naturally suggest such a course. More than seven years had elapsed after the entry of the judgment before the application for the writ of restitution was made. Green, who was the only defendant against whom the judgment ran, died within less than two years after the judgment. Green had made a conveyance of the land to Thornton more than a year before the commencement of the action in ejectment, and Thornton had stated in his affidavit that Green had then put him in possession of the land, and had himself thereafter, and until his death, occupied it as his tenant; and, while the affidavit of Mrs. Green contradicted these statements, there were other matters presented in her affidavit and in the other affidavits on her behalf submitted to the court which tended to corroborate the statements of Thornton. Mrs. Green does not claim to have had any separate title to the property, or that during the lifetime of her husband she had any possession distinct from his, or that after his death she had any claim thereto other than by succession as his widow. We cannot say from an examination of the record that the appellants have shown a clear right to have the judgment executed as against the respondents, or that the respondents entered upon the land after the commencement of the action. The conflict between the affidavits on behalf of the respective parties was at least sufficient to create a doubt in the mind of the court.

The suggestion of the appellants, that because the plaintiff's title is derived through a purchase under the foreclosure of a mortgage, they are entitled to the same relief as if they had asked for a writ of assistance under the decree of foreclosure, cannot be maintained. This action is an ordinary action of ejectment, and the relief to be given is the same as that in any other action of ejectment, irrespective of the evidence by which the plaintiff established his right to the possession of the land.

The notice of appeal contains also an appeal from an order denying the plaintiff's motion to retax the costs, and refusing to strike out the items of cost embraced in the cost bill of the respondents; but the transcript contains no copy of this order or of the cost bill, nor has the plaintiff presented any reason why the order is not correct. For these reasons this order must be affirmed. The orders appealed from are affirmed.

We concur: GAROUTTE, J.; VAN FLEET, J.

(105 Cal. 118)

### CUNNINGHAM et al. v. KENNEY. (No. 15,484.)

(Supreme Court of California. Dec. 15, 1894.)

WAREHOUSEMAN—CONTRACT FOR STORAGE — CONSTRUCTION.

A warehouseman, under a contract to store property for a certain time for a certain sum, cannot recover for storage where the property is destroyed, though without negligence on his part, before the expiration of the time.

Department 2. Appeal from superior court, Santa Clara county; W. G. Lorigan, Judge.

Action by James F. Cunningham and another against Daniel Kenney. There was a judgment for defendant, from which and from the order denying a new trial plaintiffs appeal. Affirmed.

A. S. Kittredge, for appellants. W. L. Gill and C. D. Wright, for respondent.

PER CURIAM. This is an action to recover $369.45 as bailees for the price of storage by defendant of certain hay in the warehouse of plaintiffs. Defendant had judgment, from which judgment, and from an order denying their motion for a new trial, plaintiffs appeal. The cause was tried by the court without a jury. The findings, which are supported by the evidence without conflict, show: (1) That in 1888 the plaintiffs and their grantor and E. J. Swift, deceased, of whose estate T. V. Mathews is administrator, were the owners of a warehouse in the county of Santa Clara. (2) On or about September 1, 1888, defendant delivered to plaintiffs for storage in said warehouse certain hay, upon the terms and conditions expressed in an agreement in writing, of which the following is a copy: "Ynigo Rancho Warehouse, Mountain View, Oct. 17, 1888. This is to certify that Mr. Daniel Kenney has this day stored in sections —— of the Ynigo Rancho Warehouse 3,016 bales wheat hay, weighing 720,000 lbs. balers' weight, subject to the following conditions: The warehouse owner will not be responsible for loss or damage to hay from effect of water, fire, damp, or other causes. Hay stored only for the season ending June 1st of each year. Rate, $1.00 on balers' weight. Storage payable only in gold coin of the United States, and must be paid before withdrawal of the hay. Weighing, 25 cents extra. M. W. Wilcox, Manager. 37 North First street, San Jose." (3) Said hay remained on storage under said agreement until the 17th day of March, 1889, when, without the fault of defendant, the said warehouse and hay were wholly destroyed by fire. The answer of defendant charged plaintiffs with negligence, upon which issue the court did not find, deeming it unimportant, and holding as a conclusion of law that the contract of storage was an entire and not a severable contract, and that, as the warehouse and hay having burned before the time for the storing of said hay expired, the agreement of plaintiffs to store the hay until June 1, 1889, was never performed or complied with by them, and the storage never earned.

The following extract from the opinion of the learned judge who tried the case in the court below contains a correct exposition of the law applicable to the case, and is adopted as the opinion of the court: "To defeat the plaintiffs' claim, defendant insists, among other things, that the plaintiffs did not perform the contract, and hence cannot recover upon it. I am of opinion the point is well taken. As I understand the contract, it is an entire one. The terms are that, for a compensation of $1 per ton, the plaintiffs agreed to store the hay for the season ending June 1, 1889. It is the duty of a bailee at the end of the term for which property is stored to return it to the bailor. While the law relieves a bailee at the suit of the bailor from liability for the value of the article stored when it is destroyed by fire without his fault, and when he has exercised reasonable care towards its preservation, it does not permit him to recover compensation for its custody and care when he is unable, through the loss, to perform the contract he has undertaken. His right to recover compensation is to be determined from the contract itself, and, in order to recover, he must show performance according to its terms. The industry of counsel has furnished no authority which holds that a warehouseman agreeing to store property for a given time can recover the compensation provided by the contract when the property was lost by fire before the term of storage had expired. The case of Schmidt v. Blood, 24 Am. Dec. 154, cited by counsel, does not so hold. The only point, aside from the question of negligence, involved in that case was whether the warehouseman, after part of the goods stored had been stolen without his fault, had a lien upon the remainder for the compensation due for the whole, and the court held that he had. From that decision it can only be inferentially argued that if he had the lien he had the right to compensation, but it may be with equal force argued that the compensation may have been earned and the contract performed before the goods were stolen. As the terms and conditions of the contract in that case are not set forth, and the point in dispute here was not directly involved in that case, it cannot be considered as authority. The case at bar comes, I am satisfied, under the rule announced in Archer v. McDonald, 36 Hun, 194. In that case McDonald agreed to store for Archer from October until May from 15,000 to 30,000 barrels of lime, and to deliver it at the end of his wharf in May. For this he was to receive 15 cents per barrel. In November, after 20,000 barrels had been received, they caught fire without any fault of McDonald, and were ruined by slacking. In that case the court held that the contract was an entire one, and that not only was McDonald not entitled to recover any compensation, but that Archer was entitled to recover back the money he had paid on account for storage. I see no difference in principle between the case cited and the case at bar. It is true that in both cases during all the time the articles were in possession of the warehousemen they had incurred liability and responsibility in the care of the property, and it seems inequitable that they are entitled to no compensation, as it seems to be equally inequitable to allow them compensation for services not performed. That, however, is not the fault of the law, but of the warehousemen. They could have provided in their contract for contingencies and for a proportionate compensation for proportionate service. They have not done so. The court cannot make contracts for the parties; it can only determine such contracts as they have made. In this case the plaintiffs have seen fit to enter into a contract entire in its terms, and their rights must be measured by it. As the plaintiffs failed to perform their contract, and store the property for the time specified in their contract, they are not entitled to recover. The defendant is entitled to a judgment for his costs, and it is so ordered. W. G. Lorigan, Superior Judge."

The foregoing reasons render a finding upon the question of negligence of no importance to the result. The judgment and order appealed from are affirmed.

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105 Cal. 149

## WORMOUTH v. GARDNER et al. (No. 15,645.)

(Supreme Court of California. Dec. 21, 1894.)

HOMESTEAD — ENTRY — LOCATING HOUSE OUTSIDE BOUNDARIES—RIGHTS AGAINST TRESPASSERS.

1. Under Act March 23, 1874, § 2, one who has made a United States homestead entry, and obtained a receipt from the land office on making full cash payment for the land, being a resident on the land at the time of such entry, and continuing to reside thereon, and to comply in good faith with the homestead law, till after final payment, may recover possession of that part of the land covered by the entry, of which another, not in privity with the United States, had adverse possession at the time of the entry, and continued in adverse possession.

2. A homestead entry is valid though the house in which the person making the entry is at the time living is a short distance outside the land entered, he having believed that it was on the land entered, and having moved onto it as soon as the true boundaries were discovered.

Department 2. Appeal from superior court, Marin county; F. M. Angelotti, Judge.

Action by Wormouth against Gardner and others. There was judgment for defendants, but a new trial was granted, and defendants appeal from the order. Affirmed.

Hepburn Wilkins, for appellants. E. B. Mahon, for respondent.

DE HAVEN, J. Action to recover possession of a tract of land containing 46.26 acres. The case was tried by the court without a jury, and, the issues of fact being found in favor of the defendants, judgment was thereupon rendered against the plaintiff. Subsequently the plaintiff's motion for a new trial was granted, and from this order the defendants have appealed.

1. The motion for a new trial was properly granted. The plaintiff's right to the possession of the land in controversy was based upon a United States homestead entry, made May 20, 1881, and a receipt given by the receiver of the proper United States land office, on plaintiff's making full cash payment for the land July 22, 1892. The defendants are not in privity with the United States, and there was evidence tending to show that plaintiff was residing on the land embraced in his homestead entry when such entry was made, and continued to reside thereon, and to comply in good faith with the United States homestead law, until final payment for the land. This was sufficient to entitle him to recover under section 2 of the act of March 23, 1874, "for the protection of pre-emption and homestead claimants" (St. Cal. 1873–74, p. 543), notwithstanding the fact that the defendants and their predecessors were, at the date of plaintiff's homestead entry, in the adverse possession of so much of the land covered by such entry as is involved in this action, and have at all times since continued in such adverse possession.

2. Even if it be conceded, as claimed by appellants (and as to whether the fact is so or not there appears to be some confusion in the evidence), that the house in which plaintiff was living at the date of the homestead entry was not upon the land so entered, but was a short distance therefrom, and within the boundaries of the Mexican grant known as the "Rancho Corte Madera del Presidio," still the court was justified in finding from the testimony that plaintiff believed at the time of the entry that his house was outside of the boundaries of the grant mentioned, and upon the land entered by him as a homestead, and the mistake in the location of his house, if it was one, was corrected by plaintiff as soon as the true boundaries of the adjoining rancho were discovered, by the removal of his actual residence to the land covered by such entry. Under these circumstances the original homestead entry was valid under the laws of the United States,—Case of Phylorman Higgins, 1 Copp, Pub. Land Laws (1882) p. 406; 3 Op. Attys. Gen. 312, opinion of March 10, 1838; 1 Lester, Land Laws, p. 385,—and the plaintiff's right to the possession of the land embraced therein, as against trespassers and persons having no superior right, is clearly within the spirit, if not the strict letter, of section 2 of the act of March 23, 1874, before cited. Upon the whole, we can-

not say that the superior court abused its discretion in granting the motion for a new trial, and its order must be affirmed. Order affirmed.

We concur: McFARLAND, J.; FITZGERALD, J.

105 Cal. 131

## DAVIS et ux. v. CALIFORNIA STREET CABLE R. CO. (No. 15,497.)

(Supreme Court of California. Dec. 20, 1894.)

CONTRIBUTORY NEGLIGENCE.

1. In an action against a railroad company for personal injuries, it appeared that, while building its road, defendant left a rail on the sidewalk in front of plaintiff's house, and that it had been there for four weeks before the accident. Plaintiff knew it was there. On the night of the accident, it was dark, and there was a cry of fire, and plaintiff started into the street, and fell over the rail. *Held*, that a nonsuit was properly granted.

2. One who, knowing of an obstruction on a street, negligently falls over the same, cannot predicate her right to recover on an ordinance requiring a light to be placed on the obstruction.

Department 2. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Action by Samuel Davis and Sarah Davis, his wife, against the California Street Cable Railroad Company for personal injuries sustained by the wife. Judgment was rendered for defendant, and plaintiffs appeal. Affirmed.

J. C. Bates, for appellants. Garber, Boalt & Bishop, for respondent.

PER CURIAM. Plaintiffs, Samuel Davis and Sarah Davis, his wife, brought this action to recover damages for personal injuries to said Sarah Davis, alleged to have been cause by the negligence of defendant. At the conclusion of the evidence, the court, at defendant's request, instructed the jury to return a verdict for the defendant, which was done; and, judgment having been entered thereon, the plaintiffs appealed therefrom within 60 days, upon the judgment roll and a bill of exceptions. The only point made upon this appeal is that the court erred in directing a verdict for defendant. The material facts are that in 1891 the defendant was constructing a street railroad on Hyde street, and deposited a large quantity of rails and yokes upon the sidewalk in front of plaintiffs' residence, all of which, except one rail, were removed and used in the construction of the road about four weeks before the accident occurred resulting in the injury complained of. The rail that was left upon the sidewalk was 28 feet long and 3 inches high, and one end of it was under a street gaslight. This rail had remained there for about four weeks, and Mrs. Davis not only knew it was there, but had seen children and one Chinaman fall over it. The night the injury was received, at about half past 8, there was an alarm of fire, and some one on the street cried, "Fire! Fire!" The night was dark, and it was raining. Mrs. Davis went out to see where the fire was, and Mrs. Smith, who occupied the upper floor of Mrs. Davis' house, came down for the same purpose. Mrs. Davis told Mrs. Smith to go back, as it was raining, and then started to go out into the street to find out where the fire was, and fell upon the rail, and dislocated her shoulder. She testified that she did not know whether or not she ran against the rail; that she knew it was there, but on this night forgot that it was there. The street railroad was not then completed, and the defendant was then engaged in putting in switches in the same block, and this rail was left upon the sidewalk, the defendant expecting to use it in the construction of the switches.

There was no conflict in the evidence, and the court did not err in directing a verdict for the defendant. The rule in such cases is well stated by the supreme court of the United States in Railroad Co. v. Converse, 139 U. S. 472, 11 Sup. Ct. 569, as follows: "Undoubtedly, questions of negligence in actions like the present one are ordinarily for the jury, under proper directions as to the principles of law by which they should be controlled; but it is well settled that the court may withdraw the case from them altogether, and direct a verdict for the plaintiff or the defendant, as the one or the other may be proper, where the evidence is undisputed, or is of such conclusive character that the court, in the exercise of a sound judicial discretion, would be compelled to set aside a verdict returned in opposition to it." In Stephenson v. Southern Pac. Co., 102 Cal. 143, 34 Pac. 618, and 36 Pac. 407, it was said: 'Where the facts are admitted or proven without contradiction, the court will determine whether or not they establish negligence or show contributory negligence; but, where the conclusion is open to debate, it is one for the jury, under proper instructions from the court." We quite agree with counsel for appellants that previous knowledge or familiarity with a dangerous place or obstruction in a highway is not, per se, conclusive evidence of contributory negligence in failing to avoid it. In this case, if the plaintiffs' house had been falling, rendering great haste in escaping from imminent danger necessary, the haste, excitement, and fear might reasonably be held sufficient to obliterate all memory or thought of the presence of the obstruction upon the sidewalk. But that is not this case. There was an alarm of fire, a common occurrence in the city, and wholly insufficient, where its locality is not known to be in the immediate vicinity, to disturb the memory or prevent that reasonable care commonly exercised by persons of mature years. When Mrs. Davis reached the sidewalk, she discovered it was raining. She saw no fire. She was sufficiently calm to advise Mrs. Smith to return to the house. Mrs. Smith, after stating that she heard the alarm of fire, and thought it was close by, testified as follows: "I went down to see Mrs. Davis, and, when I got down, she was out, and told me to go back, because it was raining. She just wanted to go down the street, and see where the fire was. Just as I turned around, she fell. It seemed to me she was out from the steps, and she fell before I could turn around hardly." No danger could have been apprehended by Mrs. Davis from the fire after she reached the sidewalk, but mere curiosity induced her to start to go down the street to see where the fire was. That she forgot the presence of the rail is not disputed in the evidence, but that the circumstances justified her forgetfulness and consequent want of care cannot be conceded. Appellants cite some 50 cases upon this branch of the case. We cannot review them within the limits of an opinion, nor is it at all necessary. Each rests upon its own peculiar circumstances. If the facts are doubtful, as the result of uncertain evidence or conflicting testimony, the question should be submitted to a jury; but here the facts are not doubtful, nor the evidence conflicting, and the question is one of law for the court.

One point urged by appellants remains to be noticed. It is contended that order No. 1,588, of the city and county of San Francisco, required defendant to have guarded this iron rail by a lighted lantern every night. Even if it be conceded that the ordinance required the defendant to keep a lighted lantern at the rail, the only object of the requirement was to enable persons using the walk to see the rail, and, if this purpose was served by the gaslight, it was sufficient. It is not contended that the rail could not be seen, nor that lanterns had been kept there until the night of the accident, and then were omitted, leading plaintiff to believe the rail had been removed. She knew the rail was there, and was therefore bound to use reasonable care, and could not be absolved from such care by the negligence of defendant in not keeping a lighted lantern at the place, even if it was its duty to do so.

The judgment is affirmed.

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105 Cal. 189

## In re SYLVESTER'S ESTATE. (No. 15,673.)

(Supreme Court of California. Dec. 22, 1894.)

REVIEW ON APPEAL.

A finding of a probate court on conflicting evidence in an accounting by an executor will not be disturbed on appeal.

Department 2. Appeal from superior court, city and county of San Francisco; J. V. Coffey, Judge.

Proceeding by Daniel Sylvester to settle his accounts as executor of John Sylvester. From the decree made, and from an order denying a motion for a new trial, the executor appeals. Affirmed.

J. D. Sullivan, for appellant. Blake, Williams & Harrison, for respondent.

McFARLAND, J. This is an appeal by Daniel Sylvester, executor of the last will of John Sylvester, deceased, from an order of the probate court settling the account of said executor, and from an order denying his motion for a new trial in the matter of said order. The transcript presents rather a vague and confusing representation of the proceedings out of which this appeal arises. The executor is also the surviving partner of the deceased in a certain business, and appellant contends that the account involved here is his account as surviving partner, under section 1585 of the Code of Civil Procedure, and that the probate court has no jurisdiction to settle such an account. But the account is, upon its face, the account of appellant, not as surviving partner, but as executor; and the only specifications of error are that the evidence shows: First, that the executor had no money of the estate in his hands; second, that he had paid to the surviving wife over $2,900, for which he received no credit; and, third, that all the money received by the executor as such had been legally and properly laid out. On all these questions there was substantially conflicting evidence, and we cannot disturb the disposition made of them by the lower court. It is argued by appellant that the evidence is insufficient to justify the finding of the court "that the whole of the estate received by said executor as such amounted to the cash sum of $12,021.75, all of which was received by him prior to the 12th day of June, A. D. 1882." But, assuming that this point can be raised under the specifications of error, it is sufficient to say that the transcript contains a stipulation, made at the trial, which commences as follows: "It was agreed by and between the parties hereto that the whole of the estate received by said executor as such amounted to the cash sum of $12,021.75, all of which was received by him prior to the 12th day of June, A. D. 1882." The stipulation, after reciting that said sum was the property of a firm of which the deceased and the executor were the only members, proceeds to provide that "said executor has no claim to or share in said sum of $12,021.75, or any part thereof, by reason of his said partnership with said deceased, but is chargeable with the whole thereof on the settlement of said account, as having been received by him on the said 12th day of June, A. D. 1882, and is entitled to credit also for partnership liabilities paid by him, and amounting to $2,000.00; and that all payments made for the proper expenses of administration and the personal indebtedness of said deceased should be charged against said widow as a part of her distributive share of the estate." This stipulation is really an answer to all the contentions of appellant, except those concerning the amounts of certain charges and credits, as to which, as before stated, the evidence warranted the findings of the court. The orders appealed from are affirmed.

We concur: DE HAVEN, J.; FITZGERALD, J.

105 Cal. 138

HENNESSY v. NICOL, Judge. (No. 15,870.)

(Supreme Court of California. Dec. 20, 1894.)

SUIT FOR DIVORCE—CHANGE OF VENUE—IMPOSITION OF CONDITIONS.

1. In an action for divorce, it is error to postpone the hearing of defendant's motion for a change of venue to the county in which he resides till after a motion for temporary alimony is heard.

2. After temporary alimony has been granted, it is error to refuse to hear the motion for change of venue till the alimony is paid.

3. Before a party can be brought into contempt for failure to obey an order, the order must be served on him.

Commissioners' decision. In bank.

Mandamus by John C. Hennessy to compel George W. Nicol, judge of the superior court of Tuolumne county, to hear a motion for a change of venue. Writ granted.

Clement, Cannon, Kline & Stradley, for petitioner. F. P. Otis, for respondent.

BELCHER, C. This is an application for a writ of mandate commanding the respondent, as judge of the superior court of Tuolumne county, to hear and determine a motion made in an action pending in his court for a change of the place of trial of said action. The facts upon which the application is based are as follows: On June 1, 1894, Cornelia Hennessy commenced an action in the superior court of Tuolumne county against John C. Hennessy, the petitioner here, alleging that the parties to the action were married on July 4, 1889, in said county, and had ever since been, and still were, husband and wife; that from the time of their marriage they continued to live and cohabit together as husband and wife in this state until June 21, 1891, when the defendant willfully and without cause deserted the plaintiff, and had ever since refused to live with her, or to provide a home for her, or to allow her to return to him; that in November, 1891, a son, the issue of the marriage, was born, and that since the said separation the defendant had refused and neglected to pay or contribute anything towards the support of plaintiff or the said child; that defendant had an income sufficient to pay plaintiff a reasonable sum for the support of herself and child; and that $40 per month was a reasonable sum for such support. And the prayer was that defendant be adjudged to pay plaintiff, for permanent support and maintenance of herself and child, the sum of $40 per month, besides the costs and counsel fees in the action. The summons in the action was served upon the defendant in the city of San Francisco on June 11th, and at the same time notice, with an affidavit of plaintiff, was served upon him, stating that on June 29th, at 10 o'clock a. m., counsel for plaintiff would move the court for an order requiring the defendant to pay her the sum of $200 as alimony pendente lite, and for costs. On June 23d the defendant served and filed a notice that on June 29th, at 10 o'clock a. m., he would move the court for an order changing the place of trial of the action to the superior court of the city and county of San Francisco, upon the ground that, at the time of the commencement thereof, he was a resident of the said city and county. And at the same time he also served and filed a demurrer to the complaint, a demand that the place of trial be changed from the county of Tuolumne to the city and county of San Francisco, and his affidavit stating that he then was, and for more than three years had been, a resident of said city and county, and also stating in proper form that he had a good defense to the action on the merits. On June 29th the cause was continued by consent. On July 17th counsel for plaintiff moved the court that the motion for alimony be heard before the motion for change of the place of trial. This motion was submitted and taken under advisement until August 6th, when it was granted. The motion for alimony was heard August 11th, and thereupon an order was made and entered that the defendant pay to the plaintiff forthwith the sum of $150 as alimony pendente lite. A certified copy of this order was served on the defendant in San Francisco on August 24th. On August 14th counsel for plaintiff called up the motion to change the place of trial, and it was ordered that the matter be continued until the 17th. On the last-named day, counsel for defendant renewed the motion, and counsel for plaintiff objected to the hearing of it, upon the ground that the alimony ordered had not been paid. It was admitted that the alimony had not been paid; and thereupon "the court ordered that the said objection be, and the same is hereby, sustained; and the court refuses to hear said motion until the order granting alimony pendente lite is complied with."

We think the court erred in refusing to hear and decide upon the defendant's motion for change of venue. The action was one which, under section 395, Code Civ. Proc., the defendant was entitled to have tried in the county of his residence. And, when proper application for the change was made, the court had no discretion to refuse to hear the motion, or to impose terms as a condition precedent to the hearing. In Watts v. White, 13 Cal. 324, it is said: "The party desiring a change of venue should move the court to change the place of trial, and then the court, in the proper case, has no discretion to refuse the motion. It seems to be made by the statute a matter, in such cases as this, of peremptory right." In Watkins v. Degener, 63 Cal. 500, it is said: "When the action is not one of those mentioned in sections 392, 393, of the Code of Civil Procedure, and the defendant resides without the county where it has been commenced, it is the right of the defendant, upon satisfying the court of his residence, to have the place of trial changed, if, at the time, he appears and answers or demurs, he files an affidavit of merits, and demands in writing that the trial be had in the proper county." And in Ah Fong v. Sternes, 79 Cal. 33, 21 Pac. 381, it is said that the right to a change of the place of trial "is to be determined by the condition of things existing at the time the parties claiming it first appeared in the action." Under the law as thus declared, the plaintiff had no right to have her motion for temporary alimony first heard, and the court had no right to make a compliance with the order awarding such alimony a condition precedent to the hearing of defendant's motion.

It is claimed for respondent that the defendant was not entitled to have his motion heard, when it was called up, on August 17th, for the reason that he was then in contempt of court, because he had not paid the alimony awarded the plaintiff, and ordered to be paid by him forthwith. This claim cannot be sustained. The defendant was not in contempt of court for two reasons: First, under the circumstances shown, the order awarding alimony was unauthorized; and, second, "before a party can be brought into contempt for not complying with an order of court, such order must be served upon him." Johnson v. Superior Court, 63 Cal. 580. The order was not served on defendant until August 24th, while his motion was denied on the 17th. It follows, in our opinion, that the defendant was entitled to have his motion for change of venue heard, and that a peremptory writ of mandate should be issued commanding the respondent to immediately hear and decide the same.

We concur: SEARLS, C.; TEMPLE, C.

PER CURIAM. For the reasons given in the foregoing opinion, it is ordered that a peremptory writ of mandate be issued from this court, commanding the respondent to immediately hear and decide the defendant's motion for change of the place of trial of the action referred to.

105 Cal. 151

## VON SCHMIDT v. WIDBUR, City Treasurer. (No. 15,160.)

(Supreme Court of California. Dec. 21, 1894.)

POWERS OF CITY — PURCHASE OF SMALLPOX HOSPITAL—ISSUE OF CITY WARRANT—RIGHT TO WITHDRAW.

1. The board of supervisors of a city authorized the committee on health to purchase certain land. The deed was delivered to the committee, and presented to the board, which directed that it be held "in escrow" till the consideration therefor was allowed. A warrant for the consideration was issued, and ordered by the board to be paid, and was duly audited and delivered to the grantor. *Held*, that the board could not, by repealing its action as to the purchase, divest the grantor of his right to collect the warrant.

2. Under San Francisco Charter (St. 1856, p. 170, § 84), providing that the allowance or approval by the board of supervisors or any other board or officer of any demand which, upon the face of it, appears not to have been expressly made by law payable out of the treasury or fund to be charged therewith, shall afford no warrant to the treasurer for paying it, the treasurer is charged with knowledge of the objects for which public money in his custody may be expended, and, if a demand is presented to him which, on its face, appears to be for a claim not authorized by law, he should refuse to pay the same.

3. Where the board of supervisors issue a

warrant which they are authorized to issue, the treasurer can exercise no discretion in regard to paying it.

4. San Francisco Charter (St. 1856, p. 145, § 1), providing that the city may purchase real property for the common benefit, is not a grant of unlimited power to purchase land, but declaratory of the corporate capacity to be exercised under the limitations subsequently provided.

5. St. 1863, p. 168, authorizing the board of supervisors of San Francisco "to allow and order paid out of the general fund, not to exceed $6,000 for any one year, for the support of" a smallpox hospital, does not authorize the board to purchase a site for such a hospital.

6. St. 1863, p. 540, authorizing the board of supervisors of San Francisco to make all regulations which may be necessary or expedient for the prevention of contagious diseases, does not authorize the board to purchase a site for a smallpox hospital.

7. Const. art. 11, § 11, authorizing a city to make all such police, sanitary, and other regulations as are not in conflict with general laws, does not authorize the purchase of a site for a smallpox hospital.

In bank. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Mandamus by A. W. Von Schmidt to compel James H. Widbur, treasurer of the city and county of San Francisco, to pay a city warrant. Judgment was rendered for petitioner, and from an order denying a motion for a new trial defendant appeals. Reversed.

Harry T. Creswell, for appellant. Tilden & Tilden, for respondent.

HARRISON, J. In September, 1890, respondent made an offer in writing to the board of supervisors of the city and county of San Francisco to sell to the city certain real property therein, known as "Shag Rock," for the sum of $15,000. The communication was referred by the board of supervisors to the committee on health and police, and on the 2d of December, 1890, that committee reported in favor of the purchase, and its report was adopted by the board of supervisors. December 9, 1890, the board of supervisors adopted a resolution authorizing the committee on health and police to purchase the property on behalf of the city and county for the sum of $15,000, as a site for a smallpox hospital; the title to the said property to be first passed upon by the city and county attorney, and, if found perfect, then such purchase to be made. January 2, 1891, the city and county attorney gave to the committee his opinion that the title thereto was in the respondent, Von Schmidt, and on the same day Von Schmidt executed an instrument sufficient in form, and purporting to convey the property to the city and county of San Francisco, and delivered it to the chairman of the committee on health and police. At the meeting of the board of supervisors in the evening of that day the chairman of this committee presented the deed, and upon his motion the clerk was directed to "hold said deed in escrow until the consideration therefor had been duly allowed." At the same meeting of the board of supervisors a warrant or demand for the sum of $15,000 in favor of Von Schmidt was presented, and upon the approval of the auditing committee, to which it had been referred by said board, was allowed and ordered paid, and on the following day, after having been duly audited by the auditor, was presented to the treasurer for payment, and was by that officer registered, but was not paid. January 5, 1891, the board of supervisors passed a resolution purporting to repeal its action in allowing and ordering the payment of the demand and in authorizing the purchase of the property, and directing the treasurer not to pay the said demand, and also to cause the cancellation of its registration upon its books, and also directing the auditor to cancel all action in his office whereby the said demand had been audited, and the clerk of the board was directed to return to Von Schmidt his deed of conveyance. Under these resolutions entries were made on the books of the auditor and of the treasurer canceling their previous action in reference to the demand, and the clerk returned the deed, but Von Schmidt declined to receive it, and returned it to the custody of the clerk. January 6, 1891, Von Schmidt again presented the demand to the defendant, as treasurer, and demanded payment, which was refused; and on the 12th of January made application to the superior court for a writ of mandate directing the payment of the demand. Upon the hearing by that court judgment was rendered in favor of the petitioner. A motion for a new trial was made on behalf of the defendant and denied, and from this order the defendant has appealed.

The delivery of the deed by Von Schmidt to the chairman of the committee on health and police was sufficient, on his part, as a delivery to the city. That committee had been authorized by the board of supervisors to make the purchase, and to that extent was the agent of the city to which the delivery might be made, and the action of the supervisors in directing the clerk to hold the deed until the consideration therefor had been duly "allowed" was in accord with the purpose of Von Schmidt in delivering it to the chairman that it might be delivered to the city when the warrant was issued. The term "escrow" in the direction to the clerk had no technical significance, and did not change the character of the instrument or of its delivery, but was used in the same sense in which Von Schmidt stated that the delivery was made, viz. "If I received the warrant, the sale was complete, and, if not, I was to have the deed back." It was the ordinary case in which the delivery of the deed is to be made simultaneously with the payment of the purchase money. The mere act of the grantor in placing the deed in the hands of the grantee, without an intention thereby of parting with the control of the deed, does not render the delivery complete unless the purchase money is paid. The subsequent approval by the board of Von Schmidt's demand for the purchase money, and issuance to him of the warrant therefor, completed an acceptance of the deed by the city; and, if the board of supervisors had the power to make the purchase, the transaction would have been complete, and his title to the land transferred to and vested in the city, and his right to the purchase money would also have been complete. In Laforge v. Magee, 6 Cal. 650, it was held that when the holder of a county warrant had presented it for payment at a time when there was money in the treasury which had been appropriated for that purpose, his right to the money became fixed, and could not be destroyed by a subsequent legislative enactment. The subsequent action of the board of supervisors, purporting to repeal its allowance of the petitioner's claim, could not divest him of his right to the money. McConoughey v. Jackson (Cal.) 35 Pac. 863.

The writ of mandate is issued to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station (Code Civ. Proc. § 1085); and, unless there is some duty enjoined by law upon the defendant to pay the claim of the petitioner, the writ ought not to issue. Section 82 of the act incorporating the city and county of San Francisco, commonly known as the "Consolidation Act" (St. 1856, p. 169), declares: "No payment can be made from the treasury or out of the public funds of said city and county unless the same be specifically authorized by this act, nor unless the demand which is paid be duly audited as in this act provided, and that must appear upon the face of it." Section 84 of the same act also provides that, before any demand upon the treasury can be paid, it must be presented to the auditor and allowed; and further declares that "the allowance or approval of the auditor or board of supervisors, or any other board or officer, of any demand which, upon the face of it, appears not to have been expressly made by law payable out of the treasury or fund to be charged therewith, shall afford no warrant to the treasurer, or other disbursing officer, for paying the same"; and in section 86, as amended in 1857 (St. 1857, p. 217), it is provided that "every officer who shall approve, allow or pay any demand on the treasury not authorized by this act shall be liable to the city and county individually and on his official bond for the amount of the demand so illegally approved, allowed or paid." Section 95 of the act, as amended in 1857 (St. 1857, p. 218), limits the objects for which the public moneys may be expended by declaring that "payments of demands on the treasury of said city and county may be made for the following objects, and none others"; and, after enumerating these objects, provides in the fifteenth subdivision that "expenditures previously authorized by the board of supervisors, in the lawful exercise of their powers, for objects other than those specified in the preceding fourteen subdivisions of this section may be paid out of the surplus fund as specified in sections 97 and 98, but not otherwise." Acts giving additional authority for some special expenditure of public moneys have been passed by the legislature from time to time, but the restrictions placed upon the payment of moneys out of the treasury in the original act have never been modified. From these provisions it appears that it is the duty of the treasurer to examine every claim presented to him for payment, and that the mere fact that the claim has been allowed by the supervisors or approved by the auditor does not of necessity impose upon him the duty to pay it. He is charged with a knowledge of the objects for which the public moneys in his custody may be expended; and if a demand is presented to him which on its face appears to be for a claim not authorized by law, or for an expenditure which was beyond the power of the supervisors to incur, he is required to refuse such payment. Upon the face of the demand presented to the treasurer by the petitioner herein it appears that it was for the payment for certain real property purchased from him by the board of supervisors in behalf of the city and county "as a site for a smallpox hospital," and the treasurer was required to determine whether such purpose was within the power of the board of supervisors. If the board of supervisors had the authority to make this purchase, it was his duty to pay the demand; whereas, if they did not have such authority, he was justified in refusing to pay it.

The validity of Von Schmidt's title to the land purchased cannot be inquired into in this proceeding. The condition in the resolution for its purchase, that the purchase should be made if the title was found perfect, was addressed to the committee, and was to be determined upon the examination and report upon the title by the city and county attorney, and his subsequent opinion that the title was in Von Schmidt was not open for revision by the treasurer. The treasurer is not authorized to review the action of the board of supervisors in any matter within their power upon which they have exercised their legislative judgment or discretion. He is not justified in refusing the payment of any demand for an expenditure which the board of supervisors is authorized to make, and which it has allowed and ordered paid. It is only when it directs the payment for an expenditure which it has no power to incur that the treasurer is justified in refusing to make the payment. The rule is so familiar as to be trite that a municipal corporation can exercise only such powers as have been conferred upon it in its charter, or by some general law, and that any person, in dealing with it, is charged with a knowledge of every limitation upon its power to contract a liability. This rule is not, however, to be so considered as to require an authority in express terms for the performance of every municipal act. If an express power to accomplish some result has been conferred, it will carry with it the authority to do such subsidiary acts as are incidental and necessary to the exercise of that power. The rule, as stated by Mr. Dillon (1 Mun. Corp. [4th Ed.] § 89), and approved in various authorities, is that: "It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation,—not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of the power is resolved by the courts against the corporation, and the power is denied." And in section 91 the same author says: "The rule of strict construction of corporate powers is applicable to grants of powers to municipal and public bodies, which are out of the usual range, or which may result in public burdens, or which in their exercise touch the right to liberty or property, or, as it may be compendiously expressed, any common-law right of the citizen or inhabitant." There is a marked distinction between the incidental powers that are implied in favor of the acts of a business corporation and those of a municipal corporation. The inability of a business corporation to avoid its obligation upon the plea of ultra vires, when it has received and retained the consideration for its obligation, has no application to a municipal corporation. The former is organized for the profit of its members, and its executed acts in purported furtherance of that object, unless restrained by its charter or prohibited by positive law, will be upheld; whereas municipal corporations are organized for governmental purposes, and invested with a portion of the authority which properly appertains to the sovereign power of the state, and can exercise only such powers as are expressly conferred or necessarily implied. As the power of raising money by taxation is conferred for the purpose of defraying the public expenditures, and is to be exercised only for the purpose of meeting such expenditures, the limitation upon this power is effected by limiting the objects for which the moneys may be expended. This power of taxation is one of the highest attributes of sovereignty, and as a municipality seeking to exercise it must find express authority from the legislature, so its power to disburse the public moneys, being correlative to the power of taxation, must equally find express authority for its exercise. The purchase of real estate, by itself considered, is not the exercise of any governmental function, and such purchase by a municipality can be sustained only by the production of an express authority from the legislature therefor, or upon its being shown that it is necessarily incidental to the exercise of some express function of government with which the municipality is charged.

It is conceded in the brief on behalf of the respondent that there is no statutory provision which in so many words states that the city and county of San Francisco shall have the power to purchase a site for a smallpox hospital; but it is contended by him that such power is inherent in a municipal corporation, and necessarily incident to the powers already granted, and to the discharge of its governmental functions; and in support of this proposition he cites certain provisions of the consolidation act and certain statutes subsequently enacted. The provision in section 1 of the consolidation act, that the corporation then known as the city of San Francisco should remain and continue to be a body politic and corporate by the name of the city and county of San Francisco, and declaring that by that name it "may purchase, receive, hold and enjoy real and personal property, and sell, convey, mortgage and dispose of the same for the common benefit," is to be considered not as a grant of unlimited power to do the acts therein enumerated, but merely as declaratory of the corporate capacity and power of the body politic, to be exercised in the mode and under the limitations subsequently provided in the act. The powers of a municipality are to be exercised through its legally constituted agents,—its officers, boards, or departments,—and the authority of each officer, board, or department to exercise any of the corporate power with which the municipality has been clothed must be distinctly conferred upon that officer, board, or department, or its act will create no obligation against the municipality. As the obligation sought to be enforced in the present case is claimed to arise solely from the acts of the board of supervisors, only the powers of that board to create the obligation need to be considered. The powers of this board, as conferred by the original act of incorporation, are contained in article 5, §§ 65–74 of the act, and in section 67 it is declared: "The powers of the board of supervisors are those granted in this act, and they are prohibited from exercising any others." Other statutes conferring additional and specific powers upon the board have been enacted by the legislature from time to time, and these statutes have been held to be in the nature of amendments to, and to form a part of, the charter of the city and county. By the act of April 4, 1863 (St. 1863, p. 168), the board of supervisors were authorized "to allow and order paid out of the general fund, not to exceed the sum of six thousand dollars for any one year, for the support of the smallpox hospital of said city and county." The authority to purchase land "as a site for a smallpox hospital" cannot be implied from the power conferred upon the board of supervisors by this statute. Aside from the fact that this statute makes no mention of real estate, or of any purchase thereof, its language limits the power to the expenditure of "six thousand dollars for any one year," and the money thus allowed to be expended is for the "support" of the smallpox hospital,—words which eminently refer to an existing hospital, rather than to one to be thereafter brought into existence. It is not to be inferred that when the legislature was thus careful in limiting the amount of money to be expended, and in the language in which it described the mode of its expenditure, it intended to confer an unlimited authority upon the board of supervisors to expend any amount of money that it might choose for the purchase of a site for the hospital for whose support it had thus provided. The provision in the twentieth subdivision of section 74 of the consolidation act, as amended in 1861 (St. 1861, p. 552), giving to the board of supervisors power "to provide for the care and maintenance of the indigent sick of said city and county, but not to incur any expense therefor exceeding the sum of three thousand dollars a month," is subject to the same observation, and the expenditure thus authorized is particularly provided for in the thirteenth subdivision of section 95 (St. 1857, p. 219), which directs its payment as follows: "Out of the general fund bills duly audited for expenditures in the care and maintenance of the indigent sick of the city and county, previously authorized by the board of supervisors, and not exceeding the amount in this act limited for that purpose." The "indigent sick" is a class distinct from that to be cared for in the smallpox hospital; and the subsequent act in 1863, by which additional power was given to the supervisors to allow "six thousand dollars for any one year" for the support of the smallpox hospital, shows that this provision had no connection with the provision in the original act for the support of the indigent sick. Further confirmation of this construction of the provision in section 74 is found in the act of 1865 (St. 1865, p. 214), by which, when the city desired to build an almshouse and hospital, express authority was granted by the legislature, either to set apart land belonging to the city, or to purchase land therefor, if the land owned by the city was not suitable. Nor did the board of supervisors derive authority to purchase the land in question from the power given by the act of April 25, 1863 (St. 1863, p. 540), "to make all regulations which may be necessary or expedient for the preservation of the public health and the prevention of contagious diseases," or from the provisions in section 11 of article 11 of the constitution, giving authority to the city "to make and enforce within its limits all such local, police, sanitary and other regulations as are not in conflict with general laws." The "regulations" which the board of supervisors is thus authorized to make are rules of conduct to be observed by the citizens, and cannot, by any construction of language, be held to include the purchase of real estate; nor can the power to make such purchase be implied from the authority to make the regulations. Ketcham v. City of Buffalo, 14 N. Y. 360. We are of the opinion that in none of these statutes has the legislature conferred upon the city and county of San Francisco the authority to purchase any real estate as a site for a smallpox hospital, and, consequently, that the board of supervisors had no authority to make the purchase of real estate for which the demand was given to the petitioner, and that the action of the treasurer in refusing to pay the demand was in the exercise of an authority conferred upon him by the terms of the consolidation act. The order denying a new trial is reversed, and a new trial ordered.

We concur: GAROUTTE, J.; FITZGERALD, J.; McFARLAND, J.; DE HAVEN, J.

105 Cal. 123

## Ex parte BUCKLEY. (No. 21,190.)

(Supreme Court of California. Dec. 19, 1894.)

HABEAS CORPUS—PETITION FOR WRIT.

A petition for a writ of habeas corpus to release one held on a criminal charge, which merely alleges that no evidence was taken in the preliminary examination showing or tending to show petitioner's guilt, is insufficient.

In bank.

J. A. Buckley, held to answer a charge for forging election returns, petitions for a writ of habeas corpus. Denied.

J. J. Guilfoyle and Ben B. Haskell, for petitioner. W. S. Barnes, Dist. Atty., for respondent.

BEATTY, C. J. The petition in this case is substantially the same as that in Ex parte Walpole, reported in 84 Cal. 584, 24 Pac. 308, where it was held that the matters alleged were insufficient to justify the issuance of the writ. But, as some members of the court were in doubt as to the correctness of that decision, we concluded, after some hesitation, to treat this petition as sufficient, and issue the writ, to which the sheriff has made his return, showing that he holds the petitioner under and by virtue of a commitment based upon an order of a committing magistrate, holding him to answer for the offense of forging election returns, and willfully substituting forged and counterfeit returns of an election in place of true returns, etc. The evidence adduced upon the examination of the petitioner, with the exception of some exhibits, consisting of the election returns in question, and other documents, which are in the official custody of the registrar of voters, has been produced for our inspection, from which it appears that the offense above specified has been committed.

As to the person or persons who made the alterations, the evidence is less satisfactory, but we cannot say that it was insufficient to warrant the committing magistrate to hold the petitioner to answer. Upon a reconsideration of the point decided in Ex parte Walpole, supra, we are satisfied that it was correctly decided, and that the petition in this case was insufficient to call for the issuance of the writ. The petitioner is remanded.

We concur: DE HAVEN, J.; McFARLAND, J.; GAROUTTE, J.; VAN FLEET, J.; HARRISON, J.

105 Cal. 124

## TURNER v. LUNING. (No. 15,640.)

(Supreme Court of California. Dec. 20, 1894.)

SALE OF NOTE—EVIDENCE—OTHER LIKE SALES.

1. A judgment rendered on conflicting evidence will not be disturbed for want of sufficient evidence to support it.

2. On an issue as to whether plaintiff had bought a note from defendant, where there was evidence that plaintiff bought at a great discount, evidence that at about the same time defendant had sold other notes at a great discount was admissible.

Department 2. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Action by Richard B. Turner against John N. Luning on a promissory note. Judgment for plaintiff, and defendant appeals. Affirmed.

J. P. Langhorne, for appellant. Sullivan & Sullivan, for respondent.

McFARLAND, J. This is an appeal by defendant from a judgment in favor of plaintiff, and from an order denying a motion for a new trial. The action is upon a promissory note made by defendant in January, 1883, for $1,500, and interest at 2 per cent. per month, payable to himself or order, and indorsed by him. Defendant admits the making of the note, but denies that it was ever sold to the plaintiff, or that the latter ever owned it. The only real question in the case is whether we should reverse the judgment for a want of sufficient evidence to support it. But the evidence was clearly conflicting, within the rule so often heretofore announced. Plaintiff testifies that defendant brought the note to him, and offered to sell it to him for $300, and that he bought the note for said sum, and paid it to defendant. This, he says, was on the 30th of January or 1st of February, 1883. Defendant testifies that he never sold the note to plaintiff, nor delivered it to him, nor received from him $300, or any sum of money whatever; but that he delivered the note to one Wasserman for the purpose of having it negotiated by Wasserman, and that Wasserman failed to negotiate it, and that he had never heard of the note afterwards until this suit was brought. Wasserman testifies that, to the best of his recollection, he gave the note to plaintiff upon the latter's representation that he could sell it, and that plaintiff afterwards informed him that he could not do anything with it. Plaintiff, however, says that he returned the note to Wasserman, and that defendant afterwards himself brought it to him, and sold it to him as aforesaid. Considering all the details of the testimony, the best that can be said of it favorable to appellant is that it is doubtful whether the preponderance of the evidence was on the side of respondent; but there is no such lack of substantial evidence in favor of respondent as would warrant us in disturbing the judgment.

We do not think that the court committed any material error in allowing evidence to the point that appellant had sold other notes about that time at a great discount. This was proper to account for the great discrepancy between the face of the note and the amount paid for it by the respondent. The appellant was impecunious at the time, but seems to have had great expectations.

The judgment and order are affirmed.

We concur: DE HAVEN, J.; FITZGERALD, J.

105 Cal. 208

## MARTIN v. SANTA BARBARA COUNTY. (No. 18,449.)

(Supreme Court of California. Dec. 24, 1894.)

COUNTY GOVERNMENT ACT—TIME OF TAKING EFFECT—COMPENSATION OF OFFICERS.

County Government Act, § 183 (St. 1893, p. 346), provides that "in counties of the twenty-first class the county officers shall receive as compensation * * * the following 'salaries'," and this formula is repeatedly used in the act with reference to the difference classes of counties. Subdivision 14 of section 183 provides that constables shall be allowed certain "fees," not to exceed a certain amount monthly. Subdivision 17 provides that such section shall take effect immediately, except as to the "salaries" of present incumbents; and section 237 provides that the act shall, except as otherwise provided, take effect on the first Monday after January 1, 1895. *Held*, that the word "salary," as used in section 183, means "compensation," and applies to all officers enumerated in the various subdivisions, whether they are paid in fixed salaries or in fees; so that by subdivision 17 the act does not become operative as to incumbents of the office of constable in counties of the class designated until the first Monday after January 1, 1895.

Commissioners' decision. Department 2. Appeal from superior court, Santa Barbara county; W. B. Cope, Judge.

Action by D. W. Martin against the county of Santa Barbara. Plaintiff had judgment for less than his claim, and appeals. Reversed.

Boyce & Taggart and C. A. Storke, for appellant. Thos. McNulta, for respondent.

SEARLS, C. This action was brought to recover the sum of $359.40 for fees alleged to be due plaintiff as a constable of the second township of said county. The cause was tried by the court without a jury, written findings filed, and a judgment rendered thereon in favor of plaintiff for $222.70 and costs, from which judgment said plaintiff appeals.

The cause was submitted to the court upon the pleadings and upon a certain written stipulation of facts agreed to and signed by the attorneys for the respective parties, from which it appears that plaintiff claims that he is entitled to the sum demanded in his complaint as constable fees under an act to regulate fees and salaries, etc., approved March 5, 1870, and it is admitted that plaintiff is entitled thereto if said last-mentioned act is in force. Defendant admits that plaintiff is entitled to compensation for the services set out in his complaint under "An act to establish a uniform system of county and township governments," approved March 24, 1893, but that such recovery should not be had in this action, for the reason that the claim was not presented to the board of supervisors properly itemized and verified as required by said last-mentioned act, and was rejected by the supervisors for that reason. It is admitted that the sum of $222.70 is the amount which would be due to plaintiff upon due presentation under the act of March 24, 1893. Judgment was rendered in favor of plaintiff for $222.70, being the amount due as per the act of March 24, 1893, which, for the sake of convenience, will be referred to herein as the "county government act." Plaintiff, as before stated, appeals from the judgment, and contends that he was entitled to compensation under the statute of 1870. The cause comes up upon the judgment roll without a statement or bill of exceptions.

We are not concerned to inquire into the sufficiency of the presentation by plaintiff of his claim to the board of supervisors under the county government act, for the reason that the court below held the presentation and verification sufficient, and rendered judgment in favor of plaintiff thereon under said act. Respondent is not appealing from the judgment, and is not, therefore, in a position to question its validity. There is no contention but that the claim as presented was duly itemized, verified, and presented as required by the fee bill of 1870, and, if that statute is still in force, the claim should have been allowed by the board of supervisors for $359.40, and judgment should have been rendered therefor; while, if the county government act of 1893 was in force and applicable, the judgment is correct, and should be affirmed.

The county of Santa Barbara, of which plaintiff is a constable, is a county of the twenty-first class, as designated in the county government act of March 24, 1893, and the fees claimed by plaintiff are for services rendered in April, May, and June of 1893. Section 183 of the county government act ("An act to establish a uniform system of county and township governments"), approved March 24, 1893 (St. 1893, p. 346), provides as follows: "In counties of the twenty-first class the county officers shall receive as compensation for the services required of them by law, or by virtue of their office, the following salaries, to wit." Then follow subdivisions of the section fixing the salary of the clerk, sheriff, recorder, etc., at a given sum per annum; giving to the coroner, public administrator, and surveyor "such fees as are now or may hereafter be allowed by law." The thirteenth subdivision fixes the fees of justices of the peace, which are to be charged and collected for their own use. The fourteenth subdivision provides that "constables shall be allowed to charge and collect for their own use fees as follows." Then follows the schedule of fees allowed for the discharge of various duties, followed with the proviso that no constable shall receive in any one month a sum in excess of $125 in criminal cases, or a sum in excess of $30 in vagrancy cases, "and his claim against the county shall so state." For services not enumerated he is allowed the same fees as are allowed the sheriff for like services. The seventeenth and last subdivision of the section is as follows: "This section shall take effect immediately, except such provisions as affect the salaries of the present incumbents." Section 234 of the act is as follows: "The provisions of this act, unless otherwise herein provided, so far as it relates to the compensation and salaries of all officers named, shall not affect the present incumbents; provided, that when the salary of any such officer, or fees in lieu of such salary, is not fixed by law, the same shall as to such officer take effect immediately." Section 235 applies the law to new counties to be thereafter created or organized, and provides that the salaries of officers in counties the population of which has been decreased by the organization of new counties shall not be affected during the terms for which they shall have been elected. Section 237 is as follows: "This act shall, except as herein otherwise provided, take effect on the first Monday after the first day of January, eighteen hundred and ninety-five." The contention of appellant is that subdivision 14 does not affect the present incumbents of the office of constable of Santa Barbara county. In aid of this contention it is urged that the term "salaries" in subdivision 17 of said section 183 must be construed to include the word "fee," and to be as general as the word "compensation" in its meaning. It will be observed that section 183, hereinbefore quoted, provides that county officers in counties of the twenty-first class "shall receive as compensation * * * the following salaries," and then follow the titles of the several officers, and the provisions fixing their compensation, which in some instances consists of a fixed salary per annum, and in others of fees. The word "salary" signifies the periodical compensation due to men in official and other situations. The word is derived from "salarium," which is from the word "sal" (salt), that being an article in which the Roman soldiers were paid. Black, Law Dict. tit. "Salary"; Cowdin v. Huff, 10

Ind. 85. While the term "salary" in its original and strict sense signifies a fixed compensation, it is frequently used in our constitution and laws as the equivalent of "compensation." In Kirkwood v. Soto, 87 Cal., at page 396, 25 Pac. 488, it was said: "The words 'compensation' and 'salary' were evidently used synonymously in the constitution and in the county government act." The phrase, "The county officers shall receive as compensation for the services required of them by law, or by virtue of their office, the following salaries," is repeated at least 50 times, at the commencement of as many sections, applicable to counties of different classes, in each of which provision is made for the remuneration of some of the officers by fixed and stated sums per annum, and for others by fees of office as now provided by law or as shall be hereafter provided. I regard the conclusion as irresistible that the term "salary," as used in this connection, is used not in its original and restricted sense, but in the broader and more comprehensive sense of "compensation," and as applying equally to all officers included in the act whose compensation is fixed thereby, whether such compensation is limited to a fixed sum of money, or is payable in fees, or in fees not exceeding a certain fixed amount for the performance of certain specified duties, as in the case of constables. It is, therefore, held that the term "salary," used in section 183, was intended to apply and does apply to all the officers included in the twenty-first class, viz. county and township officers therein specified.

Subdivision 17 of section 183 of the act, which, as before shown, provides that "this section shall take effect immediately, except such provisions as affect the salaries of the present incumbents," must receive the same interpretation as is given to it in its previous occurrence in the section; that is to say, that while it is to take effect at once, it does not do so as to the officers whose salaries are fixed by the section, whether by fees or by a fixed lump sum per annum. In other words, the term "salaries" in the seventeenth subdivision of section 183 must be construed as broadly as the same word where it first occurs in the first clause of the same section, and must be held not to take effect as to the compensation of the officers enumerated until the first Monday after the 1st day of January, 1895, when, by the 237th section, the act, except as otherwise provided, takes effect. This view leaves the law to take effect at once in the cases provided for in sections 234 and 235, viz. in cases where the compensation of officers is not fixed by law, and in counties within the twenty-first class, created or organized after the passage of the act, and to all matters contained in said section 183 as do not relate to the compensation of officers. These views render it unnecessary to consider other questions raised by appellant. The judgment should be reversed, and the court below directed to enter judgment in favor of plaintiff for $359.40 and costs of suit.

We concur: VANCLIEF, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed, and the court below directed to enter judgment in favor of plaintiff for $359.40 and costs of suit.

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105 Cal. 166

## PEOPLE v. WORTHINGTON. (No. 21,084.)

(Supreme Court of California. Dec. 22, 1894.)

HOMICIDE—INSANITY AS DEFENSE — HYPNOTISM—EVIDENCE—CREDIBILITY OF WITNESS.

1. On a prosecution for murder, a witness for the state may, on cross-examination, be asked if deceased was not her lover, to show her spite against defendant.

2. Where a witness, on cross-examination by the state, denies having stated out of court that defendant had done certain things, evidence to contradict him is inadmissible, as his statements are not evidence against defendant.

3. To prove insanity, defendant's family physician may be asked if he did not consider defendant "weak-minded."

4. Evidence showing that defendant was told by her husband to kill deceased, and that she did so, does not tend to prove that defendant was hypnotized, and render admissible evidence of the effect of hypnotism on people subject to its influence.

5. Where, to prove defendant's insanity, evidence of her account of the homicide is admitted, it is proper to instruct that such evidence can only be considered as bearing on defendant's mental condition.

Commissioners' decision. In bank. Appeal from superior court, city and county of San Francisco; J. M. Seawell, Judge.

Louisa Worthington was convicted of murder, and appeals. Reversed.

Robert Ferral and Burnette G. Haskell, for appellant. W. H. H. Hart, for the People.

TEMPLE, C. The defendant was convicted of the crime of murder in the second degree, and sentenced to be imprisoned in the state's prison for the term of 25 years. Her motion for a new trial was denied, and she appeals. The defendant is a young married woman, having been born in England in 1870. She was the mother of two children. In January, 1893, she met the deceased, while he was doing some plumbing on the premises where she resided. Her husband was then absent, in Europe. Illicit relations were immediately established between herself and Baddeley. In February the husband returned, and, soon after, defendant eloped with Baddeley, taking with her her youngest child. They went to Stockton, where, after about 10 days, Baddeley deserted her, leaving her entirely destitute. The husband had in the meantime got on the track of her, and took her home. He forgave her, so he says, because of the children, and because he thought she was not right in her mind. Annie Kelly had been a servant in defendant's family, and, when Mr. Worthington went to Europe, he employed her to stay with the defendant. Annie knew all about the illicit relations between defendant and deceased, and, as she testified, acted as a "go-between" for them. After defendant had been forgiven and taken back by her husband, she continued to correspond with Baddeley, both directly and by procuring Annie Kelly to write to him for her. She assured him of her continued regard, and urged him to return. In one letter to Baddeley, written March 18th, she said: "He [her husband] said that he will give me a week's time in which to find you, and, when I do, I must shoot you, or be shot myself. So what am I going to do? I am sure I don't know what to do unless I shoot myself. I think that is the best thing to do. I would not give you away to save my life. I love you too much to do that." April 26th, Baddeley, who had been away for a month or two, returned to San Francisco, and on the same day had a clandestine meeting with defendant. The meeting was by appointment, and was arranged through Annie Kelly. The record does not disclose the nature of the interview. The next day Baddeley called upon defendant during the absence of her husband, and, as defendant told her husband, tried to ravish her, whereupon she fired at him three times with a pistol. On the 1st of May, according to her story to her husband, Baddeley met her on the street, and again proposed a renewal of the illicit relation. The next morning Mr. Worthington saw Baddeley in the street, watching his windows, and went out, and procured a pistol for his wife. He gave it to her, at the same time telling her: "You protect yourself, protect your honor. I have brought you home, and agreed to forgive everything;" and, further: "Here is a gun. You protect yourself, and if he interferes with you, or attempts to interfere with you, again, you kill him, and I will do the same." That evening, at about half past 4 o'clock, deceased was seen on the wharf, leaning against a pile of sacks. The defendant walked up to him, and fired four shots at him from a pistol, when she was interfered with and arrested. She seemed not at all excited. Three shots took effect on the deceased, causing his death.

The defense was insanity and hypnotism. Annie Kelly was an important witness for the prosecution. She testified as to the improper relations which existed between defendant and Baddeley, of devices on the part of the defendant to deceive her husband. The evidence tended to show, and was evidently introduced for the purpose of showing, depraved conduct on the part of defendant; that she was not seduced from a state of innocence by the deceased. A number of letters were read in connection with her testimony, which she claimed were written by her at the instance of the defendant, and addressed to Baddeley. They were mostly written during the short period that the deceased was absent from the city. They assured deceased of the great affection of defendant for deceased, and implored him to return to her. As Baddeley did return, and was soon thereafter killed by defendant, the effect they were likely to have is obvious. There were in the letters many expressions of affection for Baddeley on the part of Annie Kelly herself. She sometimes implores him to return for her sake, and also expresses great disgust for her friend Dolf, for having loved whom she says she must suffer. In one letter she used the expression: "I must tell you I am disappointed, for the quicker I have it the better for me." Defendant's counsel asked: "What do you mean by that?" It was objected to as not cross-examination. Defendant's counsel then explained that he wished to show by it that the relation of mistress and lover existed between the witness and the deceased, in order to show the animus of the witness. The objection was still insisted upon that it was not cross-examination. No other objection was made, and it was sustained. The intent was, doubtless, to show that the remark referred to a criminal operation upon herself which the witness contemplated. If this were shown, it would tend to explain the urgent requests to Baddeley to return, and also to prove a special spite against defendant for having killed her lover. The best comment upon this ruling is found in 1 Greenl. Ev. § 446: "The power of cross-examination has been justly said to be one of the principal, as it certainly is one of the most efficacious, tests which the law has devised for the discovery of truth. By means of it the situation of the witness with respect to the parties, and to the subject of litigation, his interest, his motives, his inclination and prejudices, his means of obtaining a correct and certain knowledge of the facts to which he bears testimony, the manner in which he has used those means, his powers of discernment, memory, and description, are all fully investigated and ascertained, and submitted to the consideration of the jury before whom he has testified." To investigate just such matters as that is one of the best reasons for allowing cross-examinations at all.

Mr. Worthington, testifying for the defense, said that, in his efforts to find where his wife was, he called upon the Baddeleys. He there had some conversation, which he related. He was allowed to do this because he said he had related it to his wife, and the question of her sanity was being investigated. On cross-examination the people were allowed, over the objection of the defendant, to ask him if he did not in that conversation say that he once asked his wife to go to the Midwinter Fair, and that she did not go because she had a headache. He replied, denying that he had said so. The prosecution then called two witnesses who testified, against the objection of defendant, that he did so state. This was clearly error. The materiality of the evidence consists in the fact that another witness had said that defendant feigned headache to excuse herself from going to the fair, so that she might have an opportunity for a clandestine meeting with Baddeley. Admitting that Worthington could have been asked on cross-examination if he made the statement, because the remark was made in a conversation of which he had related a portion, still it was not binding upon his wife. His admission was not evidence against her. It was therefore immaterial whether he made the remark or not, and his denial was conclusive.

The family physician was called by the defense to prove insanity. He testified to having assisted at the birth of the two children, and that he also attended defendant for womb trouble. He was well acquainted with defendant and her ailments. He was also an expert upon the subject of mental disease. He was allowed to give testimony as to many peculiarities of the defendant, and he was asked: "From your treatment of her, from her ailments, and all you know of her, was she of an ordinarily good mind, or was she what you would ordinarily call a weak-minded woman?" This was objected to, on the ground that it was irrelevant and immaterial. The objection was sustained, and defendant excepted. Apparently, the objection was sustained on the ground that the test of legal responsibility was whether the accused was capable of knowing right from wrong, and not whether she was weak-minded. This is true; but here it is alleged as a defense that, at the time of the homicide, defendant was insane, and therefore had not the capacity of knowing that the act was wrongful. To this inquiry the character and quality of defendant's mind is a material fact. It was a fact which might have a favorable or unfavorable effect to the defense, according to circumstances. Action which would seem strange or abnormal in a person of strong mind might not seem so in a person of weak mind. So, too, it might show a person predisposed to certain species of mental disease. The evidence of insanity in the case was certainly of the weakest; yet the counsel had a right to submit it to the jury, and I think the witness should have been permitted to answer the question.

Counsel offered testimony as to the effect of hypnotism upon those subject to such influence. The court ruled out the evidence, and, I think, rightly. There was no evidence which tended to show that the defendant was subject to the disease, if it be such. Merely showing that she was told to kill the deceased, and that she did it, does not prove hypnotism, or, at least, does not tend to establish a defense to a charge of murder.

The defendant did not testify as to any material fact in the case. But, in order to show that she was insane, her husband was allowed to testify as to what he had told her, and what she had told him. In this way her story—if it was her story—was got before the jury. The court then charged the jury, in effect, that this testimony was put in merely to show the mental condition of the defendant, and that her declarations thus introduced could not be regarded as proof of the facts stated or of her belief in them. This was correct. The declarations lacked the sanction of an oath, and should not have been considered by the jury except in connection with the claim that the defendant was insane.

I see no objection to any of the instructions. Those refused were, in substance, given elsewhere. For the errors noted, I think the judgment should be reversed.

We concur: HAYNES, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is reversed.

Ordered that the opinion and direction for judgment this day filed herein be, and the same is hereby, amended so as to direct the following judgment in said action:

Judgment and order reversed, and cause remanded for a new trial.

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105 Cal. 203

## LONDON & LANCASHIRE FIRE INS. CO. v. LIEBES et al. (No. 15,784.)

(Supreme Court of California. Dec. 22, 1894.)

ACTION FOR DECEIT — SHOWING OF DAMAGE—INSURANCE—FALSE PROOFS OF LOSS—MONEY HAD AND RECEIVED.

1. A complaint in an action for false representations in furnishing proofs of loss on an insurance policy, which admits that there were more goods in the building than were destroyed, and that the value of such goods was greater than the sum paid by plaintiff on the policy, but fails to allege the amount saved therefrom, or that the amount of loss given by defendant in the profs of loss was false, is insufficient, since it does not show that plaintiff was damaged.

2. A complaint in an action to recover for money paid to defendants through their false representations in making proofs of loss on an insurance policy, which fails to allege a breach of contract by defendants, does not state a cause of action for money had and received.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco.

Action by the London & Lancashire Fire Insurance Company against Louis Liebes and Jacob Liebes to recover money paid on insurance policies. Judgment for defendant Jacob Liebes, and plaintiff appeals. Affirmed.

T. C. Van Ness, for appellant. Estee & Miller, for respondent.

HAYNES, C. This appeal is from a judgment entered in favor of defendant Jacob Liebes upon his demurrer to plaintiff's complaint. Louis Liebes was not served. The complaint alleges: That the plaintiff on January 27, 1890, issued to Liebes Bros. & Co., a firm composed of Jacob and Louis Liebes, a policy of insurance in the sum of $2,500 upon merchandise, consisting of cigars and tobacco, in a building on Davis street, in the city and county of San Francisco. Other insurance was carried by the insured in some 15 other companies, the total amount carried being $59,500. That on November 13, 1890, a fire occurred, whereby said merchandise "was damaged and partially destroyed." That proofs of loss, sworn to by respondent, were presented, wherein it was claimed that the loss amounted to $65,705.60. "That in support of said claim of loss it was represented" by defendants that their stock of merchandise on hand on January 1, 1890, was of the value of $92,442.31. That between January 1st and the date of the fire they had purchased cigars and tobacco of the value of $174,376.62, and between the same dates their sales amounted to $196,481.89, of which last-named sum $44,432.78 were profits. That plaintiff believed said statements, and, relying thereon, "did, subsequent to the presentation of said proof, and prior to the commencement of this action, pay to the defendants the sum of $2,500, being the total amount of indemnity named in its said policy of insurance." The complaint then proceeds: "That the plaintiff is informed and believes, and therefore alleges, that each and all of said statements so made by defendants to the plaintiff in support of their said claim of loss were false and fraudulent," and made for the purpose of defrauding the plaintiff, and followed this allegation with a statement of the particulars in which it is claimed the statements were false, viz.: that the stock on hand January 1, 1890, was but $67,442.31; that, of the $174,376.62 purchased, $9,447.37 had not been received by defendants, and 54 bales of Sumatra tobacco, of the value of $10,025.25, were at the time of the fire in a bonded warehouse on Broadway, leaving the value of the goods purchased and put in the store between January 1 and November 13, 1890, $154,904; and that goods of the value of $781.20 were sold and not accounted for, which should be added to the sales represented, making such sales $152,830.31. According to these allegations, the merchandise in the building at the time of the fire stands thus:

| | | |
|---|---|---|
| On hand Jan. 1, 1890.......... | | $ 67,442 31 |
| Purchased before Nov. 13...... | | 174,376 62 |
| | | $241,818 93 |
| Mdse. sold ........ | $152,830 31 | |
| Mdse. not received.. | 9,447 37 | |
| Mdse. in bond...... | 10,025 25 | |
| | | $172,302 93 |
| In building Nov. 13th....... | | $ 69,516 00 |

The complaint further alleged that, in and by the terms of the policy, it was stipulated and agreed that the entire policy should be void in case of any fraud or false swearing by the insured touching any matter relating to the insurance, or the subject thereof, whether before or after a loss.

The 15 other insurance companies hereinbefore mentioned assigned their several claims to the plaintiff, and these claims were set up in different counts, in each of which were alleged the same facts we have above stated.

The demurrer was: (1) That the complaint does not state facts sufficient to constitute a cause of action; (2) that the allegation as to the time of payment is uncertain; (3) that several causes of action are improperly united; and (4) the statutes of limitation. A like demurrer was interposed to each count.

Appellant contends that the actual loss of the defendants by the fire was $20,451.78; that they received from the plaintiff and the other insurance companies $59,500 or $39,048.22 more than they were entitled to. The result is reached argumentatively, as follows: It is alleged that the loss was not total, but partial; that the proof of loss showed the amount of the actual loss to be $65,705.60; that defendants, in their statements or representations in support of their proofs of loss, represented that the total amount of merchandise in the building at the time of the fire was $114,769.82; that deducting the alleged actual loss therefrom, viz. $65,705.60, shows the salvage to have been $49,064.22, and deducting the salvage from the amount plaintiff alleges was in the building at the time of the fire, viz. $69,516, leaves $20,451.78 as the amount of actual loss. But this is mere matter of argument, which assumes facts not alleged. It is alleged that the proofs of loss presented by defendants showed the actual loss to be $65,705.60, and it is nowhere alleged that that statement was not true, nor that the actual loss was less than that sum, while it is alleged that there was in the building at the time of the fire a larger amount, viz. $69,516. It is alleged that the loss was partial, but the amount or value of the goods saved is nowhere alleged. It is alleged that, in support of the proofs of loss, it was falsely represented that the goods in the building were of the value of $114,769.82; but as it is conceded that the value of the goods in the building did exceed the amount of the actual loss claimed by defendants, and as the amount of the actual loss is not controverted, either directly or by an allegation of the amount or value of the goods saved, it must be taken as conceded that the actual loss was as claimed by defendants, since it may be true that the representation as to the total value of the goods in the building was false, and yet the actual loss have been the amount claimed. If, then, the action is to be regarded as one for fraud, the complaint is insufficient, since the actual loss exceeded the amount insured and paid by the plaintiff and its assignors, and therefore they were not injured. In Morrison v. Lods, 39 Cal. 381, it was said: "The rule is well settled that a recovery cannot be had for a false representation, without proof of damage.' See, also, Patterson v. Donner, 48 Cal. 369; Baker v. Brown, 82 Cal. 64, 22 Pac. 879; Holton v. Noble, 83 Cal. 7, 23 Pac. 58.

But it is further argued by appellant that the fraud and false representations of the defendants rendered the policy void, under the provision hereinbefore stated; that hence there was no consideration for the payment to the defendants; and that it may be recovered upon that ground, as money had and received,—and cases are cited to the effect that under such a policy any willfully false statement in the proof of loss after the fire, or of some pretended losses, will completely forfeit the entire policy, even though the actual loss truly stated exceeds the entire amount of the policy. Conceding, without deciding, the law in this regard to be as stated by the learned counsel, the complaint does not state a cause of action for money had and received. Such action is based upon a promise, express or implied, to pay the money to the plaintiff, and is therefore an action upon a contract, the breach of which is the nonpayment of the money, and no breach alleged. In Frisch v. Caler, 21 Cal. 71, it was said: "In an action for the breach of a contract, it is necessary to allege that the contract has been broken, and there is no difference in this respect between a promissory note and other contracts. 1 Chit. Pl. 332. The failure to pay constitutes the breach, and must be alleged." See, also, Roberts v. Treadwell, 50 Cal. 520; Scroufe v. Clay, 71 Cal. 123, 11 Pac. 882; Barney v. Vigoreaux, 92 Cal. 631, 28 Pac. 678.

As the judgment must be affirmed upon the ground already considered, it is not necessary to decide other questions discussed by counsel. I advise that the judgment be affirmed.

We concur: VANCLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

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**105 Cal. 162**

## SANTA CRUZ ROCK PAVEMENT CO. v. HEATON et al. (No. 15,609.)

(Supreme Court of California. Dec. 22, 1894.)

STREET IMPROVEMENTS — SPECIFICATIONS BY CITY COUNCIL.

1. Act March 18, 1885, providing, in regard to street improvements, that "the city council may, by ordinance," prescribe general rules "as to the materials to be used and the mode of executing the work" under all subsequent contracts, is not mandatory, but leaves the matter to the discretion of the council.

2. Under Act March 18, 1885, plans and specifications for any particular street improvement need not be adopted by ordinance, a resolution of the council being sufficient.

Department 1. Appeal from superior court, Alameda county; W. E. Greene, Judge.

Action by the Santa Cruz Rock Pavement Company, a corporation, against W. D. Heaton and W. E. Miller, to enforce an assessment for street work. Judgment for plaintiff, and defendants appeal. Affirmed.

Dunne & McPike, for appellants. Parker & Eells, for respondent.

VANCLIEF, C. Action to enforce the lien of an assessment of $413 on defendants' lot for work done by plaintiff on Broadway, in the city of Oakland, under contract with the superintendent of streets. The cause was submitted to the trial court upon an agreed statement of facts, whereupon judgment was rendered in favor of the plaintiff, from which defendants appeal on the judgment roll, and contend here that the stipulated findings of fact do not support the judgment.

The street work for which the assessment was levied upon defendants' lot was done under "An act to provide for work upon streets," etc., approved March 18, 1885 (St. p. 147), in section 3 of which it is provided, among other things, that, "before passing any resolution for the construction of said improvements, plans and specifications and careful estimates of the costs and expenses thereof shall be furnished to said city council, if required by it, by the city engineer of said city, and for the work of constructing sewers specifications shall always be furnished by him." And in section 6 of the same act it is provided: "The city council may by ordinance prescribe general rules directing the superintendent of streets and the contractor as to the materials to be used, and the mode of executing the work, under all contracts thereafter made." It appears and is admitted that the plans, specifications, and estimates for the work in this case were required by and furnished to the city council by the city engineer in strict accordance with the above extract from section 3, and that such plans and specifications were made a part of the contract for doing the work, though the work did not include the construction of any sewer. But it likewise appears that the city council of Oakland never had by ordinance prescribed any general rule as to the materials to be used or the mode of executing any kind of street work before ordering the work in question to be done, though both the order and the contract for doing the particular work in this case sufficiently and with extraordinary particularity specified the materials to be used and the mode of doing the work.

Counsel for appellant contend, in substance, that the above extract from section 6 of the act is mandatory; and that strict obedience to its behest by the city council is a necessary condition precedent to the acquisition of jurisdiction of the council to order any street improvement to be made; and, consequently, that the resolution ordering the work to be done and the assessment in this case are void. To effect this construction, they interpret the word "may," in the extract from section 6, as meaning "shall" or "must," and attempt to justify this interpretation on the ground that it is necessary to effectuate the intended object of the legislature as manifested by the context of the statute in which the word is used. Primarily, and as ordinarily used in a statute, the word "may" does not denote the imperative mood of the verb to which it is attached, but merely imports permission, ability, possibility, or contingency, and should never be interpreted or understood as mandatory except by compulsion of the context in connection with which it is to be read, showing that the legislature must have used it in that sense. Minor v. Bank, 1 Pet. 64; Thompson v. Lessee of Carroll, 22 How. 434; State v. Neuner, 49 Conn. 233. There is nothing in section 6, or in the whole act of March 18, 1855, indicating that the legislature intended to command the city councils to prescribe general rules as to what kinds of materials should be used, or as to mode of executing work, or that anything more was intended by the above extract from section 6 than the ordinary import of the language of that extract, namely, that city councils are thereby permitted, in the exercise of their discretion, to prescribe such general rules as they deem practicable. It is improbable that the legislature deemed it practicable for city councils to prescribe such general rules as would be properly adapted to all the different kinds of street improvements, though it may have been deemed practicable to frame general rules applicable to some kinds of work. But, surely, there is nothing in the act indicating an intention to make the adoption of such general rules a condition precedent to jurisdiction of councils to order work to be done. The conditions precedent to such jurisdiction are fully provided in section 3; and, as above remarked, the stipulated findings show that all the conditions prescribed by section 3 were fully performed in this case.

The only other point made for appellants is that the plans and specifications were adopted by mere resolution of the council, and not by an ordinance signed by the mayor. It appears by the agreed statement that the resolution was passed by vote of 11 members of the council, and that it was signed by the president of the council. As the plans and specifications were specially adopted for a particular improvement, they were properly adopted by resolution. Only the general rules provided for by section 6 of the act need be adopted by ordinance.

I think the judgment should be affirmed.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

105 Cal. 173

## BATES v. HOWARD. (No. 15,481.)

(Supreme Court of California. Dec. 22, 1894.)

New Trial—Notice—Time — Decree of Distribution—Validity and Effect.

1. A nisi prius court may grant a new trial, though the trial was without a jury, and there was a substantial conflict of evidence.

2. Under Code Civ. Proc. § 12, providing that the time within which any act is to be done is computed by excluding the first day and including the last, a notice of a hearing of an application for administration, posted July 12th, is sufficient, as a 10-days notice, to authorize a hearing July 22d.

3. A final decree of distribution, of a probate court, does not create title in the heirs, but simply releases the title—already vested in them, under Civil Code, § 1384, which provides that the property of one dying intestate shall, on his death, pass to the heirs—from certain conditions imposed by statute.

4. A final decree of distribution sufficiently describes property when it names it as the whole of the R. ranch, which was purchased by deceased from R. by a certain deed recorded in a certain place, though, in further describing the land, it names two erroneous courses, the error in which is apparent from the fact that they do not answer the calls in the deed as to following the boundaries of adjoining owners.

Department 2. Appeal from superior court, city and county of San Francisco; Walter H. Levy, Judge.

Action by George Bates against Charles Webb Howard to recover money paid under a contract. Judgment in favor of plaintiff. From an order granting a new trial, plaintiff appeals. Affirmed.

H. D. Talcott, for appellant. Fox, Kellogg & King and Kellogg & King, for respondent.

PER CURIAM. This is an appeal from an order of the superior court in and for the city and county of San Francisco, granting a new trial. On the 27th day of August, 1887, the defendant made and executed an agreement in writing, of which the following is a copy: "San Francisco, August 27, 1887. For and in consideration of the sum of one thousand dollars ($1,000) to me in hand paid, and the receipt of which I hereby acknowledge, I agree to obtain for George Bates, of Berkeley, a deed to a certain tract of land situated in the county of Alameda, township of Brooklyn, state of California, and more particularly described as follows: A tract bounded on the west by that county road generally known as the 'Redwood Road,' on the south by the lands of A. J. Gladding, and on the east by the lands of Brennen and others, and on the north by unknown owners. Said tract of land being that formerly belonging to the O. L. Shafter estate, and described particularly in the final decree of distribution in the estate of O. L. Shafter, deceased, in the probate court of Alameda county, containing eighty-eight and twenty-one hundredths (88 21-100) acres. The following are the terms and conditions of said sale: George Bates shall pay to me a further sum of fifteen hundred dollars ($1,500) on or before Wednesday, August 31, 1887, and a further sum of twenty-two thousand six hundred and thirty-one and twenty-five hundredths dollars ($22,631.25) within forty-five days from the date of this agreement, and thirty thousand dollars ($30,000) within two years from the date of this agreement. In consideration of the above, I hereby agree to procure, and upon receipt of the said sum of $22,631.25, as hereinbefore mentioned, to deliver to the said George Bates a good and sufficient conveyance, by a grant, bargain, and sale deed, of said property, from all the owners thereof, free of all incumbrances, except that provided for in this agreement. The said deferred payment of $30,000 shall be secured by a mortgage on said property, which shall be executed and delivered upon the delivery of said deed as above provided, and shall bear interest at the rate of six (6) per cent. per annum until paid. I further agree to release from the effect of said mortgage any part of the said tract which may hereafter be sold by said George Bates, on payment to me of a sum not less than three-quarters of the purchase money received by said George Bates for sale of such part: provided that he shall not sell any part of the east half of the said tract for less than four hundred dollars ($400) an acre, nor any part of the west half of the said tract for less than eight hundred dollars ($800). Charles Webb Howard."

The cause was tried by the court without the intervention of a jury; written findings filed, which are responsive to the issues made by the pleadings, and in the following language: "That on August 27, 1887, at the city and county of San Francisco, defendant made and entered into the agreement in writing with plaintiff, set forth in the complaint herein, and the sum of $1,000 was duly paid by plaintiff to defendant in pursuance of the terms of said agreement, and as part of the consideration for the procuring of a good and sufficient title to the real property therein described. (2) That it was also understood and agreed by and between the parties in the said instrument named, at the time of its execution, that the defendant should promptly furnish to said plaintiff, for his approval, an abstract of title to the premises aforesaid, but that none was furnished to plaintiff until about the 10th day of September, 1887, when defendant submitted to plaintiff, for his examination and approval, an abstract of the title to said property, which he proposed and designed to offer to plaintiff in fulfillment of the terms and conditions of said agreement, and for the money considerations paid and to be paid by plaintiff; that plaintiff was advised by his counsel that the title to said premises and property was imperfect, and not a marketable title, of all which defendant was properly notified, but neglected and refused to perfect said title, and make the same marketable, as requested by said plaintiff. (3) That, upon the neglect and refusal of said defendant to perfect and make the title to said property marketable, plaintiff demanded of said defendant the repayment of the said sum of $1,000 paid by plaintiff to defendant on account and in pursuance of the terms of said written agreement; that defendant then refused, and has ever since refused, to repay to said plaintiff the said sum of $1,000, or any part thereof, and has never repaid any part of the same. (4) That plaintiff was at all times ready and willing to do and perform everything in said written agreement contained, on his part to be done and performed, until the defendant refused to perfect and make good and marketable the title to said property. (5) That time was not of the essence of said written agreement; that the plaintiff complied with all the terms and conditions of said written agreement on his part to be kept and performed, so far as he was called upon so to do, either in law or equity. (6) That the title to said property was not, during any of the time or times herein mentioned, a marketable title, and defendant took no measures to make said title marketable, and has not complied with the terms and conditions of the said agreement on his part to be kept and performed. (7) That defendant, by his conduct and actions, rendered unnecessary the further fulfillment of the terms of said written agreement on the part of said plaintiff." From the facts thus found, the court concluded, as matter of law: (1) That the title to the property was not marketable. (2) That plaintiff was entitled to recover from the defendant $1,000 and interest, for which sum judgment was entered. Defendant, in due time, moved for a new trial upon the ground of the insufficiency of the evidence to support the facts as found, errors of law occurring at the trial, etc., specifying the errors complained of. The motion was supported by a statement, and upon a hearing the motion was granted and a new trial ordered, from which order, as before stated, plaintiff prosecutes this appeal.

As before stated, the motion for a new trial was based upon various grounds, one of which was that the evidence failed to support the findings. It is a cardinal doctrine of this court, the oft enunciation of which has rendered it monotonous, that where, upon a question of fact, the testimony in the court below involves a substantial conflict, the action of such court below will not be disturbed. These considerations, however, do not prevail with the nisi prius court. There, although there may be what to us, judging from the cold record, seems a substantial conflict in the evidence, the court, having heard the evidence, and having had ample opportunity to judge as to the demeanor, manner, and credibility of the witnesses, may, if he is dissatisfied with the verdict, and is of opinion that it is clearly against the weight of evidence, set it aside, and grant a new trial. The judge of the superior court is in a position to determine between the apparent and the real; to detect the fallacy of specious testimony, which may have misled the jury, but which his wider experience enables him to readily comprehend. Like considerations apply to cases tried by the court without the intervention of a jury. In the hurry of a trial, or in the disposition of cases, deductions of fact and conclusions of law may be indulged, which, on maturer reflection, do not commend themselves to his judgment, and to say that he is to be bound by hasty or improvident action, as against his more mature judgment, and that in the face of those wise provisions of the law intended for just such emergencies, is to lose sight of one of the fundamental objects of trials at law, viz. the promotion of justice.

It is for these and other reasons, which might be mentioned, that a wide discretion is accorded to trial courts in the disposition of motions for new trials. Watson v. McClay, 4 Cal. 288; Weddle v. Stark, 10 Cal. 302; Burnett v. Whitesides, 15 Cal. 35; Quinn v. Kenyon, 22 Cal. 82; O'Brien v. Brady, 23 Cal. 243; Hall v. The Emily Banning, 33 Cal. 522; Harrison v. Peabody, 34 Cal. 178; Phelps v. Union Copper Min. Co., 39 Cal. 407; Pierce v. Schaden, 55 Cal. 406; Bronner v. Wetzlar, 55 Cal. 419; Hawkins v. Reichert, 28 Cal. 535; Dickey v. Davis, 39 Cal. 565; Mason v. Austin, 46 Cal. 385; Sherman v. Mitchell, 46 Cal. 576; Higuerra v. Bernal, 46 Cal. 581. We might continue to quote cases coming down to the present time, to like effect, but the foregoing are, in all reason, sufficient.

There was a substantial conflict in the evidence upon many of the issues, and upon some of them, at least, the testimony in favor of the plaintiff was by no means conclusive, or even satisfactory. To illustrate: Under the agreement, plaintiff paid $1,000 down, and was to pay an additional $1,500 on the 31st day of August,—four days after the agreement was made. This he did not pay. The reason given therefor was that defendant had agreed to promptly furnish plaintiff with an abstract of title, and failed to do so until some time in September. The testimony of plaintiff on this point was that there was an understanding that defendant should furnish an abstract, and that he did it. Defendant testified, in substance, that he made no agreement with plaintiff, except the one in writing, and added that defendant might subsequently have asked him to furnish an abstract, and he might have consented, and done so. Plaintiff, in rebuttal, said the abstract, as far as he believed, never came into his hands; that he saw it in the hands of his attorney, and, when asked if he ordered it prepared, said he did not remember anything about it, but was sure he never paid for it. This was practically all the evidence upon the point, and was the basis upon which the court found that defendant agreed to promptly furnish an abstract, but that none was furnished until September 10, 1887. This is referred to, not by reason of its importance, but as a sample of the uncertainty of the evidence upon many of the issues in the case. In view of these conditions of the evidence, the action of the court below in granting a new trial must be upheld.

There is another question, however, which, while it is not absolutely essential to a disposition of the case here, is yet of prime importance in its final disposition, and is certain to arise in any future trial upon the merits. It is that which relates to the title of the property, to which defendant agreed to procure for plaintiff a deed of conveyance. It was to be "a good and sufficient conveyance, by a grant, bargain, and sale deed, of said property, from all the owners thereof, free of all incumbrances, except that provided for in this agreement." It appeared at the trial that the tract of land agreed to be conveyed to plaintiff was conveyed to Oscar L. Shafter, May 1, 1869, by John M. Redding and Rose Redding, his wife, by a conveyance in due form, which described it as being "the whole of Redding's ranch," situate, etc., and then describing it by courses and distances, etc., and containing 88.21 acres. This description is conceded to be correct. Oscar L. Shafter died intestate prior to July 12, 1873, leaving, as heirs at law, a widow and several children. On the 12th day of July, 1873, James McM. Shafter and Charles Webb Howard filed a petition, in due form, in the probate court of Alameda, praying to be appointed administrators of the estate of said Oscar L. Shafter. On the same day an order was made by said court, fixing July 22, 1873, as the day for hearing said petition, and directing 10 days' notice of the hearing of said petition to be given by posting, etc. The notice was posted on said 12th day of July, etc., and a hearing had, and said petitioners appointed administrators, on said 22d day of July. Objection No. 1 to the title of the heirs is founded upon the allegation that the notice above mentioned was not posted 10 days, as required by the statute and order of the court. Such proceedings were thereafter had in the matter of the estate, that in 1885 a final decree of distribution of the real property of said estate to the heirs thereof (naming them, and the interest of each therein) was had, which, as the record states, "was regular in form, and regularly and properly distributed the property in dispute; the only question here made under such decree of distribution being as to the description of the property, and that in such decree of distribution this property is described as follows." Then follows a description stating that it is known as the "Redding Tract," containing 88.21 acres, situate, etc., "being the whole of the Redding ranch," and describing it by courses and distances, and further describing it as "being the property conveyed to Oscar L. Shafter, by John M. and Rose Redding, by deed dated May 1, 1869, recorded in Alameda County Records, book 41, pages 192–193–194." The description by courses and distances in the decree of distribution is in all respects the same as in the deed to Shafter, except that two courses in the decree are erroneous; the one reading 26° 30″ E., instead of 36° 30″ E., as in the deed, and the other reading 29° W., instead of 49° W., as in said deed. The evidence showed, without contradiction, that since the purchase by said Shafter, in 1869, the ranch or land had been in the possession of said Shafter and his heirs; that it was inclosed by a good, substantial fence; that all taxes had been paid by them; and that it was generally known as the "Redding ranch." Under these circumstances, plaintiff contended in the court below, and, as appellant, contends here, that the heirs at law of Oscar L. Shafter (from whom it is conceded the conveyance was to come, under defendant's agreement) could not convey a valid title to the land in question to plaintiff; and this is the second question presented in relation to said title. The court below, upon the foregoing facts, which are not disputed, found, as a fact and a conclusion of law, that the title was not a marketable title, and hence that defendant had not complied with his agreement.

The notice posted on the 12th day of July, giving notice of a hearing of the petition on the 22d day of the same month, was sufficient as a 10-days notice, under section 1373 of the Code of Civil Procedure. Section 12 of the Code of Civil Procedure provides that "the time within which any act provided by law is to be done is computed by excluding the first day and including the last, unless the last day is a holiday, and then it is also excluded." In Misch v. Mayhew, 51 Cal. 514, section 1116 of the same Code, which provided for a notice of three days, was construed by this court, and it was said: "The case is, therefore, covered by section 12 of the same Code, and a list served on the 7th of December could properly be relied upon and proven at the trial on the 10th of December." See, also, Landregan v. Peppin, 86 Cal., at page 126, 24 Pac. 859, and Hagenmeyer v. Mendocino Co., 82 Cal. 214, 23 Pac. 14.

The second and more important question for consideration relates to the sufficiency of the title vested in the heirs of Oscar L. Shafter, to answer the requirement of defendant's agreement. There is no contention as to the willingness of the heirs to convey, but the question relates to their power to do so, viz. their power to convey the land described in defendant's agreement as the land that formerly belonged to the O. L. Shafter estate, and described in the final decree of distribution of said estate. We assume at the outset that defendant, under his agreement with plaintiff, was bound, not simply to obtain for the latter a conveyance in form,—a semblance or muniment of title,—but a conveyance of the land itself, and the fee simple title thereto. Civ. Code, § 1105. When Oscar L. Shafter departed this life, in 1873, the title to the land in question being vested in him, such title at once, and by operation of law, passed to his heirs, subject only to administration. "The property, both real and personal, of one who dies without disposing of it by will, passes to the heirs of the intestate, subject to the control of the probate court, and to the possession of any administrator appointed by that court for the purposes of administration." Civ. Code, § 1384. See Code Civ. Proc. § 1452. Section 1384 of the Civil Code, quoted above, was adopted in its present form in 1884, but is declarative of the law as previously interpreted by this court. Brenham v. Story, 39 Cal. 179; Estate of Donahue, 36 Cal. 329; Estate of Woodworth, 31 Cal. 604; Chapman v. Hollister, 42 Cal. 463. The title of the heirs did not originate in the decree of distribution, but came to them from their ancestor; and the settlement of the estate in the probate court, and the final decree of distribution in that court, only served to release their property from the conditions to which, as the estate of a deceased person, it was subject. Waiving all this, however, and waiving the fact that all that defendant had agreed to have conveyed to plaintiff was the land "described particularly in the final decree of distribution," and assuming that the decree of distribution was essential, to the end of perfecting the title of the heirs, and we are of opinion that the description therein is amply sufficient to secure that result. It was described as "the whole of the Redding ranch." It was described as the property purchased by Shafter from Redding and wife by deed dated May 1, 1869, and the place of record thereof specified. That a grant of real property, having a descriptive name, may be described by such name, is elementary. Civ. Code, § 1092. The erroneous courses are apparent on their face, when applied to the land, for the reason that they do not answer the calls in the deed, as to following the boundaries of adjoining owners and the county road. Under such circumstances, the description being perfect without the erroneous courses, and the latter being apparent, they will be rejected as surplusage. It was said in Copertini v. Oppermann, 76 Cal., at page 186, 18 Pac. 256: "The words 'good title' import that the owner has the title, legal and equitable, to all the land; and the words 'defective title' mean that the party claiming to own has not the whole title, but some other person has title to a part or portion of the land." If the heirs of Oscar L. Shafter have not the title, legal and equitable, to the land in question, we are at a loss to determine where it is vested. Their right to the land, and to every part of it, is evidenced by paper title of record in the county where the land is situate; and there being no other person or persons, in whom any apparent title, legal or equitable, is vested, their conveyance of the property, duly executed, will estop them, and all persons claiming or to claim through or under them, or either of them. The order appealed from is affirmed.

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(4 Cal. Unrep. 916)

## STEEN v. HENDY et al.[1] (No. 15,644.)

(Supreme Court of California. Dec. 24, 1894.)

HEARING BEFORE REFEREE — CLAIM AGAINST DECEDENT'S ESTATE — FAILURE TO PRESENT CLAIM —PREMATURE OBJECTION—REVIEW ON APPEAL.

1. Pending a reference, defendant died, and his executor was substituted in his stead. On the hearing before the referee the executor objected to the taking of any testimony, because plaintiff had not filed his claim with him. *Held* that, the objection being made before there was any evidence as to whether the claim had been

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[1] Reversed in banc. See 40 Pac. 21, 107 Cal. 49.

presented to the executor, it was premature, and the referee rightly proceeded with the hearing.

2. Where no motion for a new trial is made, the question whether the judgment is supported by the evidence will not be considered on appeal unless the appeal is taken within 60 days after the rendition of the judgment on a bill of exceptions setting out the evidence.

Department 2. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

Action by J. W. Faulkner against Joshua Hendy and the Joshua Hendy Machine Works, a corporation, for the dissolution of a partnership and for an accounting. Pending the action, the cause of action was assigned to E. T. Steen, who was substituted as plaintiff, and defendant Joshua Hendy died, whereupon his executors were substituted in his stead. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

Boyd, Fifield & Hoburg, for appellant corporation. W. H. H. Hart and Nowlin & Fassett, for appellant executors. Wm. H. Jordan, for respondent.

TEMPLE, C. This appeal is from the judgment, with a bill of exceptions. The action was brought to obtain a dissolution of an alleged partnership, to have an account taken, and for other relief. It was commenced March 11, 1876. At the first trial plaintiff recovered judgment, and defendants appealed, and that appeal was disposed of here October, 1889. 80 Cal. 636, 22 Pac. 401. The facts of the case appear in the opinion then rendered. It was found that the partnership —if the relations between the parties could be so called—had ended before the suit was brought, leaving in Hendy's hands property in which Steen had a contingent interest, and which Hendy continued to sell from time to time after this suit was begun. By stipulation, however, it was found that Hendy had in his hands something more than $10,000, which belonged to Steen. The question left to be determined was what interest or what share of the profits of Hendy's business Steen was entitled to. After the remittitur was filed from this court, Steen amended his complaint, made for the first time the corporation a defendant, and claimed that Hendy had actually realized a large amount of money from the use of the trust funds which he, Steen, was entitled to recover. The corporation was created September 29, 1882, and it was made a party to this suit November 26, 1889. The supplemental and amended complaint, by which the corporation was brought in, charges, in effect, that Hendy owned all the stock of the corporation, and that it was organized to carry on Hendy's business, to hide plaintiff's property, and to defraud plaintiff. A money judgment was demanded against both defendants. Soon after, Hendy paid the amount found due, exclusive of interest, and the cause was referred to a referee to try, with directions to report findings and a judgment. While the trial was in progress, —October 21, 1891,—Hendy died. The record does not show when letters of administration were issued in the estate of Hendy, but it appears by order made August 10, 1892, that the death of Hendy was suggested by plaintiff, and it was ordered that the case be continued in the names of the executors; and the bill of exceptions recites that: "At the first session after his death and said substitution, to wit, on the 19th day of November, 1891, said defendants objected to further proceeding with the trial or the taking of any further testimony in the case upon the ground that the claim upon which the action is based has not been presented for allowance to the executors and executrix of Joshua Hendy, deceased; but the referee, notwithstanding such objection, proceeded with said trial and the taking of testimony in the case, to all of which the defendants duly excepted, and the said trial and taking of testimony was then proceeded with by said referee, the trial was concluded, and the case argued and submitted." The bill goes on further to state that no claim upon which the action was based was ever presented to the executors or executrix for allowance, or to either of them. That "the defendants, and each of them, excepted, and now except, to the decision, upon the ground that it is against law in the following particulars: * * * (3) The decision is against law in giving judgment against defendants, to wit, the executors and executrix of the estate of Joshua Hendy, deceased, inasmuch as no claim was presented to them. (4) The decision is against law in deciding that the action is not barred by the statute of limitations as to the defendant corporation." The appeal is from the judgment, and was not taken within 60 days.

It is objected that these points are really that the decision—that is, the findings—is not justified by the evidence, and such objection cannot be made in this way. The objection was not that improper evidence was offered, or had been admitted, but that plaintiff would not be able to produce certain evidence which was essential to his case. If the pleadings had shown that no such evidence could be produced, or counsel had admitted upon the trial that the fact could not be proved, the court could then and there have ruled upon the question. But the bill of exceptions does not show that any such admission was made. It is true, the bill of exceptions, after reciting the objection, the ruling, and exception, proceeds to state that the court proceeded to hear the evidence and to render judgment, and that no claim on the part of plaintiff was ever presented to the executors or executrix. The bill of exceptions was made after judgment, and does not show that at the time of the exception the fact that the claim had not been presented was an established or admitted fact before the court. Defendants could not dictate the order of proof, and, so far as the bill of exceptions shows, the court might well have presumed that such evidence, if essential, would be yet produced by plaintiff. The real objection is that the evidence does not support the decision—that is, the finding. As no motion for a new trial was made, and the appeal was not taken within 60 days after the rendition of the judgment, this question cannot be now considered.

The objection that the court erred in not finding in favor of the defendant corporation upon the plea of the statute of limitations is in the same position. No evidence is contained in the bill of exceptions, and, if it were there, it could not now be considered. The court found that the demand was not barred by the statute of limitations. This finding is not attacked in any mode authorized by law, to wit, by a motion for a new trial, or on an appeal taken within 60 days, with a bill of exceptions setting out the evidence. We must presume, therefore, that there was sufficient evidence to sustain the finding.

The other point—that plaintiff cannot recover interest, because he elected to claim the profits actually made by the use of the trust funds—was determined on plaintiff's appeal from this judgment. The judgment now appealed from was then modified by increasing the amount of interest allowed. Respondents then had an opportunity to be heard, and were heard at least in their petition for a rehearing. The question cannot be again raised. I think the judgment should be affirmed.

We concur: HAYNES, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

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105 Cal. 262

## PEOPLE v. DANIELS et al. (No. 21,010.)

(Supreme Court of California. Dec. 26, 1894.)

PROSECUTION FOR CONSPIRACY — FALSE MAINTENANCE OF SUIT—REVIEW ON APPEAL—HARMLESS ERROR—EVIDENCE.

1. As Pen. Code, § 1258, provides that the appellate court must give judgment without regard to technical errors or defects, or to exceptions which do not affect the substantial rights of the parties, a conviction will not be reversed merely because much of the evidence was immaterial.

2. On a trial for conspiring to falsely move and maintain a suit, the complaint in the suit is admissible to show an overt act in furtherance of the conspiracy, as required by Pen. Code, § 184, providing that no agreement, except to commit a felony, amounts to a conspiracy, unless some act besides such agreement be done to effect the object of the conspiracy by a party to the agreement, though neither defendant was a party to the suit.

3. A conversation with one of defendants in regard to what was done as to the suit after its commencement may be admitted before the conspiracy is established, if the conspiracy is subsequently proved.

4. On a criminal trial, a witness who overheard only a part of a conversation with defendant may testify as to what he overheard.

5. Pen. Code, § 1118, provides that, if the court deems the evidence insufficient to warrant a conviction, it may "advise" the jury to acquit, but that the jury are not bound by the advice. *Held*, that the court cannot "instruct" the jury that there is no evidence in support of an indictment.

Commissioners' decision. In bank. Appeal from superior court, Fresno county; S. A. Holmes, Judge.

E. P. Daniels and Joseph Hutchings were convicted of conspiracy to falsely move and maintain a suit, and appeal. Affirmed.

Graham & Terry and Frank H. Short, for appellants. Atty. Gen. Hart, for the People.

HAYNES, C. Appellants were indicted for conspiring falsely to move and maintain an action of slander by Zua Daniels against M. J. Church, under division 3 of section 182 of the Penal Code, and upon the trial were found guilty by the jury, and a judgment against each was entered, imposing a fine; and they appeal from said judgments, and an order denying their motion for a new trial.

The appeal from the order denying a new trial must be dismissed, because taken long after the time limited therefor by section 1239, Pen. Code. Appellants' brief, however, is almost wholly devoted to questions which could only be considered upon an appeal from such order, and point out no errors in receiving or rejecting evidence, unless it is contained in the statement that "the whole of the evidence for the prosecution is irrelevant, immaterial, and inadmissible for any purpose, for the reason that it did not even tend to show that Daniels and Hutchings had conspired together to falsely move or maintain the action of Zua Daniels v. M. J. Church." The bill of exceptions covers nearly 400 pages of the transcript, and clearly it was the duty of the counsel, if, in their opinion, any material error was committed, to have pointed it out, and shown how or why appellants were prejudiced by it. That the evidence took an exceedingly wide range, and that much of it was immaterial, is apparent; but we cannot, on that ground alone, reverse the judgment. The Penal Code (section 1258) provides: "After hearing the appeal the court must give judgment without regard to technical errors or defects, or to exceptions which do not affect the substantial rights of the parties." The exceptions which seem to us to be most important will be briefly noticed.

The complaint in the action of Zua Daniels against M. J. Church was properly received in evidence. To sustain this prosecution, it was necessary to allege in the indictment, and to prove upon the trial, in addition to the conspiracy, some overt act in furtherance or pursuance of the conspiracy. The commencement of the action by filing the complaint was an overt act (Pen. Code, § 184), though such overt act need not be alleged or proved, if the conspiracy was to commit a felony.

Objection was made to evidence of a conversation between Church and defendant Hutchings relating to the suit, after its commencement, upon the ground that no conspiracy had then been established. Evidence had been given tending to prove a conspiracy, but it was not necessary that the conspiracy be actually shown to have been formed, before the declarations of either of the conspirators can be proven. If the conspiracy is not ultimately proved, such declarations must be disregarded; but generally conspiracy cannot be proved as an independent fact, such as the execution of a promissory note, but is shown from circumstances, some testified to by one witness, and others by other witnesses. It is largely in the discretion of the court as to how much evidence of the existence of the conspiracy shall be required before receiving evidence of the acts and declarations of one of the alleged conspirators in the absence of the other. The evidence objected to was properly received.

A witness for the prosecution was called to testify to what he overheard defendant Daniels and his wife say concerning Mr. Church, and suits against him for slander. The witness said he could not hear all that was said; that sometimes their voices would be so low he could not hear. The defendants objected to the witness stating any part of the conversation, unless he heard and could state the whole of the conversation. The objection was properly overruled. The general rule is that a witness called to testify to a conversation cannot give a part and withhold a part, but must give the whole conversation, at least in substance. But, where a part only of a conversation is heard by the witness, the rule that he must give all that was said applies only to so much as he heard. If what he heard is intelligible, and pertinent to the case, the prosecution is entitled to it. If the part not heard by the witness would in any material respect modify or explain the part he heard, the defendant can give it in explanation. Frank v. State, 27 Ala. 37.

Numerous other exceptions were taken, but, after reading the entire transcript, we do not find that any prejudicial error was committed in receiving or rejecting evidence. Great latitude was allowed in the introduction of evidence, and there is much that might have been omitted without prejudice to either side, but we cannot for that reason reverse the judgment.

The minutes of the court show that a demurrer to the indictment was overruled, but the demurrer is not in the record. We see no ground, however, upon which the indictment could be held insufficient.

When the prosecution rested after the introduction of its evidence in chief, counsel for defendants moved the court as follows: "We move the court to instruct the jury on two grounds: First, that there is no evidence of any conspiracy to do an unlawful act, and no evidence tending to support the allegations of the indictment." This motion was denied, and defendants excepted. Section 1118, Pen. Code, provides: "If, at any time after the evidence on either side is closed, the court deems it insufficient to warrant a conviction, it may advise the jury to acquit the defendant. But the jury are not bound by the advice." The motion to "instruct" the jury was properly denied. The court was only authorized, in any case, to "advise" the jury to acquit. People v. Horn, 70 Cal. 18, 11 Pac. 470. It must be borne in mind that the court has no such power to control the action of the jury in criminal as in civil cases, for in criminal cases the court cannot "direct," but only "advise," an acquittal. We cannot say, therefore, that defendants were prejudiced by the refusal so to advise, since the jury might, notwithstanding the advice, have found the defendants guilty; and, if so, the verdict could not be set aside upon the ground that the jury had disobeyed or disregarded the instruction of the court, but only upon motion for a new trial, upon the ground that the verdict was not sustained by the evidence. The obvious effect of this provision of the Penal Code is to take from the court the power to determine, as a matter of law, at the close of the evidence for the prosecution, that the evidence is insufficient to justify a conviction.

It is further urged by appellants that the court erred in giving the ninth instruction requested by the prosecution. They say that: "The prosecution, being unable to prove that defendants falsely moved or maintained said action, began to cast about for some grounds upon which the prosecution might be maintained by dropping out the word 'falsely,' * * * and came to the conclusion that they could admit that Church did slander Zua Daniels; that she had a good cause of action against Church; and yet, if the defendants advised or assisted her in said action, they became thereby criminally liable." As the record is not open to us for the purpose of considering whether the verdict is supported by the evidence, we can only examine this contention in the light of the instructions given to the jury. In People v. Richards, 67 Cal. 415, 7 Pac. 828, it was said: "A conspiracy is, in the absence of statutory limitations, an agreement of two or more to do an unlawful act, or a lawful act by unlawful means." This definition applies to the conspiracy here charged. Such charge may be maintained by proving a conspiracy to move an action without cause, knowing that no cause of action exists, or, a cause of action existing, to maintain it by false testimony, or other unlawful means. The ninth instruction given at the request of the prosecution, after referring to the case of Zua Daniels v. Church as the action to which the alleged conspiracy related, and cautioning the jury that they were not trying that action, proceeded as follows: "The issues here are, did E. P. Daniels and Joseph Hutchings, at the time and place as alleged in the indictment, willfully, unlawfully, conspire, combine, and agree together falsely to move or maintain that suit and action, as set out in the indictment, and whether, in pursuance of such agreement, they, or either of them, committed an overt act looking towards the carrying out of the common design." It will be seen that this instruction closely followed the statute, and did not omit the word "falsely." But instructions given at defendants' request, while entirely consistent with the instruction above quoted, were more specific, and expressly instructed the jury that, if they had any reasonable doubt whether the action of Zua Daniels against Church was one which could be justly and lawfully prosecuted, they should give the defendants the benefit of the doubt, and assume that it was a just one; and, if they should have any reasonable doubt as to whether said action was justly or unjustly prosecuted, "and you, under such circumstances, should assume, as it would be your duty to assume, that the said action was a just one, and one that could rightfully be prosecuted, then you may consider whether or not, in prosecuting said action, the said defendants conspired together, willfully, corruptly, falsely, and fraudulently, to prosecute said action by unlawful means, or by false and fraudulent testimony, corruptly procured." And upon this point, also, they were instructed to give the defendants the benefit of any reasonable doubt. In preparing these instructions, counsel stated the law as favorably to defendants as they could desire, and cannot complain that the jury were misdirected. We advise that the appeal from the order denying a new trial be dismissed, and that the judgment be affirmed.

We concur: SEARLS, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, it is ordered that the appeal from the order denying a new trial be dismissed, and that the judgment appealed from be affirmed.

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104 Cal. 594

## BALDWIN v. ZADIG et al. (No. 15,652.)

(Supreme Court of California. Dec. 29, 1894.)

In bank.

On rehearing. For former report, see 38 Pac. 363.

PER CURIAM. Rehearing denied.

BEATTY, C. J. I dissent from the order denying a rehearing in this case. The judgment, in my opinion, is not sustained by the findings. It is nowhere found that transactions in question were sales of stock on margin or for future delivery, nor do the special facts found necessarily imply such sales. That the evidence would have sustained such a finding may be true, but that is not sufficient. This court cannot take evidence, however conclusive, in place of a finding necessary to sustain the judgment.

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105 Cal. 526

## ROBINSON v. SOUTHERN PAC. CO. (No. 15,283.)

(Supreme Court of California. Jan. 5, 1895.)

RAILROAD PASSENGER — RIGHT TO STOP OVER — ILLEGAL RULES OF COMPANY—EFFECT.

1. Civ. Code, § 490, empowers the purchaser of a railroad ticket to ride from the station at which the ticket was bought to the station of destination, "and from any intermediate station to the station of destination," at any time within six months thereafter. *Held*, that the right of a passenger to stop at an intermediate station, and resume his journey, is not affected by the fact that the ticket bought by him gave him the choice of two different routes, and he selected the longer route.

2. A passenger need not take notice of a rule of a railroad company which contravenes a statute.

McFarland, J., dissenting.

On rehearing. Affirmed. For former reports, see 38 Pac. 94, 109.

BEATTY, C. J. The three principal questions arising in this case were very fully and elaborately argued by counsel, both orally and in the printed briefs filed prior to its submission, and they were as carefully considered in the opinion of the court heretofore filed, wherein it was held: First, that section 490 [1] of the Civil Code is still in force; second, that it confers stop-over privileges upon the holders of the tickets therein provided for; and, third, that the defendant is subject to its provisions. As to these points our views remain unchanged, and nothing further need be said concerning them. The rehearing, indeed, was ordered with special reference to a question which, although it had been stated in the briefs, had not been discussed at the oral argument, and had been but slightly considered in the opinion of the court. This question, to which the reargument was practically confined, may be briefly stated as follows: Did the plaintiff, by purchasing and accepting a ticket which in terms and in fact gave him the alternative right to go to Oakland or Alameda, become thereby entitled to go to Oakland, stop off there, and afterwards resume his journey to Alameda? When this question is considered in the light of the principles established by our former decision, and with reference to the facts stated in the opinion and other facts appearing in the record, it is of comparatively easy solution. The defendant had a ferry and railroad line which it was operating between the foot of Market street, in San Francisco, and the city of Alameda, and which passed through the city of Oakland, where there was a station at which passengers were accustomed to enter and leave its cars. The fact that defendant had another and more direct line of road (and ferry) between the same termini did not relieve its statutory obligation to fix (either alone or in conjunction with the railroad commission) a regular passenger rate by the longer route. The right to operate the road and the obligation to fix such regular rate are correlative. It had in fact complied with the statute, and fixed the rate at 15 cents, and this was well known, not only to the plaintiff, but to the public generally. Such being the case, the plaintiff, desiring to go from San Francisco to Alameda via Oakland, tendered the regular fare, and demanded the ticket which it was the duty of the defendant to furnish. He received a ticket in the form set out in our original opinion, which was the only ticket the defendant was accustomed to issue to passengers desiring to go by either of two routes to Oakland or either of two other routes to Alameda. But the fact that the ticket gave the plaintiff his choice of these various routes and different destinations made it none the less effective as a ticket from San Francisco to Alameda via Oakland. What he wanted was a ticket of that particular kind, with all the lawful privileges thereto attached, and it was not in the power of the defendant to deprive him of such privileges by offering him other privileges in exchange. This conclusion does not involve the consequences that are apprehended by counsel for appellant. We do not hold, and it does not follow, from the views herein expressed or from anything decided or said by way of argument in our original opinion, that there can be no ticket sold on any line of road which is not a stop-over ticket. We only hold that there must be a regular passenger rate established from one depot to another, and that a passenger who tenders the regular fare is entitled to a ticket to his place of destination, which ticket, under the law, gives him a right to stop over at an intermediate station. And the railroad company cannot demand the regular rate, and at the same time deny the privilege which the law confers upon all who pay it. If in consideration of an abatement from the regular established rate a passenger voluntarily accepts an excursion or other limited ticket, an entirely different case is presented. Here the regular established fare was tendered and accepted, and a ticket issued, which was the only ticket a passenger from San Francisco to Alameda via Oakland could obtain,—the only ticket provided by the defendant. This being so, the defendant cannot be permitted to say that it was not the ticket which the statute obliged it to provide and issue, and this is more especially true in view of the fact that it contained nothing which in terms denied or assumed to curtail the rights conferred by the statute.

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[1] Civ. Code, § 490, empowers the purchaser of a railroad ticket to ride from the station at which the ticket was bought to the station of destination, "and from any intermediate station to the station of destination," at any time within six months thereafter.

But it is said that the ticket is not the contract; that it is a mere token or voucher, and that it is the duty of the passenger to inform himself of the rules and regulations of the carrier, which really determine his rights. This is, perhaps, true to a certain extent. But the passenger is not bound to take notice of any rule or regulation which contravenes the law of the land. So far as the law fixes the terms of the contract, it cannot be varied by rules of the company, known or unknown, unless assented to by the passenger. We have held that under the law of California the ticket issued by a railroad company upon receipt of the regular fare from one depot to another gives the holder the right to stop over at an intermediate station, and to resume his journey at any time within six months; and, if this is so, it matters not how well it may be known to a particular passenger that this right is contested or denied by the company. He nevertheless acquires, by payment of the regular fare, all the rights which the statute gives him. The passenger who is informed of the claim and practice of the carrier is in no worse position than one who is not informed. So far as the law goes, it protects all alike. These views are conclusive of the question submitted for reargument, and for the reasons here stated, and those set forth in the original opinion, the judgment and order of the superior court are affirmed.

We concur: GAROUTTE, J.; HARRISON, J.; VAN FLEET, J.; FITZGERALD, J.; DE HAVEN, J.

McFARLAND, J. I dissent. There was nothing in the argument on rehearing which in the least changes my mind as to these propositions: (1) That section 490 of the Civil Code does not require a railroad company to "provide" or "furnish" a stop-over ticket, under either the legal or the common meaning of that word; and (2) that the ticket which appellant did "furnish" respondent was not, on its face, a stop-over ticket, but merely gave him the right to go either to Oakland or Alameda,—not to both; and that he well knew the meaning and purpose of the ticket when he accepted it. This action is not for refusing respondent the kind of ticket he wanted, but for refusing to do something for which the ticket he accepted did not provide. In my opinion, the judgment can be affirmed only upon the theory that, if respondent had paid the proper fare, he could ride, and get off, and get on again, as often as he pleased, upon any sort of a ticket, or without any ticket at all.

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105 Cal. 232

## MILLS v. HOME BEN. LIFE ASS'N. (No. 15,201.)

(Supreme Court of California. Dec. 26, 1894.)

MUTUAL BENEFIT INSURANCE — NONPAYMENT OF ASSESSMENT—WAIVER OF FORFEITURE —EVIDENCE.

1. In an action on a life insurance policy, on an issue as to whether a certain notice was sent to assured by the company, the secretary

testified that it was customary to send the notice with another communication sent assured. Plaintiff, wife of assured, testified that it was customary for her to receive all insurance papers sent assured, and that she never received the notice. *Held*, that a finding that the notice was not sent would not be disturbed.

2. Where the failure of an insurance company to send to assured a certain notice waives the forfeiture of a policy for nonpayment of an assessment, the fact that the failure to send the notice was due to a mistake of an employé is not material.

3. A finding that an insurance company by a certain act waived a condition in a policy excludes the presumption that the act was unintentional.

Department 1. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Action by Miranda E. Mills against the Home Benefit Life Association on an insurance policy. Judgment was rendered for plaintiff, and defendant appeals. Affirmed.

T. C. Van Ness and L. A. Redman, for appellant. L. T. Hengstler and Jas. Alva Watt, for respondent.

GAROUTTE, J. The facts of this case are fully stated in Murray v. Association, 90 Cal. 402, 27 Pac. 309. Upon that appeal, by the decision of the court, the cause was remanded for a new trial. The respondent has since married, a new trial has been had, and the case is again before us upon the merits. In this action a recovery is sought upon a policy or certificate of insurance issued by appellant upon the life of respondent's husband. Prior to his death he suffered default in the payment of two certain assessments, and such default is now relied upon to defeat the right of recovery. Respondent insists that the forfeiture incurred by reason of the aforesaid defaults was waived, owing to an extension of time being granted to make the payments, and this court's disposition of the case is solely dependent upon the conclusion to be arrived at from an examination of this question of forfeiture and waiver. The facts, in the main, are similar to the facts presented at the previous trial, and to a great extent the law of the case has been established by the prior decision of this court. The waiver of the forfeiture was based upon a letter written to the insured by the company, notifying him that a certain assessment would be due upon a named day in the future, and, in effect, requesting a remittance thereof on or before that time; and in this regard, upon the previous appeal, the court declared the law as follows: "But the letter notifying the insured that an assessment would be due and payable on October 1st, and in substance requesting payment, of itself constituted a waiver of the previous default, and must be construed as an unconditional offer to accept payment of that assessemnt on or before the date named. It was, in effect, an assertion that the certificate was still in force, and, notwithstanding previous defaults known to defendant, would remain in force until the date therein named for such payment. As already stated, this notice was sent after full knowledge by defendant of the nonpayment of the previous assessments; and, if it was the intention to make the acceptance of the amount to become due on this assessment conditional upon the payment of such prior assessments immediately upon the receipt of the other letter, it should have so stated. But, not having done so, we think its legal effect was to waive the previous forfeiture, and continue the certificate in force until October 1st; and, this being so, the insured had the right, at any time after receiving it, and before October 1st, to make payment of all assessments accruing prior thereto, and necessary to be made in order to give the certificate continued existence." To avoid the force and effect of the prior decision of this court as to the waiver, upon the second trial it was attempted to be shown that a health certificate (to be signed and returned to the company) was inclosed to the insured in connection with these notices of assessments due, to the effect that the insured was in good health when he forwarded the remittance. At the time the insured tendered a payment of the amounts due under his certificate of insurance he was not in good health, and was unable to make the certificate contemplated, and for these reasons it is now insisted the facts of the present case are different, the law of the case inapplicable, and the waiver not proven.

Upon the question of the sending of a health certificate to the insured an issue of fact was presented to the trial court, and upon that issue the court made its finding; and, after first finding as a fact that it was the customary practice of defendant to inclose these certificates with notices of delinquent assessments, the court further found "that said custom was not invariable, and was not followed in the instance of the sending to said Murray of the notice of said assessment to become due and payable on or before the 1st day of October, A. D. 1886, but the failure to so mail the notice that such certificate was required was an exception to the customary practice of said company." Appellant now insists that the portion of this finding to the effect that defendant mailed no health certificate to the insured is unsupported by the evidence, but we cannot say so by the record. The testimony upon the one side is that of the ex-secretary of the company, and upon the other that of the plaintiff, the former wife of the insured. The ex-secretary does not testify positively that the certificate was sent; the wife does not testify positively that it was not received. The evidence as to the fact is purely circumstantial upon both sides. The appellant says it was the custom of the company to send this paper under the then existing conditions; ergo, it was sent. The respondent says it was the custom of the wife to receive all insurance papers sent to the insured; she did not receive this one; ergo, it was not sent. The question appears to be one of presumption, inference, probability, and conjecture, and under such circumstances we will not disturb the court's best judgment as to the truth of the fact.

It is further contended that it is immaterial under the evidence whether the health certificate was mailed or not; that, if it was not mailed, it was an unintentional omission upon the part of the company, and a mistake of its employés; that a waiver is defined to be an intentional relinquishment of a known right, and that upon the present state of facts the elements constituting a waiver of the forfeiture are consequently wanting. Under the law of the case as declared in a former portion of this opinion, we do not see how this contention can be urged with any hope of success. In the absence of the receipt by the insured of a health certificate, the former decision seems to be conclusive of the rights of the parties. The case was litigated and decided solely upon that state of facts, and the reasons, good or bad, why the notices were forwarded to the insured by the company without health certificates, appear from the reading of that decision to be matters entirely immaterial. It appears to be held that the company's intentions are to be judged by its acts. But another conclusive answer to appellant's position in this regard presents itself to our minds. There is no finding of fact by the court that the failure to send the health certificate occurred by mistake or oversight, but, inferentially, the finding is to the contrary, if we concede appellant's position as to the law upon this point to be correct, for a waiver is found as a matter of fact, and as the ultimate fact, and, if an intentional failure by the company to send this health certificate is necessary to support the waiver, then we are bound to presume the court so found the fact. We think there is evidence to support an express finding of fact to that effect. Certainly, as the cause now presents itself to us, we are not justified in saying from the evidence that a failure of the company to send the certificate was an unintentional omission upon its part. There is nothing whatever to support such a statement, aside from the general custom of the company, for the court finds the practice was not an invariable one. As opposed to appellant's position, it is disclosed that the sending of the notice to the insured of the October assessment—there being two delinquent assessments unpaid at that time—was a wide departure from the custom of the company, and can only be explained upon the ground that the company was solicitous to retain the insured as a member thereof. If such a desire actuated its conduct in giving notice of the October assessment, it is most reasonable to presume that, actuated by the same reasons, it refrained from forwarding the health certificate. Again, there is no evidence whatever but that some one of its many officers, clothed with all necessary authority so to do, did not direct the notices to be sent exactly as they were sent, without the health certificate. For the foregoing reasons, the judgment and order are affirmed.

We concur: HARRISON, J.; VAN FLEET, J.

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## DE LONG v. WARREN. (No. 14,924.)

(Supreme Court of California. Dec. 22, 1894.)

In bank.
On rehearing. Affirmed.
For former report, see 36 Pac. 1009.

J. C. Bates, for appellant. Henley & MacSherry, for respondent.

PER CURIAM. The defendant did not in his answer allege that he did the acts complained of under the authority of the city and county of San Francisco, nor was the evidence adduced upon the trial sufficient to establish such a defense. Judgment and order affirmed.

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105 Cal. 311

## EVANS et al. v. GERKEN et al. (No. 15,566.)

(Supreme Court of California. Dec. 31, 1894.)

PLEADING—GENERAL DEMURRER—WAIVER — ACTION ON EXECUTOR'S BOND—PETITION —SUFFICIENCY—DEFENSE.

1. A general demurrer is not waived by consenting that it may be overruled.

2. In an action against sureties on an executor's bond, a complaint which alleges that the executor was appointed, that letters were directed to be issued to him on "executing a bond according to law," etc., and that he and defendants "duly made and executed the bond required by said order," is good, as against a general demurrer.

3. In an action against sureties on an executor's bond, in which the breach alleged is the failure of the executor to pay plaintiffs the sums directed to be paid them by the order of distribution, it is no defense that the money the executor failed to pay over was no part of the personal estate, but was derived from the sale of realty, which the court and plaintiffs had permitted him to sell without giving the additional bond required by law, and that defendants did not consent to such sale without additional bond.

Department 1. Appeal from superior court, city and county of San Francisco; J. M. Troutt, Judge.

Action by Thomas Evans and others against George P. Gerken, Henry P. Gallagher, and William Offerman, on the bond of defendant Gerken as executor, on which the other defendants are sureties. From a judgment for plaintiffs, defendants Gallagher and Offerman appeal. Affirmed.

Jones & O'Donnell, for appellants. Pierson & Mitchell, for respondents.

VAN FLEET, J. This is an action to recover from the principal and sureties on an executor's bond a balance unpaid by the executor upon distributive shares of an estate awarded to plaintiffs upon distribution. The action was not pressed as to defendant Gerken, the principal on the bond, but the judgment went against the defendants Gallagher and Offerman, the sureties, and they appeal from the judgment upon the judgment roll and a bill of exceptions.

1. Appellants claim their demurrer to the complaint should have been sustained. To this respondents object that appellants should not be heard to press their demurrer in this court, because it appears by the order of the court below overruling the demurrer that it was done by the express consent of the parties. This objection should undoubtedly be good as to any special ground of demurrer, since obviously consent to the overruling of a demurrer is tantamount to a withdrawal of it and a waiver of the objections thereby raised. It is quite distinguishable from an instance where the demurrer is overruled merely from failure to argue it, or, as is sometimes expressed, "for want of prosecution." In such case it has been properly held that it is the demurrer, and not the argument, which raises the issue of law, and that the party cannot be deprived of his right to be heard upon it in this court because he saw fit to submit the demurrer without argument in the court below. Richards v. Insurance Co., 80 Cal. 505, 22 Pac. 939. In this case, however, the demurrer is general, and, as this ground is one which is not waived even by failure to demur, it is obvious that it was not waived by consent that it be overruled. The objection urged is that the complaint does not allege that the bond sued on was approved by the judge, or was ever filed or recorded, or that any certificate of justification was attached thereto. It is alleged, however, that the executor was appointed; that letters testamentary were directed to be issued to him upon his "executing a bond according to law," etc.; and that the executor and the appellants "duly made and executed the bond required by said order." We regard this as a sufficient allegation of the requirements of the statute, certainly as against a general demurrer.

2. It is complained that the court erred in striking out portions of the answer. The portions struck out proceeded upon the theory that it would be a good defense for appellants to show that the money appropriated by the executor, and which he failed to pay over to the distributees, was not a part of the personal property or income of the estate, but was derived from the sale of realty belonging to the estate which he had been permitted, by the neglect and failure of the superior court and plaintiffs, to sell without giving the additional bond required by law, and without the consent of appellants that said realty should be sold without such additional bond being required. It is perfectly obvious that this matter did not tend to constitute a defense to the action, and was properly stricken out as irrelevant and redundant. The argument of appellants is, in effect, that, by reason of the failure of the executor to give a bond as required by law upon the sale of real estate, the title to the property never passed from the estate, and hence there could be no loss suffered therefrom. But there is nothing in this position, nor is any such question open for collateral inquiry here. The decree of distribution had fixed the liability of the executor, and was conclusive alike upon the sureties. Chaquette v. Ortet, 60 Cal. 594; Irwin v. Backus, 25 Cal. 222-224. The fact that the executor failed to give such a bond could in no way affect the rights of appellants, except incidentally as to their right to contribution in a proper case. Primarily they were liable upon their undertaking to the full extent of the penalty, whether such additional bond had been given or not. Powell v. Powell, 48 Cal. 234; La Coste v. Splivalo, 64 Cal. 40, 30 Pac. 571. The findings are sufficient to cover the issues. Judgment affirmed.

We concur: HARRISON, J.; GAROUTTE, J.

105 Cal. 292

## STONE v. OWENS et al. (No. 15,615.)

(Supreme Court of California. Dec. 31, 1894.)

ASSIGNMENT OF BUILDING CONTRACT—LIABILITIES OF ASSIGNEE.

One to whom a building contract is assigned as security for advances to the contractor, and who is authorized to draw all moneys as they become due to the contractor, but is to have nothing to do with the conduct of the work, is not—under Civ. Code, § 1589, providing that a voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it—liable for wages due persons employed on the work.

Department 1. Appeal from superior court of city and county of San Francisco; J. E. Murphy, Judge.

Action by Thomas Stone against F. J. Owens, J. M. Wood, and others for wages. Judgment was rendered for plaintiff, and defendant Wood appeals. Reversed.

J. M. Wood and J. C. Bates, for appellant. Reddy, Campbell & Metson, for respondent.

PER CURIAM. In September, 1890, F. J. Owens and J. V. Owens, who were brothers and copartners, entered into a written contract with the state, through the harbor commissioners, to construct a section of the sea wall and wharf on the water front of the city of San Francisco. On February 11, 1891, the Owens Bros. assigned their said contract to defendant Wood as security for advances made and to be made by Wood to them, and constituted Wood their attorney in fact, with authority to demand and receive all warrants and moneys due or to become due them under said contract, by the following instrument: "For value received, we hereby assign and transfer to J. M. Wood all our right, title, and interest in, to, and under the contract to construct section B of the sea wall, thoroughfare, and wharf on the water front of the city and county of San Francisco, made by us with the proper authorities of the state of California, and dated September 22, 1890, at said city and county. This assignment is made by us to said Wood by way of security for advances made and to be made by said Wood to us; and we do hereby authorize and empower him, the said Wood, as our attorney in fact, to demand and receive and collect all certificates, warrants, and moneys due or to become due thereunder. Witness our hands, this 11th day of February, 1891, at said city and county. Owens Brothers. F. J. Owens. J. V. Owens." On March 18, 1891, the Owens Bros. entered into a contract with Reiley & Loane, whereby they agreed to excavate a cellar, which contract they also assigned to defendant Wood on March 19, 1891, by the following instrument: "State of California, City and County of San Francisco. For value received, we hereby sell, assign, transfer, and set over unto J. M. Wood, as security for moneys advanced by him to us, our certain contract and agreement made with Messrs. Reiley & Loane, made on, to wit, March 18, 1891, to excavate a cellar at the southeast corner of Filbert and Sansome streets, in said city and county, amounting to the sum of $3,150, on land belonging to Mrs. Robert C. Johnson. Dated March 19, 1891. F. J. & J. V. Owens." At the time of the assignment of the sea-wall contract, the Owens Bros. were indebted to the defendant Wood in the sum of about $3,000, for money theretofore loaned; and on that day he loaned them $1,500 more, to enable them to pay the men employed by them as laborers in performance of the sea-wall contract. During the following months of April and May, 1891, the Owens Bros. carried on the work on both contracts at the same time, and paid their laborers by orders or checks on defendant Wood, which he paid, and which were drawn in the following form: "$56. July 19, 1891. Pay to the order of C. Sheridan fifty-six dollars, value received, and charge the same to account of F. J. & J. V. Owens." In July, 1891, Wood refused to pay any more of such checks, and thereafter Owens Bros. failed. At the time of their failure they were indebted to the plaintiff and 33 others for labor on the sea wall and cellar, in sums ranging from $3 to $110, and each of the other 33 assigned his demand to the plaintiff, and thereupon plaintiff commenced this action to recover his own demand and that of the 33 others assigned to him; the complaint consisting of 34 counts, in each of which it is alleged that defendants are indebted to plaintiff in a sum therein named, "for work and labor performed for them at their special instance and request." The separate answer of the defendant Wood is a special denial of all material averments in each count, so far as they relate to him. Neither of the Owens brothers answered. The court found that all the allegations of the complaint are true, and that the answer is wholly false, and rendered judgment against the defendant Wood alone for the sum of $2,062.57 and costs, taxed at $97.50.

The parol evidence, without conflict, is positive to the effect that Wood had nothing to do with the work on the sea wall or on the cellar; that he neither directly nor indirectly employed or discharged any laborer, but, on the contrary, that all laborers on the cellar or sea wall, including the plaintiff and his assignors, were employed and wholly supervised by the Owens Bros. Nor did Wood pay for any part of such labor, though he paid orders or checks drawn on him by the Owens Bros. in favor of laborers, but charged the amount so paid to Owens Bros., as directed to do in such orders. If Wood was under any obligation to pay plaintiff or his assignors for labor performed on the cellar or sea wall, such obligation must be deduced from the written assignments of the cellar and sea-wall contracts, and the law applicable to such assignments. And accordingly counsel for respondent contend that Wood's obligation to pay for such labor is the product of their application of section 1589 of the Civil Code to those assignments, which section reads as follows: "A voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it, so far as the facts are known or ought to be known to the person accepting." But we think this section applies only to "a transaction" to which the person accepting the benefit is, or purports to be, or is claimed to be, a party, but who would not have been bound by the transaction if he had not accepted the benefit thereof. For example, an alleged principal is not bound by a transaction for him or in his name by an assumed agent, without authority, unless he accept the benefits of such transaction; and the application of this section of the Civil Code was thus exemplified by the code commissioners, in their annotated edition, by citing the case of Bennett v. Judson, 21 N. Y. 238, in which the defendant was held to be bound by an unauthorized transaction in his name, on the ground that he had accepted the benefits thereof.

Wood purported to be, and was, a party to the transactions by which Owens & Bro. assigned to him the sea-wall and cellar contracts as security for money advanced, and he received a part and claims all the benefits of those transactions; and it appears that he not only consented to all the obligations on his part arising from those transactions, but that he has fully performed and discharged them. But Wood was not, did not purport to be, and was not represented to be, an original party to the sea-wall and cellar contracts. Did he become a party to those contracts by the assignment of them to him as collateral security for money loaned? This seems to be the only remaining material question, and must be answered negatively. As it appears that the contracts were delivered to Wood at the time they were assigned, and also appears on the face of the written assignments, as well as by extrinsic evidence, that the assignments were intended to operate as collateral security for the payment of debts, the legal effect of the assignments, and the power of attorney to receive the warrants and the money to become due under those contracts, was merely a pledge of those contracts creating a lien thereon, subject to which the title to, and the general property in, the pledge, remained in the pledgor. Civ. Code, § 2888; Haber v. Brown, 101 Cal. 452, 35 Pac. 1035, and cases there cited. And such pledge and lien implied no obligation of the pledgee to perform or to pay for the work which the pledged contracts required to be performed by the pledgors,—the Owens Bros. And surely no such obligation is expressly imposed by those assignments. Nor is it true that Wood accepted or received any benefit from the transaction of executing the pledged contracts by the parties thereto, in the sense in which the word "benefit" is used in section 1589 of the Civil Code. True, he received part payment by Owens Bros. of their debt to him from proceeds of their work done under those contracts; but other creditors of Owens Bros. may have received payments from the proceeds of that work before the contracts were pledged to Wood, and creditors of contractors are often paid from the proceeds of work done under contract. But to say that all creditors who are thus paid accept or receive a benefit from the contract under which the work was done, in the sense of section 1589 of the Civil Code, and thereby obligate themselves to pay for such work, would be to give that section not only an absurd, but an outrageously unjust, effect. Yet Wood's relation to the pledged contracts differs from that of the general creditors only in that he had secured a lien upon the proceeds of the work. But this distinction does not remove absurdity, nor mitigate the injustice. Why should a creditor who is secured by a pledge be in a worse condition than those who have no collateral security? The case of Cutting Packing Co. v. Packers' Exchange, 86 Cal. 574, 25 Pac. 52, cited by respondent, is not in point. It differs from this case in several respects; but the most important difference, and that which makes it inapplicable, is this: that the assignment of the contract in that case was absolute, and was so intended by the parties. Neither party to it claimed or pretended that it was intended as security for a debt, or for the performance of any act.

Other points made by the appellant are deemed unimportant, in view of the construction which we have given to the assignments of the contracts, and to section 1589 of the Civil Code. The judgment and order are reversed, and the cause remanded.

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105 Cal. 214

## BARNARD v. BOLLER. (No. 18,327.)

(Supreme Court of California. Dec. 26, 1894.)

PUBLIC LANDS—HOMESTEAD ENTRY—EXEMPTIONS.

Under Rev. St. U. S. § 2296, providing that "no lands acquired under this chapter [on homesteads] shall in any event become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor," land so acquired is not liable for a debt contracted after final proofs were made by the applicant and the receipt entitling him to a patent was issued, but before the issuance of the patent.

Commissioners' decision. Department 1. Appeal from superior court, Tulare county; Wheaton A. Gray, Judge.

Action by Joe Barnard against Luella M. Boller to quiet title to land. Judgment for plaintiff, and defendant appeals. Affirmed.

E. T. Cosper, for appellant. Lamberson & Middlecoff, for respondent.

SEARLS, C. This is an action to quiet the title of plaintiff to a quarter section of land, fully described in the complaint, and situate in the county of Tulare. The cause was tried by the court without a jury, written findings filed, upon which plaintiff had judgment, quieting his title as prayed for in his complaint. Defendant appeals from the judgment, and the case is presented upon the judgment roll without a statement or bill of exceptions.

The findings show that on the 26th day of September, 1884, plaintiff entered the land in question, under the homestead laws of the United States, at the United States land office at Visalia, Cal. On the 17th day of November, 1890, plaintiff made the proper proofs under his homestead entry, and received from the receiver a receipt in due form, entitling him to a patent for said land, which patent in due form issued to him from the government of the United States, February 23, 1892. After the issuing to plaintiff of said receipt, viz. after November 17, 1890, but before the patent issued, plaintiff became indebted to M. Schwartz & Son for goods, wares, and merchandise sold and delivered by them to said plaintiff in the sum of $860.78, for which sum said firm of Schwartz & Son brought an action in due form, and obtained a judgment against plaintiff. On the 23d day of January, 1892, said Schwartz & Son caused an execution to issue upon their judgment against this plaintiff, which was levied upon the land in question, under which execution the land was sold, purchased by Schwartz & Son, who in due time received a sheriff's deed therefor, and thereafter conveyed the land to the defendant and appellant herein.

The only question presented by the appeal is: Was the land subject to levy and sale upon a debt contracted by respondent after he had made his final proofs and received his receipt, but before the patent actually issued? Section 2296 of the Revised Statutes of the United States provides that "no lands acquired under the provisions of this chapter [chapter on homesteads, and providing for acquiring title thereto] shall in any event become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor." The contention of appellant is that when respondent had made his final proofs and received his receipt the right to a patent vested in him; that he then had a perfect equitable title to the land, which he could convey; and that when the patent issues it relates back to the act upon which the equitable title depends; citing Morton v. Nebraska, 21 Wall. 660; Reichart v. Felps, 6 Wall. 160; Barney v. Dolph, 97 U. S. 652; Stark v. Starrs, 6 Wall. 402. Other cases are also referred to as illustrative of the principle that at the stage of proceedings indicated the equitable title is vested in the claimant, and that thereafter the government holds the legal title in trust until the patent issues. We agree in main with the position of the appellant, so far as dealing with the title is concerned, independent of statutory provisions; but his conclusion, in the face of the statute quoted above, cannot be maintained. Under that statute the condition or existence of the equitable title is not made the criterion of liability for antecedent debts. The land shall not, in any event, become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor. The date of issuing the patent is made the point of time which divides the liability and nonliability of the land. It is this event or act which determines the question of liability, and not the title or the question of relation as applicable to the holder thereof, which must be taken as the criterion. Congress has in plain and direct terms exempted the land from the debts of its owner or claimant contracted up to the happening of a specific event, viz. "to the issuing of the patent therefor." Had the statute provided that homesteads should not be liable for the debts of the patentees thereof contracted during their natural lives, or for 10 years after the issuance of the patent, its constitutionality being conceded, the end of the life of the patentee or the expiration of the 10 years would afford the test by which to measure the liability, and in such a case, it is believed, no just claim of liability could be maintained on account of debts contracted before the expiration of the time specified or event mentioned upon the ground that the patentee had previously held the title, legal or equitable. The provision of section 2296 is regarded as being equally explicit with the case supposed. In Jean v. Dee (Wash.) 32 Pac. 460, the supreme court of Washington, in a case involving this question, held that the provision was an absolute condition annexed to the grant, and applied as against liability for debts contracted prior to the issuance of the patent therefor, although the land had ceased to be occupied as a homestead after the issuance of the patent. Miller v. Little, 47 Cal. 348, is directly in point, and conclusive against the contention of appellant. The judgment should be affirmed.

We concur: TEMPLE, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

105 Cal. 258

SCHAMMEL v. SCHAMMEL. (No. 15,636.)

(Supreme Court of California. Dec. 26, 1894.)

DIVORCE—CUSTODY OF CHILDREN.

1. Under Civ. Code, §§ 138, 139, empowering the court in divorce to provide for the care and custody of the minor children, the court cannot require a defendant husband to pay money for the support of his child to its legal guardian other than its mother.

2. Upon the death of the parent to whom is awarded the custody of a minor child by the decree divorcing the parents, the other parent becomes entitled to the custody of the child.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; J. M. Seawell, Judge.

Action by Maria Schammel against Henry Schammel for divorce. There was a judgment for plaintiff granting the divorce, awarding her the custody of a minor child, and ordering the defendant to pay a certain sum monthly for the support of the child to the plaintiff or to the child's "legal guardian." Application by Ernestine Gallagher, guardian, against Henry Schammel, for an order directing the issuance of an execution. From an order granting the application, and an order refusing to vacate said order, defendant appeals. Reversed.

Fisher Ames, for appellant. J. D. Sullivan, for respondent.

BELCHER, C. The parties to this action were husband and wife, and were divorced by a decree entered therein on December 9, 1887. The decree awarded to the plaintiff the custody of Etta Schammel, the minor child of the parties, and the defendant was "ordered and decreed to contribute to the support and education of said Etta the sum of fifteen dollars per month during the period of her minority," and "to pay said sum of money to the plaintiff, or to her order, or to the legal guardian of said minor, on the first day of every month for the time aforesaid." On May 5, 1890, on motion of the plaintiff, the allowance for the support of the minor was increased by order of the court to $25 per month. On March 27, 1891, the plaintiff died, owning two lots of land, with houses thereon, in the city and county of San Francisco, one of which she gave to her said minor daughter, and the other to Ernestine

Gallagher, a married daughter. The house and lot given to the minor daughter was worth about $3,500, and when rented yielded about $25 per month. On June 12, 1891, an order was duly made and entered in the matter of the estate of Maria Schammel, deceased, allowing said minor out of said estate the sum of $50 per month for her support, education, and maintenance, and on the same day Ernestine Gallagher was duly appointed guardian of her person and estate. The defendant paid the allowance for his daughter regularly every month, up to and including the month of March, 1891, but thereafter neglected and refused to make any further payments. About a month after her mother's death defendant saw his daughter, and requested her to go and live with him,—he had then married again,—but she refused to do so; and again in April, 1892, he saw her, and invited her to live with him and make his house her home, but she still refused to do so. In March, 1893, Ernestine Gallagher, as guardian of her sister Etta, applied to the court below for an order in the above-entitled action directing the clerk of the court to issue an execution against the property of the defendant for the aggregate of the sums ordered to be paid by him for the support of said Etta, but not paid. The application was heard, and in August following an order was made and entered directing the clerk of the court to issue an execution as asked for for the sum of $600. From this order, and an order subsequently made refusing to vacate or modify it, the defendant appeals.

Under sections 138 and 139 of the Civil Code, the court, in an action for divorce, is authorized to make any necessary or proper provision for the custody, care, and education of the minor children of the marriage; and, where a divorce is granted for an offense of the husband, it may compel him to provide for the maintenance of such children, and may from time to time modify its orders in these respects. But the power to make such orders must be held to be limited to the conditions and circumstances existing at the time they are made. The court cannot then anticipate what may possibly thereafter happen, and provide for future contingencies. For example, the court, in making its orders for the custody and support of the minor in this case, could not anticipate that the mother might possibly die during the minority of the child, and that a guardian of her person other than her father might thereafter be appointed, and then proceed to direct that the allowance made to the mother for the support of the child should be paid to such guardian. The order, as made, that the defendant pay said sum of money "to the legal guardian of said minor" was therefore beyond the power of the court, and without any legal effect. Upon the death of the mother, the father again became entitled to the custody of the child, and this right continued until a guardian of her person was appointed. After that he was under no obligation to furnish her support other than such as the law imposed upon him. It follows that the orders appealed from should be reversed, and the court below directed to dismiss the proceeding.

We concur. SEARLS, C.; TEMPLE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the orders appealed from are reversed, and the court below directed to dismiss the proceeding.

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105 Cal. 268

## BLACK v. COUGHLIN et al. (No. 15,385.)

(Supreme Court of California. Dec. 27, 1894.)

ISSUANCE OF EXECUTION—ORDER TO SHOW CAUSE—APPEAL—JURISDICTION.

1. Upon the plaintiff's motion for an order that execution issue it was proper for the court of its own motion to order the defendant to show why the motion should not be granted.

2. Where no appeal was taken from an order of the superior court that execution issue, the fact that counsel consent to the argument before the supreme court of objections to that order does not give the supreme court jurisdiction to review it.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; Eugene R. Garber, Judge.

Action by John Black against Daniel Coughlin and others for the recovery of land. There was a judgment for plaintiff. Motion by John Black, for whom is substituted John O. McAuliffe, against Daniel Coughlin and others, for an order for execution. From an order citing defendants to show cause why execution should not issue they appeal. Affirmed.

J. D. Sullivan, for appellants. Sullivan & Sullivan, for respondent.

VANCLIEF, C. This appeal by the defendants is from an order of the superior court citing them to show cause why an execution should not issue on a judgment of said court in favor of the original plaintiff against the defendants for the recovery of the possession of a defined strip of land. The bill of exceptions shows that in an action of ejectment the original plaintiff recovered a judgment against defendants for the possession of said strip of land on January 14, 1882; that in August, 1890, McAuliffe, who had purchased said strip of land from the original plaintiff, and had been substituted for the latter, moved the court for an order that execution issue upon said judgment. The motion was based upon affidavits of Black and McAuliffe and the judgment roll in said action of ejectment, it appearing by the judgment roll, however, that the judgment had been fully satisfied by Black (the original plaintiff) on September 12, 1883. But it was stated in Black's affidavit that the judgment never had been satisfied, and that he was induced to enter satisfaction thereof by false and fraudulent statements of the defendants to the effect that they had vacated the land and delivered possession thereof to Black by removing their fence inclosing it so that it inclosed no part thereof. The affidavits further show that defendants never so removed their fence, but that it has always inclosed, and still incloses, a part of said strip of land, and that they refuse to deliver possession thereof to McAuliffe. Upon this showing the court made the order to show cause, from which this appeal was taken.

Conceding, merely for the purposes of this appeal, that this order to show cause is an appealable order (which I think questionable, at least), the court did not err in making that order on the showing made, since it had jurisdiction of the subject-matter of the motion for an order to issue execution on the judgment, and incidentally to determine whether or not the apparent satisfaction of the judgment was void, as claimed by the plaintiff. It does not appear that plaintiff moved for the order to show cause, but upon his motion for an order that execution issue it was proper and regular practice for the court, of its own motion, to order the defendants to show cause why plaintiff's motion should not be granted; thus giving the defendants an opportunity to be heard in answer to that motion. The order to show cause was simply a notice of the motion, and a citation of the defendants to appear at a stated time and place and show cause why plaintiff's motion should not be granted. Such orders are frequently made, especially on applications for injunctions and writs of mandate. They are never prejudicial to the rights of the party cited, and I am not aware of any case of appeal from such an order, except this. Nor has counsel advanced any reason or authority for holding the order in this case erroneous. His argument is wholly directed against the subsequent and final order directing the issuance of the execution, made, after the appearance of the defendants, as the result of a hearing on the merits, and from which final order no appeal has been taken. It is true, however, that counsel for respondent have replied to these arguments against the final order, without objection, on the ground that no appeal from it has been taken; but this does not supply the want of jurisdiction of this court to review orders of the superior court from which no appeal has been taken, except such as are made in a pending action before final judgment. I think the order appealed from should be affirmed.

We concur: TEMPLE, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

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105 Cal. 344

## PEOPLE v. BRAY. (No. 21,062.)

(Supreme Court of California. Dec. 31, 1894.)

SALE OF LIQUOR TO INDIANS—CONSTITUTIONAL LAW.

1. Pen. Code, § 397, making it a felony to sell intoxicating liquor to any Indian, applies to all Indians as a class, regardless of their citizenship or tribal relations.

2. Since Pen. Code, § 397, making it a felony to sell intoxicating liquors to Indians, is general and uniform in its operation as to all persons in the class designated, it is a valid exercise of the police power of the state, and not a violation of any constitutional rights or immunities to which such Indians as are citizens of the United States are entitled.

In bank. Appeal from superior court, Sonoma county; R. F. Crawford, Judge.

One Bray was convicted of selling intoxicating liquor to an Indian, and appeals. Affirmed.

J. M. Thompson & Son, for appellant. Atty. Gen. Hart, for the People.

DE HAVEN, J. The defendant was convicted of the crime of selling intoxicating liquor to an Indian named Mary Smith, in violation of section 397 of the Penal Code, which, as amended in 1893 (St. 1893, p. 98), reads as follows: "Every person who sells or furnishes, or causes to be sold or furnished, any intoxicating liquors to any habitual or common drunkard is guilty of a misdemeanor; or who sells or furnishes, or causes to be sold or furnished, intoxicating liquors to any Indian, is guilty of a felony." It was admitted upon the trial that the defendant furnished intoxicating liquor to the said Mary Smith, named in the information, at the time and place stated therein, and that she "has no other than Indian blood in her veins." It was further shown that her father and mother lived in a house of their own; that they both dressed like white people, and have adopted the habits and customs of civilized life. Her father is a fisherman, and sells his fish in the neighboring city of Santa Rosa. He owns a horse, wagon, household goods, and other property, and their said daughter, Mary, resides with her parents, and none of them have ever lived upon a government reservation, "nor have they ever lived in tribal relations, or under or subject to the control of any chief or like authority." Upon this state of the evidence the defendant requested the court to give the following instructions: "(2) Section numbered 397 of the Penal Code, under which the information in this case was filed, is not violated by a sale of intoxicating liquor to an Indian who at the time of the sale was a citizen of this state." "(4) If you find from the evidence that the Indian in question was born in this state, and at the time of her birth her parents were living separate and apart from any tribe of Indians, and had no tribal relations, and did not live on any Indian reservation, or other land set apart for such purpose, then I charge you that the Indian in question is a citizen of the United States, and you cannot convict the defendant of the crime charged against him in the information, even if you should also find that he did sell or furnish the said Indian intoxicating liquors at the time alleged." "(12) All citizens of this state are entitled to equal protection under the law in person, property, and privileges; and a law which takes from one person, on account of color or race, any privilege which others are legally permitted and allowed to enjoy, is void as to such person." The court refused to so instruct the jury, and this refusal is assigned as error, and covers all the grounds upon which the defendant claims that the judgment and order appealed from should be reversed; and the argument made in behalf of defendant for such reversal rests upon these three propositions: First, that under the facts shown the person named in the information as the one to whom defendant furnished the intoxicating liquor is a citizen of the United States; second, that section 397 of the Penal Code, in so far as it relates to Indians, applies only to those Indians who are under control of the general government as dependent communities, living in tribal relations, or upon government reservations, and as such deemed wards of the general government; third, that, if said section is not so limited by construction, it is void, because it discriminates between citizens of the United States, denying to the citizen of Indian birth the privilege of buying intoxicating liquors, which is accorded to citizens of the white race, and in making such distinction that it abridges the privileges and immunities of the former.

By an act of congress approved Feb. 8, 1887 (24 Stat. 390), it is provided that "every Indian born within the territorial limits of the United States who has voluntarily taken up within said limits his residence, separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States, without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property." It was undoubtedly competent for congress to thus confer upon Indians the privileges of citizenship (Elk v. Wilkins, 112 U. S. 94, 5 Sup. Ct. 41), and it may be conceded that the facts of this case show that the said Mary Smith, referred to in the information, is a citizen of the United States, within the meaning of the act of congress from which the foregoing quotation is made, and as such is entitled to the privileges and immunities of such citizens; but we are not able to agree with the further contention of appellant's counsel in their construction of section 397 of the Penal Code. In our opinion that section forbids the sale or giving of liquors to Indians of full blood, without any reference to the question whether they have or have not adopted the habits of civilization, or separated themselves from tribal relations. It was intended to apply to Indians as a class, and was enacted in view of their well-known race peculiarities and their relations to society. There are thousands of California Indians to be found in this state, most of them civilized in a certain degree, perhaps none of them living under any well-defined tribal government. They live generally by themselves, in small villages or communities, and yet are in constant contact with the white race, some of them living in families as servants, and all of them at times engaged in fishing or employed as laborers in the harvest fields or otherwise. The statute applies to this people as a race, and in its enforcement all inquiry as to the habits or the degree of civilization attained by the individual of such race to whom the intoxicating liquor is furnished, or as to whether he is or is not a citizen of the United States under the act of congress before referred to, is irrelevant; and,. as thus construed, this section of the Penal Code is not in conflict with any provision of the constitution of the United States or of this state. It is general and uniform in its operation, because it affects in the same manner all persons belonging to the class to which it refers (Ex parte Smith, 38 Cal. 710), and does not deprive any citizen of his privileges and immunities as such. The privileges and immunities which pertain to citizens in the several states are thus defined by Washington, J., in Corfeld v. Coryell, 4 Wash. C. C. 380, Fed. Cas. No. 3,230: "We feel no hesitation in confining these expressions to those privileges and immunities which are in their nature fundamental, which belong of right to the citizens of all free governments, and which have at all times been enjoyed by the citizens of the several states which compose this Union from the time of their becoming free, independent, and sovereign. What these fundamental principles are it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject, nevertheless, to such restrictions as the government may justly prescribe for the general good of the whole; the right of a citizen of one state to pass through or to reside in any other state for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold, and dispose of property, real and personal, and an exemption from higher taxes or impositions than are paid by the other citizens of the states,—may be mentioned as some of the particular privileges and immunities of citizens which are clearly embraced by the general description of privileges deemed to be fundamental, to which may be added the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised." It will be seen that in the above extract the learned judge was careful to say that the right to acquire and possess property and to pursue and obtain happiness is not unlimited, but "subject, nevertheless, to such restraints as the government may justly prescribe for the general good of the whole." And it is well settled that in regulating the sale of intoxicating liquors the legislature may, in the exercise of its judgment as to what restrictions upon such sale the general good of the public requires, prescribe the conditions upon which the license to make such sale shall be granted. "Wherever the law allows the sale of liquor under licenses or other restrictions, there are statutes forbidding such sale to certain classes of persons who are peculiarly liable to be injured or demoralized by indulgence in alcoholic beverages; such as minors, persons already intoxicated, and habitual drunkards. The constitutionality of such laws has seldom been questioned, and, indeed, their validity could scarcely be assailed with any show of reason." Black, Intox. Liq. § 42. Whatever may be true in respect to particular individuals of that race, it is certainly true that Indians as a class are not refined, cultured,—civilized in the same degree as persons of the white race,—and doubtless, in the judgment of the legislature, they are less subject to moral restraint, and therefore more liable to be dangerous to themselves or others when under the influence of liquor, or less able to resist the desire for such liquors, and for that reason they, as well as the community in which they move, were thought entitled to the protecting influence of this statute. We have no doubt the law under consideration falls within the proper exercise of the police power of the state. It was so stated by Sanderson, J., in Ex parte Smith, 38 Cal. 708, and a statute in all respects similar to it was upheld by the supreme court of the territory of Montana as a valid exercise of the police power in the case of Territory v. Guyot, 22 Pac. 134, the court there saying: "The act under consideration is clearly within the police power of the territorial government as defined by the courts, and is not inconsistent with the constitution and laws of the United Sates." These views dispose of all the questions arising upon this appeal. Judgment and order affirmed.

We concur: GAROUTTE, J.; HARRISON, J.; McFARLAND, J.; VAN FLEET, J.; FITZGERALD, J.

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(105 Cal. 277)

## BURKE v. GOULD. (No. 19,358.)

(Supreme Court of California. Dec. 29, 1894.)

DURESS—EVIDENCE—MORTGAGOR AND MORTGAGEE.

In an action to recover money as paid under duress, it appeared that defendant held a mortgage on plaintiff's land, and that plaintiff, being unable to pay the interest, conveyed the land to defendant, under an agreement that defendant would, up to a certain date, reconvey the land on payment of a certain sum, exceeding the amount of the mortgage with interest to the date named. Plaintiff sold part of the land, and the purchaser paid to defendant such agreed sum, and received from defendant a deed of the land purchased, and the mortgage was canceled. The balance of the mortgaged land defendant conveyed to plaintiff. Plaintiff testified that when such agreed sum was fixed he supposed it was the principal of the mortgage, with interest to the date of the proposed reconveyance, but admitted that when the money was paid to defendant he knew that it exceeded the amount of such principal and interest. *Held*, that no duress was shown.

Commissioners' decision. In bank. Appeal from superior court, Santa Barbara county; W. B. Cope, Judge.

Action by M. F. Burke against G. H. Gould to recover money alleged to have been paid under duress. Judgment was rendered for plaintiff, and defendant appeals. Reversed.

C. H. Gould and C. F. Carrier, for appellant. B. F. Thomas, for respondent.

SEARLS, C. This is an action to recover from defendant $679.78, alleged to have been paid to him by plaintiff, under duress of the property of said plaintiff. Plaintiff had a verdict for $652.48, upon which judgment was entered. The appeal is by defendant from the judgment, and from an order denying his motion for a new trial. On the 21st day of February, 1890, plaintiff executed to defendant and Mary M. Barnes a mortgage upon certain real property situate in the county of Santa Barbara, to secure the payment of two certain promissory notes aggregating $17,000, payable one year after date, with interest at 10½ per cent. per annum, interest payable semiannually, and, if not so paid, to be added to principal, and draw like interest. No interest was paid upon the notes, and at their maturity plaintiff was unable to pay, and defendant was about to foreclose, when, by an agreement, plaintiff on the 9th day of March, 1891, conveyed all the mortgaged property to defendant, whereupon the latter executed an agreement to one R. J. Broughton, a friend of the plaintiff, whereby he agreed and bound himself, upon the payment to him of $20,500 on or before September 1, 1891, to convey to said Broughton or his assigns all of said property so mortgaged and so conveyed to him, the said defendant. Plaintiff found a purchaser for the most of the property, who paid the defendant said sum of $20,500, whereupon, and on the 25th day of August, 1891, the latter conveyed the property so purchased to the purchaser, and the residue, consisting of 100 acres and certain town lots, to the plaintiff. The notes and mortgage were surrendered to plaintiff for cancellation upon his conveyance to the defendant. The sum of $20,500 mentioned in the agreement and paid to defendant was in excess of the sum which would have been due to him as principal and interest on the mortgage up to September 1, 1891, by at least the amount of the verdict, viz. $652.48, but was less by perhaps $1,000, more or less, than plaintiff would have been compelled to pay to redeem had a foreclosure and sale occurred, with the costs thereof, and a counsel fee of 5 per cent., as provided in the mortgage. The main question in dispute at the trial related to this sum of $20,500 mentioned in the agreement. Plaintiff testified that he was told by defendant, or his attorney, or by both, that it represented the principal and interest which would be due, at the rate prescribed in the notes, on the 1st of September, 1891, and that, being extremely busy as a public officer, viz. as tax-collector of the county, he had no time to compute the interest, and trusted to defendant and his counsel to do so. That a few days after the papers were executed he made the computation, and had others make it, and found it was wrong; and, in substance, that he thereafter refrained from protesting, and consented to the payment of the sum named to defendant, because he was pecuniarily involved, and feared defendant, should he raise objections, would defeat his attempts to sell the property, and he would thereby lose it all. The agreement as originally drawn is conceded to have mentioned the sum of $20,820 as the consideration to be paid to defendant, but, upon objection by plaintiff, that sum was stricken out, and $20,500 inserted. It is thought the weight of testimony was to the effect that $20,500 was an arbitrary sum at which defendant was willing to take the deed and agree to convey, and which was agreed to by the parties plaintiff and defendant; but, the jury having found in consonance with the theory of plaintiff, and there being a substantial conflict in the evidence, we are bound in favor of the verdict, to assume plaintiff's theory as proven.

Two propositions are presented in the case: (1) Can plaintiff recover upon the ground that the money was paid by mistake? (2) Do the facts presented establish such a case of duress as entitled plaintiff to recover?

The first proposition demands but brief notice. That money paid under mistake of a material fact and without consideration can be recovered back is well settled. In the present instance, however, it was not so paid. Whatever the belief of the plaintiff may have been when the agreement between defendant and Broughton was made, it is rendered certain, by his own uncontradicted testimony, that he became aware of the mistake in the sum mentioned in the agreement very shortly thereafter, and for nearly six months before payment was made was cognizant of all the facts bearing thereon; yet he permitted the money to be paid in his interest, and on the contract made for his benefit, without protest or objection. Against this voluntary payment with knowledge of the facts no recovery can be had. Keener, Quasi Cont. c. 2, and cases there cited.

The second proposition involves more serious considerations. Money paid to prevent the unlawful taking or detention of property may be recovered back. The doctrine is an equitable one, and is founded upon the theory of the moral duress not justified by law. "When such duress is exerted under circumstances sufficient to influence the apprehensions and conduct of a prudent business man, payment of money wrongfully induced thereby ought not to be regarded as voluntary. But the circumstances of the case are always to be taken into consideration." Bradley, J., in Robertson v. Frank, 132 U. S. 17, 10 Sup. Ct. 5. The case holds, in substance, that a plaintiff who added additional charges to the cost of goods, thereby involving a payment of increased duties, and paid the same, to avoid a penalty which the custom officials threatened to enforce if he did not add such additional charges, could recover the amount of the increased duties which had been paid under protest. So, in Hills v. Street, 5 Bing. 37, it was held that the plaintiff who paid to the defendant a sum of money to prevent a wrongful removal and sale of his goods under a distraint could recover the money so paid. Hooper v. Mayor, etc., 56 Law J. Q. B. 457; Chamberlain v. Reed, 13 Me. 357; Astley v. Reynolds, 2 Strange, 915; Briggs v. Boyd, 56 N. Y. 289; Buford v. Lonergan, 6 Utah, 301, 22 Pac. 164; Scholey v. Mumford, 60 N. Y. 498. In Close v. Phipps, 7 Man. & G. 586, a mortgagee, who had caused the mortgaged property to be advertised for sale under a power in the mortgage, refused to stop the sale, or deliver up the deeds, upon tender of the amount due on the mortgage, unless some $451 illegally added was paid. Payment was made under protest, and the court held that a recovery could be had in an action for money had and received. Cases might be multiplied indefinitely to the same effect, but the foregoing are deemed sufficient. The underlying principle of them all is that by the performance or threat to perform some unlawful act, whereby plaintiff will suffer loss, the defendant has induced the plaintiff, under circumstances sufficient to control the action of a reasonable man, to pay money which he would not otherwise have paid. Keeping in mind this principle, which is applicable alike to cases where money or other valuable thing is extorted as in cases (1) to prevent the wrongful taking or detention of property; (2) to avoid injury to business; (3) in performance of a usurious contract; (4) to induce a defendant (as in case of a public officer) to discharge a duty; (5) to avoid arrest, or to be released therefrom,—and it will be seen that the unlawful act of the defendant is the keynote to the whole doctrine. See Keener, Quasi Cont. c. 11. This being so beyond a peradventure, it is not perceived how plaintiff can be entitled to recover in the present case. All that defendant threatened or was about to do was to foreclose, in the usual way, his mortgage which plaintiff had executed, and which was overdue. This was not an unlawful act. It was the exercise of a right which the law conferred upon him, and was neither in law nor morals reprehensible. In Buck v. Axt, 85 Ind. 512, which was an action to foreclose a mortgage executed by Buck and wife to secure an antecedent debt owing by the husband, the wife pleaded duress, and averred she executed the mortgage under a threat that if she refused "they would sell her out of house and home, and Frazier would prosecute her at once." The court, in holding the allegation of duress insufficient, said: "The threats alleged were not such as to constitute duress. The evident meaning of the threats used was that Frazier would at once seek his legal remedies against her and her husband, and so sell them out of house and home; and if more than this was meant the facts should have been alleged to show it." See, also, Kohler v. Wells, 26 Cal. 606. The whole question is in a nutshell. To pursue or threaten to pursue the usual legal steps for the collection of a debt in the manner provided by law does not constitute duress of property. According to plaintiff's own testimony, this was all that was proposed or hinted at here. Thereupon, according to his testimony, he proposed to convey all the mortgaged property to defendant, and take back an agreement to repurchase, upon paying the principal and interest by September 1st. In such agreement, by mistake, as he understood it (but, as he admits, defendant did not so understand it), an amount larger than the aggregate of principal and interest was included as the price at which it was to be repurchased. He afterwards, with full knowledge of all the facts, caused the full amount to be paid without protest. By so doing he ratified the agreement, and, as before stated, the payment became voluntary, and cannot be recovered. Kohler v. Wells, supra. The excuse that plaintiff thought defendant was about to leave the state to avoid the conveyance is without merit. He had agreed to convey the property, and, had he in fact sought to evade the agreement, plaintiff had only to tender performance to conserve all his legal rights. It follows that the motion for a nonsuit should have been granted, and that the verdict is not supported by evidence, and the judgment is against law. The judgment and order denying a new trial should be reversed, and a new trial had.

We concur: TEMPLE, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order denying a new trial are reversed, and a new trial granted.

105 Cal. 357

## HINCKLEY v. AYRES et al. (No. 15,788.)

(Supreme Court of California. Jan 2, 1895.)

MARRIAGE—EVIDENCE.

On an issue as to whether defendant was the wife of deceased, she testified that they had verbally agreed to be husband and wife, and that, after living apart for two years thereafter, during which time there was occasional sexual intercourse, she lived with deceased for three years, till his death. Friends of deceased who frequently called at his house testified that she was introduced by him as "Miss D., my niece," and that they had always known her as Miss D., and that she so signed her name, and was so called by deceased in his letters to them. The business agent of deceased testified that he had been on close terms with deceased and defendant, and always knew her as Miss D., and heard her variously spoken of by deceased as "Miss D.," "my niece," "Cousin Alice," etc., and that after the death of deceased she said to witness "I am Mrs. B.," and on his questioning her as to when she became such she replied, "You know how I have been living with Mr. B., and I expect you to help me prove my claim." There was also evidence of numerous letters by her to deceased, in which she addressed him as "Dear Uncle," and signed herself "Your Niece," and evidence that deceased intended to adopt her legally as his niece. *Held*, that the evidence sustained a finding that defendant was not the wife of deceased.

In bank. Appeal from superior court, city and county of San Francisco; J. V. Coffey, Judge.

Action by Florence Blythe Hinckley against Abbie Ayres, Alice Edith Blythe, and others to establish plaintiff's right to the estate of Thomas H. Blythe, deceased. Judgment for plaintiff, and defendant Alice Edith Blythe appeals. Affirmed.

Henry E. Highton and E. D. Wheeler, for appellant. Garber, Boalt & Bishop, T. I. Bergin, W. H. H. Hart, W. W. Foote, and H. I. Kowalsky, for respondent.

McFARLAND, J. This case is a branch of the litigation which arose out of the settlement of the estate of Thomas H. Blythe, deceased. The general history of that litigation and the leading facts upon which it was founded are sufficiently stated in the opinions of the court in Blythe v. Ayres, 96 Cal. 532, 31 Pac. 915, and Id., 102 Cal. 254, 36 Pac. 522; and they need not be here repeated. The present appeal is taken by defendant "Alice Edith Blythe" (so called in the transcript by order of the lower court) from an order denying her motion for a new trial. She claims to have been the lawful wife of said Thomas H. Blythe, deceased, at the time of his death, and to be now his widow. The court found against this claim. She also contends that the respondent, Florence Blythe, is not the daughter of said Thomas H. Blythe, deceased; and the court found against this contention. The elaborate brief of her counsel, covering

438 pages, has two main divisions. In "Division 1" it is contended that the evidence is insufficient to support the finding that respondent is the daughter of said Blythe, deceased; and in "Division 2" that the evidence is insufficient to support the finding that appellant was not the lawful wife of said deceased.

1. With respect to the contention made in said division 1 of the brief, it is sufficient to say that there is nothing in the evidence presented in the transcript on this appeal, or in the argument of counsel, that changes or affects the conclusion reached on the former appeals on the subject of the paternity of the respondent. There was evidence sufficient to support the finding of the lower court that she is the daughter of the deceased; and we do not care to say anything more on the subject than was said in the opinions delivered in the said cases of Blythe v. Ayres, 96 Cal. 532, 31 Pac. 915, and Id., 102 Cal. 254, 36 Pac. 522.

2. It is not to be wondered at that counsel contend strenuously for their second proposition, viz. that appellant was the wife of the deceased. For if she was not his wife, then, notwithstanding the fact that she gave to him the best years of her life, and appears to have contributed more to his comfort and happiness than any other person mentioned in the record, she will be left without a dollar of his vast estate. If he had made a will and left her a large share of his ample fortune he would thereby have done an act as commendable, at least, as any other act of his life which the evidence shows. But courts cannot control the disposition of property, otherwise than as the law directs. They cannot take property from its lawful owners, and give it to others according to their own notions about its proper distribution. The trial court found that "said Thomas H. Blythe was never married to the defendant styling herself, in her answer herein, as and by the name of Alice Edith Blythe, widow of said Thomas H. Blythe, deceased"; but that for a certain period before his death she did cohabit with him as his mistress, and in no other character or capacity. And, putting the case in the most favorable light for appellant, the pivotal question is really one of fact, and presents itself in this form: Was there sufficient evidence to warrant the court in finding that from about April 1, 1880, until the death of the deceased on April 4, 1883, the appellant and deceased did not live together and cohabit as husband and wife? Of course the court may not have believed that any contract of marriage had ever been made between said persons. It may be, also, that their living together as husband and wife during said period would not have constituted marriage, because it is not pretended that there was any contract of marriage later than two years prior to the commencement of said period; and in the meantime they had meretricious intercourse. But we are passing over these questions, and putting the case most favorably to appellant. The appellant testified that on or about May 19, 1878, in a certain cottage at the corner of Dupont and Geary streets in the city of San Francisco, which she had procured from the deceased, she and said deceased, no other person being present, joined hands and used certain language to each other, the substance of which was that he promised to be her husband, and she promised to be his wife. She, before that, had been a married woman, and had been divorced. He lived in his house, or apartments, at No. 6 O'Farrell street in said city. From that time on they had sexual relations; but there can be no pretense that for the next two years there was between them any "mutual assumption of marital rights, duties, or obligations." He continued to live at No. 6 O'Farrell, and during the two years she lived at a half-dozen or more different places. She testified that during said time she frequently went to No. 6 O'Farrell, when she had the opportunity, and stayed there over night with the deceased. Counsel for appellant do not contend that there was an assumption of the marrage relation at or near the time of said alleged consent and agreement to be married; but they seem to suggest that during the next two years there was a sort of gradual, unfolding, evolutionary, progress towards assumption. We dismiss this part of the case by saying that there is nothing to show anything like an assumption of the marriage relation prior to the spring of 1880, when appellant went to live with the deceased at said No. 6 O'Farrell. About April 1, 1880, the appellant commenced to live with deceased at his said house at 6 O'Farrell, and lived there with him until October, 1882, when they removed to No. 27 Geary street, where they lived until the death of the deceased on April 4, 1883. There is no need here of discussing the law of marriage without solemnization, or the question, what constitutes a "mutual assumption of marital rights, duties, or obligations," within the meaning of section 55 of the Civil Code? The law on that subject is sufficiently settled for the purposes of the case at bar in Sharon v. Sharon, 79 Cal. 633, 22 Pac. 26, 131; White v. White, 82 Cal. 427, 23 Pac. 276; Kilburn v. Kilburn, 89 Cal. 46, 26 Pac. 636; People v. Beevers, 99 Cal. 286, 33 Pac. 844; and other cases. There is no such assumption unless the parties live together as husband and wife, treat each other "in the usual way with married people," and so conduct themselves as to have full repute among their intimate friends and associates to be husband and wife. And, applying the law as declared in the cases above cited, the question in the case at bar is whether the court was justified by the evidence in finding that the deceased and appellant did not so live together as husband and wife. And we are satisfied that the evidence was sufficient to warrant the conclusion reached by the court below, and that under the well-established rule as to conflict of evidence we cannot here disturb that conclusion. The evidence upon

the subject covers a great many hundred pages of the four large volumes of the transcript, and it is impracticable to notice any considerable part of it in this opinion. But, as the case is an important one,—both as to personal and property rights,—we will refer to some of the evidence and facts in proof which tend to support the finding of the court below.

At the outstart one is struck with the wonderful dearth of lady visitors at the residence of the deceased and appellant. A married woman living in the usual way with a man who beyond any doubt or suspicion is her husband, no matter how humble her surroundings, has almost invariably some friends and visitors of her own sex. Entire isolation from such visitors is exceptional in the highest degree. The appellant in the case at bar appears to have been an agreeable and attractive woman, well educated, and having considerable musical and artistic tastes and capabilities. She was living with a man of wealth; and, if the relations between them had been reputed to be that of marriage, it is difficult to imagine why she did not have a number of respectable women among her associates and visitors. But, practically, she had none after she commenced to live openly with the deceased at his house.

When determining whether a man and woman were living together as husband and wife, we look mainly to those who knew most about the situation, who were the most intimate with them, who had the best opportunity to observe their conduct towards each other, and who knew best what their relation was reputed to be. And, naturally, they are those who have been social visitors to, and inmates of, the house where the persons in question lived. The visitors to the house were gentlemen, and there were not very many of them. As counsel for appellant say: "There was but little company at 3 O'Farrell. Mr. Blythe's visitors there were gentlemen who called to see him about his Mexican property." But some of them were, or became, quite intimate social acquaintances, and quite familiar with the house and its occupants. The most intimate of these was the witness Gen. Andrade. He had visited the house in question very often, and finally, at the request of the deceased, took up his quarters there, and lived there permanently for three months at one time in 1882. He slept and took his lunch and dinner there. Appellant ate at the table with him and deceased, and sang and played for them in the evening. Sometimes Mr. Yberri, another friend and visitor, was also there. Andrade therefore had the most ample opportunity of observing and knowing the relations of the parties; and he testifies that he always knew her as Miss Dickason, and not as Mrs. Blythe; that Blythe called her "Alice," or "dear Alice," or "my child," and that he heard him introduce her as "Miss Dickason, my niece." In a letter written by him to Blythe a short time before the latter's death, he speaks of the appellant as "Miss Dickason." The appellant herself, when testifying, was asked: "Did he [Blythe] ever introduce you to General Andrade as his wife?" and answered, "Mr. Andrade thought I was his niece." The witness Jeffers was also an old and intimate acquaintance of the deceased "in business and social affairs." He first met appellant at lunch at No. 6 O'Farrell. He said she "was addressed as Miss Dickason, and that is the name I have since known her by." He says that in July or August, 1882, he went to see Blythe when the latter was sick, at said No. 6. When he first entered the room the appellant was there, but shortly afterwards went out. The witness testified that: "Then I said to Mr. Blythe, 'Do you intend to marry Alice?' He said, 'No, but I shall make her my legal niece.'" Appellant admitted that Jeffers always called her Miss Dickason or Alice. Mr. Yberri was a visitor at the house. Appellant testified that he stopped there at one time for a couple of weeks, taking his dinner and lunch there, and she being at the table. But Yberri thought she was Miss Dickason. As late as February, 1883, he wrote to the deceased as follows: "I beg you to give my respects to Miss Dickason. I am very much obliged to her kindness, notwithstanding I have been informed what poor idea she has of my heart." George S. Irish, who had business connections with the deceased, visited the house a number of times in 1881 and 1882. He knew appellant as Miss Dickason. He took her once to the theater. Appellant admitted going to the theater with him, and testified that "Mr. Irish thought I was his [Blythe's] niece." In a letter of October 26, 1882, Irish says: "Kindly thank Miss Dickason for writing, and tell her," etc. George Eggleton visited a number of times both at No. 6 O'Farrell and 27 Geary, and took lunch and dinner there. He testified that Blythe introduced him to appellant, saying: "Mr. Eggleton, Alice, my niece." L. H. Varney was Blythe's business agent at San Francisco, and had been for many years before and down to his death, and was on a social standing with both the parties. He was at the house very often, at least two or three times a week, looking after repairs, suplies, etc. He had the greatest opportunity of knowing the relations existing between Blythe and appellant. He testified that: "From 1879 up to the middle of June, 1882, I always knew her as Miss Alice Edith Dickason, and as Mrs. A. P. Vilette in May, 1878. From 1879 up to the middle of June, 1882, I knew her as Miss Dickason; from that time until the death of Mr. Blythe I knew her as Cousin Alice or Miss Dickason. Never knew her during that time by any other name." He testified that in May or June, 1882, appellant requested him to take a walk with her; that they went into a store in which rugs, skins, etc., were kept; that she told him Blythe was going to build a house in Mexico, in which he wanted such things instead of carpets; and that Mr. Blythe was going to adopt her as his niece. He further testified that a day or two after Blythe's death he saw appellant, when the following occurred: "She came to my room on Market street, and said: 'I am Mrs. Blythe.' I said: 'Alice, since when have you been Mrs. Blythe? This is the first time I ever heard you called Mrs. Blythe.' She said: 'You know how I have been living with Mr. Blythe, and I expect you to help me prove my claim.' And I told her I knew nothing about it." Jerome Deasy, a private detective, testified that he was employed by Blythe as a bodyguard for three years; that he once asked Blythe why he discharged a certain colored girl, and he said that he was going to have Miss Dickason take charge of the house; and that up to the death of Blythe he knew the appellant as Miss Dickason. The persons named above are about the only ones who had opportunities of observing the parties closely, and intimately knowing their relations. No person having such opportunities has known the appellant as Mrs. Blythe.

A few more facts and circumstances may be here stated. On January 1, 1883, appellant wrote a note to the witness Varney, asking him to call and have a glass of eggnog, and signed it "Cordially, yours, A. Dickason." A large number of letters were introduced in evidence, written by appellant to Blythe,—mostly when he was in Mexico,—in which she addressed him as "Dear Uncle," and signed herself "Your Niece" or "Devotedly, your Niece." No letter was produced from him to her. She kept an artist's studio, on which was always the name "Miss Dickason," and went to an art school under that name. She had no calling cards with the name "Mrs. Blythe." In 1881 there was issued to her a certificate of mining stock which she indorsed "Alice Dickason." In addition to the occasions above mentioned, she was at other times introduced by Blythe as "Miss Dickason, my niece," "My housekeeper," etc., without protest by her. On the day of Blythe's death, the witness McDonald called at the house to offer his services, and saw the appellant. He asked to whom he was speaking, and she replied "Alice Dickason." He took out a card to write the name, and asked her how to spell it, when she took the card and wrote on it "Dickason." As to Blythe himself, he usually referred to her as "Miss Dickason," "My niece, Alice," "housekeeper," or "cousin." In letters to Andrade and other friends, he always referred to her as "Miss Dickason." In 1882 and 1883 he wrote numerous letters to his daughter in England, and in them always referred to appellant as "Cousin Alice," and in the daughter's replies she was referred to as "Cousin Alice"; and in appellant's testimony she says that Mr. Blythe read her these letters. Shortly before his death he told the witness Luttrell, who had jested him about getting married, that he was too old; that no one would marry him except for his money; that he had never been married, and never would be; and that he had no one but his housekeeper. When he asked the witness Irish to take appellant to the theater, Irish asked him why he didn't go along, and he replied: "O, no; I never go out. When Miss Dickason wants to go I usually send Varney with her." On one occasion he exacted of the witness Jeffers the promise that, if he (Blythe) should die first, Jeffers would care for his daughter "and be faithful to my friend, Miss Dickason." In the summer of 1881 the witness De Grost had a conversation with him about his mode of living, and on the subject of marriage, and Blythe said that "he had met a comely young person, a Miss Dickason, whom he had taken into his service as housekeeper." Upon another occasion, in 1882, he said to the same witness that he desired to bring his daughter out from England, "but his domestic arrangements seemed to present a difficulty about bringing out the girl." The witness told him that he thought that "a moneyed consideration—a few thousand dollars—might cause a good-looking young woman to prefer her freedom, and take the chances of marrying a young man instead of keeping house for an old one. He seemed hurt, and said, impatiently, that he had thought of that, but did not want to terminate those relations abruptly, and an expedient had occurred to him of adopting her as his niece, and he said he had done so."

We think that the foregoing is sufficient to indicate the general character of the evidence for respondent—although it forms but a part of the great mass of evidence. Counsel for appellant would no doubt consider it a one-sided statement; and, to a great extent, it is so. We are not here weighing conflicting evidence and finding facts. We are merely noticing some of the evidence which supports the finding of the court; and, in view of the evidence already noticed, it is difficult to conceive how any contrary evidence could possibly do more than raise a conflict which would leave the case entirely within the province of the trial court. Appellant, no doubt, produced evidence more or less favorable to her side. She introduced a number of witnesses—mostly tradespeople who had dealt with appellant or delivered packages at the house—who thought she was Mrs. Blythe. But other witnesses of the same character—that is, merchants and mechanics who furnished goods or labor—did not think that she was Mrs. Blythe. There was also some testimony of casual acquaintances that on a few occasions Blythe recognized or introduced her as his wife. What credence the court gave to this testimony we do not know; but they were matters about which witnesses might easily have been mistaken, and, at least when considered in connection with the evidence above noticed, this testimony raised but a slight conflict. Appellant explained why she wrote to Blythe as "uncle," and signed the letters as "niece," by saying that he did not want it to be known in Mexico that he was married. But why did he wish to deny his marriage in Mexico? Of this there is no plausible explanation. It was shown that Blythe, about the time he first became intimate with appellant, had some trouble with a woman named Firman, and this is set up as some excuse for secrecy; but all trouble with her was settled and ended in the fall of 1879. It was shown, also, that in the presence of the gentlemen who visited the house the conduct of appellant was proper and ladylike. Other things favorable to appellant were, no doubt, shown. But the position to be maintained by appellant is this: That the evidence so overwhelmingly preponderates to the point that appellant and deceased lived and cohabited together as man and wife that there was no substantial conflict on the point, and that the court below abused its discretion in finding otherwise. Such position is utterly untenable. The transcript contains a number of exceptions to rulings upon the admissibility of evidence and other questions of law; but they have not been much pressed in the argument. It is sufficient to say that we see no errors—if any there are—of sufficient importance to at all affect the decision of the case. Neither do we see any ground for a new trial on the score of newly-discovered evidence.

Under the foregoing views we deem it unnecessary to notice the many positions taken by counsel for respondent as to the requisite proof of an unsolemnized marriage, nor to review the many authorities cited by counsel for both sides. Those views lead us clearly to the conclusion that the findings of the superior court should not be disturbed. The order appealed from is affirmed.

We concur: DE HAVEN, J.; VAN FLEET, J.; GAROUTTE, J.; FITZGERALD, J.

BEATTY, C. J., and HARRISON, J., being disqualified, did not participate in the decision herein.

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105 Cal. 271

## RANDALL v. DUFF et al. (No. 15,718.)

(Supreme Court of California. Dec. 28, 1894.)

PRACTICE ON APPEAL—MOTION TO AFFIRM.

Where, prior to a hearing of an appeal in its regular order, respondent moved to affirm the judgment upon the ground that the appeal was taken for delay, and in his notice of motion stated that in support thereof he relied upon the transcript, the points and authorities of the parties already filed, and oral argument, the motion, being in substance one to advance the cause on the calendar for hearing before its time, will be denied.

Department 1. Appeal from superior court, Humboldt county; G. W. Hunter, Judge.

Action by one Randall against one Duff and others. Judgment for defendants, and plaintiff appeals. On motion to affirm the judgment and dismiss the appeal. Denied.

S. M. Buck and W. C. Belcher, for appellant. W. L. Duff, H. S. Foote, and I. D. McKisick, for respondents.

HARRISON, J. Motion to affirm the judgment upon the ground that the appeal is without merit, and merely for delay. A motion heretofore made herein to dismiss the appeal was urged upon the same grounds as are now urged in support of the present motion, and was denied. 37 Pac. 803. In the opinion then given, reference was made to Howell v. Howell, 101 Cal. 115, 35 Pac. 443, in which it was said: "When an appeal has been regularly taken from an order of the superior court, the lack of a bill of exceptions embodying and authenticating its proceedings is not a ground for dismissing the appeal, but rather for a judgment of affirmance, if, as is usually the case, there is, in the absence of such bill of exceptions, nothing in the record upon which the action of the superior court can be properly reviewed;" and the respondent presents that case as authority for his present motion. The opinion in that case does not authorize a motion for the affirmance of a judgment immediately upon the filing of a transcript, or prior to a hearing upon the appeal in its regular order, but holds that upon such hearing a judgment of affirmance would necessarily be given. The additional ground for the motion—that, as the judgment appealed from was entered in conformity with the directions of this court on the former appeal, the present appeal is a contempt of this court—does not appear upon the face of the judgment, and cannot be determined without an examination of the record in the two cases. Whether the judgment so entered is according to the directions upon the former appeal is the real question to be determined on this appeal, and counsel on each side has filed a brief in support of his position. The respondent states in his notice of the present motion that on the hearing of said motion, and in support thereof, he will rely "upon the transcript, upon the points and authorities of the appellant and respondent now on file in said action, and upon oral argument." This is, in substance, only a motion to advance the cause for hearing prior to being reached in its order upon the calendar; and it can be readily seen that, if such procedure is permitted, the number of respondents who will urge an early hearing of their causes on account of the lack of merit in the appeal will be increased to such a degree as to practically dispense with the regular calendars of causes. If, upon the hearing, it shall be made to appear that the appeal is without merit, and has been taken merely for delay, the statute furnishes an appropriate remedy. Code Civ. Proc. § 957. The motion is denied.

We concur: GAROUTTE, J.; VAN FLEET, J.

105 Cal. 299

PERRY et al. v. QUACKENBUSH. (No. 14,-497.)

(Supreme Court of California. Dec. 31, 1894.)

FINDINGS OF FACT — EFFECT OF DISCREPANCIES— BUILDING CONTRACT — BREACH BY CONTRACTOR —DEFECTIVE WORK—CANCELLATION OF NOTE.

1. The finding by the trial court of the ultimate fact controls its findings as to the probative facts.

2. In an action to cancel a note and mortgage given for the construction of a house, the court found that the quality of material contracted for was not used; that the building was not properly constructed; that the foundation was not as large as contracted for; that second-hand brick, of poor quality, instead of good, hard brick, were used; that the piers were only a fourth part as large as called for, were of inferior brick, and were only half as many as were called for; and that second-hand and refuse lumber was used. *Held*, that there was not a substantial performance, and hence plaintiff was entitled to have the note canceled, though the court also found that there was only a difference of $350 between the value of the house as constructed and as it should have been constructed, the contract price having been $3,000.

3. Where the amount of costs claimed is less than $300, an order made, after final judgment, striking out the cost bill, is not appealable.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; John F. Finn, Judge.

Action by Edward H. Perry and another against Thomas M. Quackenbush to cancel a note and mortgage. From a judgment merely adjudging that a certain amount be deducted from the note, plaintiffs appeal. Modified.

Sullivan & Sullivan, for appellants. E. J. Pringle, for respondent.

TEMPLE, C. This is an appeal from the judgment, and upon the judgment roll. The complaint shows: That plaintiffs own a described tract of land. That on the 21st of January, 1887, they entered into a contract with the defendant, whereby defendant agreed, in consideration of the sum of $3,000, to construct and build a house on said lot. As part of said contract, plaintiffs executed and delivered to defendant their promissory note for the sum of $3,000, and a mortgage to secure the same on the described real estate. The note and mortgage are recited at length in the complaint. Thereupon, the defendant commenced the construction of the house, but in building the same did not furnish the quantity and quality of materials provided for in the contract. That he did not construct said building in a good and workmanlike manner, and did not construct the building according to the contract, and has not performed his agreement. Plaintiffs specify as defects: He agreed, in the construction of the foundations, to use good, hard brick, and lay seven courses, and to construct twelve piers of brick, laid in six courses. In violation of the agreement, he used old, second-hand brick, of poor quality, that had been used in other buildings, and laid the same in courses in five and six, instead of seven, and constructed only six piers, of brick of the same kind, laid in three courses. (2) He agreed to use in the construction of the frame of said building the best kind of lumber. Contrary to his agreement, he used only second-class lumber, and second-hand and refuse lumber that had been used in other buildings. (3) He agreed to use in the construction of the roof the best quality of shingles. Contrary to his agreement, he used second-hand lumber and second-class shingles. (4) He agreed to paint the building with two coats of metallic paint, but used no metallic paint at all, but cheap and inferior paint. (5) In divers other respects, he disregarded and failed to carry out the agreement. That there is $1,000 difference in the value of the house as constructed and as called for under the agreement.

The answer denies all the allegations of the complaint in respect to the failure to perform the contract, and avers that the building was accepted by plaintiffs after a careful examination.

The action was brought to have the note canceled. Upon the issues made by the pleading, the court found that the construction of the building was completed before the commencement of this action; that, in constructing said building, defendant did not furnish the quantity and quality of materials provided for in said contract; that defendant did not construct said building in a good and workmanlike manner; that defendant did not perform said contract, nor construct said building according to said agreement. There are then findings specifying defects as in the complaint, and finding all in favor of plaintiffs as alleged, except that, as to the roof, it finds that the shingles were of the quality agreed upon, and, as to the painting, that defendant did not agree to use metallic paint, but in painting the building he used cheap and inferior material, contrary to his agreement. After these specific findings is the following finding: "That, in divers other respects, defendant disregarded his said specifications, and failed to carry out his agreement." It was then found that "there is $350 difference in value of said building, as actually constructed, and as it should have been constructed under said agreement, pursuant to said specifications." It was found that the note and mortgage, if left outstanding, may cause serious injury to plaintiffs; that the building was never accepted or received by the plaintiffs in full or part satisfaction of the contract, but plaintiffs took possession of the building under protest, and with notice to defendant that they were dissatisfied with it, and would not accept it, and offered "to deliver up to defendant said building, if defendant would cancel said note and mortgage." As conclusion of law from these facts, the court found that plaintiffs were entitled to judgment; that $350 be deducted from the amount secured by the note and mortgage; and that, as to the residue, the note and mortgage were adjudged valid. A judgment was entered in accordance with the conclusion of law. From this judgment, plaintiffs have appealed, claiming that it is not supported by the findings of fact.

This contention must be sustained. The issues were whether the building had been constructed according to contract, and, if it had not been so constructed, whether it had been accepted by the plaintiffs as performed. On both these issues the court found for the plaintiffs. Respondent contends that what he calls the "old rule" upon the subject of performance has been relaxed, and now a more liberal rule, which only requires a substantial performance, instead of a literal compliance with all the provisions of the contract, prevails. But, conceding this, the rule still is that the contract must be substantially performed. The court here did not find that what was done, though not a literal compliance, amounted to substantial performance, or that the failure was only in trivial matters. Upon every material issue the facts are found for the plaintiffs, and unless their complaint was demurrable, which is not claimed, they are entitled to the judgment demanded.

Respondents' counsel claims that the ultimate fact found, of nonperformance, is a conclusion from the probative facts found, and that the finding of probative facts, being more specific, must control. This point cannot be maintained for several reasons:

1. Findings of probative facts will not, in general, control, limit, or modify the finding of the ultimate fact. The province of the trial court is to find the ultimate facts, and not probative facts. If, from a consideration of the probative facts, this court should determine that they did not justify the finding of the ultimate fact, it would determine that the evidence was insufficient to justify the decision. This, it has been repeatedly held, cannot be done in this mode. In Smith v. Acker, 52 Cal. 217, the court said: "It has been held that where facts are found, from which the existence of the ultimate fact must be conclusively inferred, the finding is sufficient as a finding of the ultimate fact. But, when the ultimate fact is found, no finding of probative facts, which may tend to establish that the ultimate fact was found against the evidence, can overcome the principal finding." And it is said, "This point could only have been made on motion for a new trial, or on appeal on a statement or bill of exceptions specifically pointing out the deficiencies in the evidence." In other words, the opposing party must be allowed to show what the evidence was, and is not concluded by the finding of probative facts. This decision was expressly affirmed by this court in Gill v. Driver, 90 Cal. 72, 27 Pac. 64. See, also, Pico v. Cuyas, 47 Cal. 174; Barrante v. Garratt, 50 Cal. 112; Jones v. Clark, 42 Cal. 180; Mathews v. Kinsell, 41 Cal. 512; Downing v. Graves, 55 Cal. 544.

2. The probative facts found are not inconsistent with the ultimate fact found. On the contrary, they tend to support it. It is found, for instance, that defendant did not furnish the quantity or quality of materials called for, and did not construct the building in a good and workmanlike manner; that the foundation was not as large as contracted for, and, instead of good, hard brick, he used old, second-hand brick, of poor quality. The piers were only one-fourth part as large as called for, and of inferior, old brick, and only half as many of them. There was no first-class lumber in the framework, and some of it was old, refuse lumber from other buildings. The paint used was inferior to that called for in the agreement. And then, to prevent the conclusion that the ultimate fact of nonperformance was a deduction from the specific facts stated, it is added that in divers other respects the contract had not been performed.

3. If there were no other findings save the specific findings, I think it a case where the ultimate fact that the contract has not been substantially performed would be necessarily inferred. The findings may be, in fact, unjust to defendant, but we cannot go behind them. If true, they show an intentional departure from the contract,—in fact, an attempted fraud. Under such circumstances, the court would not have been justified in finding that there had been a substantial performance.

Nor does the finding that the difference between the value of the house as actually constructed and as it should have been was only $350, tend to show that the contract had been substantially performed. That might have been true, though the structure were totally unlike the house contracted for. The owner has a right to have built the structure he contracted for, and not another. Even his caprices, if expressed in the contract, must be complied with, even though they would not have added to the value of the structure, or may have lessened its value. It is only when this plan has been substantially embodied in the work that the court can have an occasion to estimate the deficiencies. The authorities are very clear upon this point. There are a variety of cases to which the so-called modern equitable rule has been applied. One is where the contractor fails to complete the structure. In such case it is said, if the contractor has done or furnished anything of which the owner avails himself, such owner may be made to pay the value of it, after deducting all damages resulting from the failure of the contractor. In such case it has been sometimes said that it does not matter why the contractor failed to perform. Another case is where there is a defect which can be remedied. Here the contractor may recover the contract price, less damages caused by the failure, including costs of supplying the deficiency. Another case is where the contractor has endeavored, in good faith, to perform his contract, and has substantially performed, but there are some unimportant defects, arising through accident or inadvertence. Here, the defects not being such as defeat or materially change the design embodied in the contract, the contractor may recover, less damages occasioned by the failure. In such case there must be a substantial performance of every material covenant in the contract, and the failure must not have resulted from design or bad faith; and whether these facts exist is a matter to be determined by the jury, or the court sitting as a jury. Substantial performance must be found. The rule is laid down in Kelly v. Bradford, 33 Vt. 35. The court says: "The party must have intended, in good faith, to comply with the terms of the contract. The spirit of the contract must be faithfully observed, though the very letter of it fail. Hence, a voluntary abandonment of the agreement, or a willful departure from its stipulations, are not allowed. Still, if the contract is substantially kept, a failure in minor particulars—though plainly ascertainable, and patent to observation, if consistent with good faith, if not wanton or willful—will not prevent a recovery upon the quantum meruit." In Hayward v. Leonard, 7 Pick. 180, it is said: "When we speak of the law allowing the party to recover on a quantum meruit or quantum valebant, where there is a special contract, we mean to confine ourselves to cases in which there is an honest intention to go by the contract, and a substantive execution of it." In Elliott v. Caldwell, 43 Minn. 357, 45 N. W. 845, it is said: "The omissions and deviations were not slight and easily remedied, but substantial and remediless, except by tearing down and rebuilding the structure. Neither were they the result of mistake or oversight, but intentional, and even fraudulent. And we may remark here, in passing, that the very nature of the deviations, as in using inferior and defective material all through the building, is intrinsic evidence strongly supporting the finding that defendant acted fraudulently. No case, we think, can be found where the doctrine of substantial performance was applied to such a state of facts. To justify a recovery upon the contract, as substantially performed, the omissions or deviations must be the result of a mistake or inadvertence, and not intentional,—much less, fraudulent; and they must be slight, or susceptible of remedy, so that an allowance out of the contract price will give the other party substantially what he contracted for. They must not be substantial, and running through the whole work, so as to be remediless, and defeat the object of having the work done in a particular manner. And these are questions of fact, for the jury or trial court." In Crouch v. Gutmann, 134 N. Y. 45, 31 N. E. 271, the rule is stated in these words: "Since the rule of exact or literal performance has been relaxed, and recovery may be founded upon 'substantial performance,' that term, in its practical application to building contracts, has, perhaps necessarily, become somewhat indefinite, otherwise than that the builder must have in good faith intended to comply with the contract, and shall substantially have done so, in the sense that the defects are not pervasive, do not constitute a deviation from the general plan contemplated for the work, and are not so essential that the object of the parties in making the contract, and its purpose, cannot, without difficulty, be accomplished by remedying them." There is no necessity for multiplying citations upon this point. So far as I have extended my investigations, there is no conflict in the cases. Since the rule as to what shall constitute performance has become so indefinite, it is an important consideration, in determining whether there has been a substantial performance, that the deviations are so slight that they might have been made by one who was honestly endeavoring to comply with his contract. Good faith, however, on the part of the contractor, is not enough. The owner has a right to a structure in all essential particulars such as he has contracted for; and, to authorize a court or jury to find that there has been a substantial performance, it must be found that he has such a structure. The court cannot say that anything is immaterial which the parties have made material by their contract. One has the right to determine for himself what he deems a good foundation, or what materials he desires to be used; and, if he contracts for them, neither the contractor nor the court has the right to compel him to accept something else, which may be shown by the witnesses to be just as good, or even better. No precise rule can or ought to be laid down upon this subject; but, whenever such a case arises, courts and juries should see to it that the design of the owner shall not be defeated in any important respect. I think the judgment should be modified by giving plaintiffs a decree in accordance with the prayer of the complaint.

There is another appeal contained in the same transcript,—an appeal from an order, made after judgment, striking out plaintiffs' cost bill. The amount of the costs claimed was less than $300. This court, therefore, has no jurisdiction to hear the appeal. Fairbanks v. Lampkin (Cal.) 34 Pac. 101.

We concur: BELCHER, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is modified by giving plaintiffs a decree in accordance with the prayer of the complaint, and that the appeal from the order made after judgment, striking out plaintiffs' cost bill, be dismissed.

4 Cal. Unrep. 924

## PEOPLE v. McSWEENEY. (No. 21,112.)

(Supreme Court of California. Dec. 31, 1894.)

PROSECUTION FOR MURDER — CHARACTER OF DEFENDANT—EXAMINATION OF WITNESS.

1. Where the question as to what the witness in a murder case had heard against the defendant was not limited to a period prior to the homicide, it was properly ruled out.

2. Where a witness in a murder case on his direct examination did not testify that he knew the defendant's reputation at any time, and on cross-examination his testimony tended to show that his knowledge of such reputation prior to the homicide was insufficient to qualify him to testify regarding it, it was not error to refuse to allow him to further testify on the subject on his redirect examination.

Commissioners' decision. In bank. Appeal from superior court, San Bernardino county; Campbell, Judge.

U. B. McSweeney was convicted of murder in the first degree, and appeals from the judgment and an order denying a new trial. Affirmed.

Byron Waters and A. B. Paris, for appellant. Atty. Gen. Hart, for the People.

VANCLIEF, C. The defendant was convicted of the crime of murder in the first degree, and sentenced to imprisonment for life in the state prison, and appeals from the judgment, and from an order denying his motion for a new trial.

The only question presented for decision is whether or not the trial court erred in sustaining the objections of the district attorney to certain questions asked John McFee, a witness for defendant, on his re-examination by defendant's attorney. The record does not show what questions were asked by defendant's attorney on the direct examination, but shows that the witness testified that he was acquainted with the defendant; that he had known defendant for the last four or five years at Holcomb Valley, in San Bernardino county, where the homicide occurred; and that defendant's "general reputation during the past four years, in the vicinity where he has resided, for peace and quietude, has been fair." Upon cross-examination as to his means of knowledge of defendant's character, he said he had not resided at Holcomb Valley prior to the homicide, but resided six or seven miles from there, and went up there only occasionally, and was "somewhat acquainted with the reputation of McSweeney in Holcomb Valley," but that he did not remember whether he had heard defendant's "reputation for peace and quietude discussed in Holcomb Valley at all prior to the shooting." He further said: "I think I have talked about it,—about some of his actions, and that sort of thing." The following re-examination of this witness by defendant's attorney shows the action of the court assigned as error: "Mr. Paris: Q. State whether or not you have heard of his being in any difficulties there, or of a turbulent nature. Have you ever heard anything against him as a man of peace and quiet? Mr. Oster: We object to the question as irrelevant, immaterial, and incompetent. The Court: Sustained. (Defendant then and there duly excepts.) Q. State whether or not you have ever heard, in the neighborhood where you and McSweeney resided for four years, anything against the general peace and quietude of this man McSweeney's character. Mr. Oster: We object to the question as incompetent. The Court: You can answer the question 'Yes' or 'No,' if you can,—just whether or not you have heard it. A. Well, yes; I have heard about it somewhat. Q. Well, what have you heard? Mr. Oster: We object to the question on the ground that it is incompetent. The Court: Sustained. (To which ruling the defendant then and there duly excepts.) Q. Have you, in that neighborhood, for the last four years, in which you and McSweeney have resided, have you ever heard anything against the peace and quiet of that man's character? Mr. Oster: We object to the question as incompetent, on the ground that no proper foundation has been laid for it. The Court: Objection sustained. (To which ruling the defendant then and there duly excepts.)" Inasmuch as the witness was permitted to answer, and did answer affirmatively, the twice-repeated question as to whether he had heard anything said against the character of the defendant, the defendant could not have been injured by the temporary rulings against that question, even if they were erroneous, which, however, is not conceded.

The only remaining question is whether it was error to exclude an answer to the question: "Well, what have you heard?"—that is, what have you heard said against the character of the defendant? As the only answer called for by this question was what the witness had heard said against the character of the defendant, it is difficult to conceive how the defendant could have been benefited by the answer or injured by its exclusion, since the witness had already answered, in effect, that he had heard somewhat against defendant's character. But, however this may be, the question was objectionable on the ground that it was not limited to a period prior to the homicide, especially in view of the testimony of the witness on the cross-examination, in which he said he did not remember having heard defendant's reputation discussed in the community (Holcomb Valley) where he resided, prior to the homicide. People v. Fong Ching, 78 Cal. 169, 20 Pac. 396. Furthermore, since the witness did not, on his direct examination, testify that he knew the general reputation of the defendant at any time, and his testimony on cross-examination strongly tended to show that his knowledge of such reputation in the community where defendant resided prior to the homicide was not sufficient to qualify him to testify in regard to it, the court may have properly sustained the objection to his proffered further testimony on this ground. People v. Moan, 65 Cal. 534, 4 Pac. 545; People v. Rodrigo, 69 Cal. 601, 11 Pac. 481. I think the record fails to show any error which could have been prejudicial to the defendant, and that the judgment and order should be affirmed.

We concur: SEARLS, C.; HAYNES, C.

HARRISON, J. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

We concur: DE HAVEN, J.; VAN FLEET, J.

McFARLAND and GAROUTTE, JJ. We concur in the judgment. We think that some of the questions asked the witness McFee which were ruled out should have been allowed, but think that, taking the examination of that witness as a whole, appellant was not prejudiced thereby.

105 Cal. 244

## BOLTON v. GILLERAN et al. (No. 15,397.)

(Supreme Court of California. Dec. 26, 1894.)

MUNICIPAL IMPROVEMENTS—CONTROL BY COUNCIL—DELEGATION OF POWERS—INVALID ASSESSMENT—SUIT TO SET ASIDE.

1. The exclusive power over street improvements conferred by the legislature on the legislative department of the various city governments cannot be delegated to any officer or committee, but must be exercised by that department itself as a body.

2. Under Laws 1889, p. 157, § 2, giving authority to the city council to direct street improvements, such council must direct the manner and extent of the improvement, the items of material and work, ascertain the total expense, and definitely fix the price in the contract of construction.

3. Laws 1889, p. 157, § 3, requires the city legislative body, which in San Francisco is the board of supervisors, before contracting for street improvements, to pass a resolution of intention, "describing the work" proposed, and requires "plans and specifications and careful estimates of the cost and expense" to be furnished said board. A resolution of intention passed by said board described the work as the construction of certain sewers according to plans and specifications furnished by the city engineer. One of such specifications provided that, if the soil was unfit for a foundation, planking and concrete must be used. The bid accepted, and on which the contract was made, gave different prices per lineal foot, depending on whether such materials were necessary, the price being about one-third greater in such case. The specifications did not fix the amount of sewer work requiring such material, but the matter was left to the superintendent of streets, with whom the contract was made; he thus having the power to determine the amount of tax to be levied, to the extent of one-third the cost of construction. *Held*, that an assessment levied for work done under such contract was invalid.

4. An abutting owner may sue to set aside an invalid contract for sewer construction, and the assessment levied thereunder, when there is nothing on the face of the assessment to show its invalidity, since such assessment would constitute a cloud on his title.

Department 1. Appeal from superior court, city and county of San Francisco; Charles W. Slack, Judge.

Action by Ellen Bolton against James Gilleran and others to set aside a contract for sewer construction made by defendants with the superintendent of streets for the city and county of San Francisco. Judgment for defendants, and plaintiff appeals. Reversed.

J. C. Bates, for appellant. Ash & Mathews, F. E. Spencer, C. T. Bird, and D. W. Burchard, for respondents.

HARRISON, J. The board of supervisors of the city and county of San Francisco passed a resolution of intention, June 1, 1891, to construct sewers in Fell street, and certain connecting streets, "according to plans and specifications prepared by Charles S. Tilton, city engineer." After an order for said improvement of the streets had been passed, the board of supervisors caused notice for sealed proposals to do the work to be given, and upon receiving bids therefor awarded the contract to the respondents, Conklin & Co. After the completion of their contract the superintendent of streets made an assessment therefor, which, after being recorded, was delivered to the said respondents. A portion of the expense for doing the work was assessed against certain lands of the plaintiff, and this action was brought by her to obtain a judgment declaring that the contract made with said respondents for the work be declared null and void, and that the assessment be declared not to be a lien upon any of her said property. Judgment was rendered in favor of the defendants, from which the plaintiff has appealed upon the judgment roll and a bill of exceptions. The legislature of the state has conferred upon the "legislative department of the government of any city," which in San Francisco is the board of supervisors, the exclusive authority for the improvement of its streets. This legislative department of the city has no power to delegate to any other officer or body the authority to determine upon the necessity of making such improvement, or the character or extent of any improvement which it may itself direct to be made. In the language of Mr. Dillon (Mun. Corp. § 96): "It is not competent for the council to pass an ordinance delegating or leaving to any officer or committee of the corporation the power to determine the mode, manner, or plan of the improvement." Accordingly, it has been held that no valid assessment upon property can be made under an order directing the improvement "where necessary" (Richardson v. Heydenfeldt, 46 Cal. 68); or "excepting such portions of the above-described work which have been already done in a suitable manner" (Foss v. Chicago, 56 Ill. 354); or for constructing curbs "where the same are not now in good and sound condition" (Bryan v. Chicago, 60 Ill. 507); or where in constructing a drain, certain pieces of lumber were to be set "at equidistant points of not more than four feet" (Village of Hyde Park v. Carton, 132 Ill. 103, 23 N. E. 590); or improving "such portions of the sidewalks as the city engineer may direct" (Hydes v. Joyes, 4 Bush, 464); or "in such manner as the city superintendent shall direct" (Thompson v. Schemerhorn, 6 N. Y. 92). See, also, Phelps v. Mayor, 112 N. Y. 221, 19 N. E. 408; City of Kankakee v. Potter, 119 Ill. 324, 10 N. E. 212; McCrowell v. City of Bristol, 89 Va. 652, 16 S. E. 867. The legislative body must determine, not only the character and extent of the improvement which it will delegate, but also the amount of the burden which is to be imposed therefor by the assessment upon the adjacent property to defray the expense of the improvement. This power of assessment is referable to the power of taxation, and is itself a legislative power, which must not only find express authority for its exercise, but which can be neither exercised by an executive officer, or delegated to such officer by the legislative body of the municipality. The clerical or ministerial act of apportioning the assessment upon the lands to be charged therewith may be performed by another official, but whether the assessment shall be imposed upon the lands and the amount of such assessment must be determined by the legislative body. A prominent consideration before this body, in determining whether an improvement shall be made upon a street, is the amount of its expense, and the advantage that will accrue therefrom to the property which is to be charged with that expense; and, unless it can know to a reasonable degree of certainty what the expense will be, it will be unable to exercise any intelligent discretion in determining whether the improvement should be made. Hence it becomes necessary for the legislative body to know the probable expense of the improvement before it will order it to be made, and, after the improvement has been ordered, the actual expense must be approved by this body, and fixed in the contract for doing the work, as the data upon which the assessment is to be calculated. This includes, not only the price at which the work is to be done, but also the items of the material and work which enter into its construction, so that the official who is to apportion the expense shall have no other function than to compute the amounts that have been previously approved by the legislative body.

This power, and the exercise of this discretion, in the city and county of San Francisco, has been conferred upon the board of supervisors, and must be exercised by that body, and cannot be delegated by it to the superintendent of streets. By section 2 of the street improvement act of this state (St. 1889, p. 157), the authority to direct improvements is given to the city council of any municipality, which in section 34 of the act is declared to include "any body or board which under the law is the legislative department of the government of any city"; and section 3 requires, as the initiatory or jurisdictional step, that the board of supervisors shall pass a resolution of intention, "describing the work" which they propose to order done; and that "before passing any resolution for the construction of said improvements, plans and specifications and careful estimates of the cost and expenses thereof shall be furnished to said city council, if required by it, by the city engineer of said city, and for the work of constructing sewers specifications shall always be furnished by him." Section 5 provides that, before awarding any contract, a notice, with "specifications," shall be given, inviting proposals for doing the work ordered; and the city council is authorized to reject all proposals, if it deem it for the public good, and can award a contract only to the lowest responsible bidder. This contract is to be entered into by the superintendent of streets with the bidder to whom it has been awarded, and after its completion the superintendent is to apportion the expense of the work, as fixed by the contract, upon the lands liable to be assessed therefor.

The proceedings in the present case show a wide departure from these provisions. The work which was "described" in the resolution of intention was the construction of sewers upon certain designated streets, "of the materials and dimensions hereinafter described," and "according to plans and specifications prepared by C. S. Tilton, city engineer." One of these specifications was in the following terms: "If the soil be of improper nature for a foundation, it shall be removed to a sufficient depth, and two tiers of three-inch planks be laid, one tier transversely and the other tier longitudinally, to be securely spiked with six-inch cut spikes where the foundation is not sufficiently secure, and upon these planks will rest a bed of concrete, which must be laid to conform to the invert, and to be to a depth below the center of the invert, as shown on plans." In the notice for proposals calling for bids these specifications were referred to, and bidders were required to estimate for the entire work, and state for how much they would construct the sewers per lineal foot "if on stable foundation," and for how much per lineal foot "if planking and concrete should be required," "correctly computing and carrying out the aggregate amount for the entire work." Under this notice Conklin & Co. presented a bid in which they offered to take the entire work at the following prices: "Per lineal foot, for the five-foot circular brick sewer, if on stable foundation, $9.83; per lineal foot, for the five-foot circular brick sewer, if planking and concrete should be required, $12.78; per lineal foot, for the 4x5-foot elliptical-shaped brick sewer, if on stable foundation, $850; per lineal foot, for the 4x5-foot elliptical-shaped brick sewer, if planking and concrete should be required, $11.45; per lineal foot, for the 3x5-foot egg-shaped brick sewer, if on stable foundation, $7.20; per lineal foot, for the 3x5-foot egg-shaped brick sewer, if planking and concrete should be required, $10.24"; and the contract therefor was awarded to them at those prices, and was afterwards entered into between them and the superintendent of streets.

A mere glance at these proceedings shows that the amount of tax which is to be imposed upon the lands for the expense of the improvement was not determined by the supervisors in their award of the contract, but that they gave to the superintendent of streets the discretion to determine that amount to the extent of fully one-third thereof. For the 5-foot circular sewer which was to be constructed for $9.83 per lineal foot, the superintendent was allowed to add $2.95 for each foot, according as he should determine whether the foundation was stable or whether there should be a foundation of plank and concrete; and he was given the same discretion to determine whether the cost of the 4x5-foot elliptical brick sewer should be $8.50 or $10.45, while the cost of the 3x5 egg-shaped sewer could be increased by him from $7.20 to $10.24, an increase of nearly 50 per cent. This discretion was not controlled by any fixed rules, but its exercise was intrusted solely to his own judgment or volition. The specifications gave no indication of the amount of "stable foundation" on which the sewers were to be laid, or what character of ground should be regarded as "stable foundation," or the extent of the ground for which "planking and concrete" would be required. These matters were to be determined by the superintendent of streets alone, nor were the conditions for his determination fixed. What constituted an "improper" nature for a foundation, or what would be a "sufficient depth" to which it was to be removed, or the place in which the foundation was not "sufficiently secure," were elements of uncertainty, which prevented any previous determination of the cost. It is not sufficient to say that the character of the ground in which the sewers were to be constructed was not known to the board of supervisors. It was their duty to cause its character to be examined before ordering the improvement, and not to leave the character of the improvement to depend upon the subsequent examination by some other officer. The statute requires that, before they shall pass any resolution for the construction of the improvements, they shall cause "careful estimates of the costs and expenses therof" to be furnished them by the city engineer. This necessarily includes an examination of the character of the ground in which the sewer is to be constructed, and is to be a guide for their deliberation. It might be that upon such an examination, and in view of the extraordinary expense that would result therefrom, they would deem it best not to order the improvement, or would cause the construction of a different kind of sewer, or would enlarge the district upon which the expense should be laid. In any event, they were not justified in divesting themselves of the responsibility that the statute has imposed upon them. A contract in terms like the present gives to the superintendent of streets the opportunity to make the cost of the improvement greater or less, according to his desire to favor or injure the contractor, vests him with an illegal discretion, tends to prepare the way for an unfair assessment, and opens wide the door to fraud and favoritism. If there is any profit in doing the work at the higher figure, the natural effect of such a contract is to induce the contractor to put planking and concrete upon the whole line of work, while, if it is without profit, he would be disposed to consider the entire foundation stable. Under such a notice for proposals, bidders can have no intelligent basis upon which to calculate the cost of the work, and all competition for doing the work is practically destroyed. The statute gives to the owners of the land to be assessed the right to take the contract at the price at which it was awarded to the successful bidder. This implies that the owners shall be definitely informed of the work which is to be done, and of the amount for which the assessment is to be made, in order that they may intelligently consider whether it will be to their advantage to take the contract; but if there are no data from which to determine the amount of material that will be required in doing the work, or if the cost thereof, to the extent of at least one-third, is to depend upon the volition of an officer who may or may not be friendly to them, they would naturally hesitate to place themselves in the position of depending upon his friendship or antagonism, and would thus fail to receive the advantage which the statute intended to confer upon them. We cannot better express the result of upholding such a proceeding than in the words of the supreme court of Illinois in Foss v. Chicago, 56 Ill. 358: "Every such covert, irresponsible, discretionary power as here assumed is wholly inconsistent with a proper exercise of the high and sovereign power of taxation or eminent domain. It might be used, and it does not affect the principle whether it was so used or not, as a cover to an unfair estimate or assessment. It might be used as the instrument of favoritism in letting the contracts for the work. Some of the parties might be made to understand that the portions of the work already done were not done in a suitable manner, and that it would all have to be removed, while others might be informed that if they got the contract the portions already done would be considered as done in a suitable manner, and be so much clear gain."

The right of the plaintiff to maintain the action is clearly established. The statute makes the assessment a lien upon her lands, and there is nothing upon the face of the assessment to show that the lien is not in all respects valid. If, by reason of matters outside of the assessment as it is recorded, this apparent lien may be shown not to be a valid incumbrance, the assessment constitutes a cloud upon her title which she is entitled to have removed; and, although she can assert the same matters as a defense to any action for the enforcement of the assessment, she is not required to wait until such action may be brought, and, in the meantime, suffer the injury of having the title to her lands impaired by this apparent lien, but may herself invoke the equitable aid of the court to remove the cloud, and to enjoin the holder of the assessment from asserting any claim upon her lands by virtue thereof. The judgment is reversed.

We concur: GAROUTTE, J.; VAN FLEET, J.

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105 Cal. 471

## In re PHILBROOK. (No. 21,188.)

(Supreme Court of California. Jan. 5, 1895.)

ATTORNEY — SUSPENSION FROM PRACTICE — ABUSE OF SUPREME COURT.

An attorney who, in his brief in the supreme court, without ground, characterizes an associate justice thereof as a corrupt person, and threatens that, if the supreme court decides adversely to his client, the general public will see that it is corrupt, should be suspended from practice.

In bank.

The supreme court, on its own motion, issued an order requiring Horace W. Philbrook to show cause why he should not be removed from his office as attorney and counselor at law. Ordered that he be suspended for three years, and thereafter until the further order of the court removing the suspension.

R. Y. Hayne, for prosecution. Horace W. Philbrook, in pro. per.

PER CURIAM. Horace W. Philbrook, a licensed attorney, having filed in this court a certain brief in which he appeared to have violated his duty as an attorney, was cited to appear before the court on the 17th day of December, A. D. 1894, at 10 o'clock a. m., to show cause why he should not be removed from his office as an attorney at law, and debarred from further practicing law before the courts of this state. The citation was served on him 10 days previous to said December 17th. On said day he appeared, and, as he did not ask any continuance, but announced himself ready, the matter was proceeded with. A committee from the bar association of San Francisco requested to be allowed to appear "for the purpose of seeing that said matter is properly presented," and their request was granted. The respondent, Philbrook, filed a written answer to the citation, and he was allowed to make an oral argument in his own defense without restriction of time, his argument occupying the greater part of two days. The committee of the bar association argued that he should be disbarred. In the citation attention was called to certain pages of the brief which contained the objectionable matter, and a part of it was quoted. The respondent did not offer any apology or make any excuse; but in his written answer, and in his oral argument, he boldly contended that his brief was unobjectionable, and contained nothing which he had not the right to put there. His argument was, for the most part, a reiteration of the assertions and language of the brief.

The brief in question was filed by said Philbrook as attorney for the appellant in a certain action now pending here on appeal (No. 15,857), entitled: "Rankin, Special Administrator of the Estate of John Levinson, Deceased, Plaintiff and Appellant, vs. Wm. J. Newman and Benjamin Newman, Defendants and Respondents." Levinson, deceased, had, in his lifetime, been a copartner with the said Newmans, under the firm name of Newman & Levinson; and said action grew out of a difference about the settlement of the business and affairs of the partnership, and was decided by the trial court in favor of the Newmans. A motion for a new trial had been made by Philbrook's client in the trial court, and had been there denied; and the appeal was taken from the order denying the motion for a new trial. This appeal has not yet been argued or submitted in this court, and its merits are not before us, although the transcript in the case and also the transcripts in two other appeals between the same parties, in which the Newmans were also successful in the trial court, are made parts of the said Philbrook's answer in this present proceeding.

The objectionable parts of the said brief for which respondent, Philbrook, was cited as aforesaid, consist mainly (1) of offensive, scandalous, and contemptuous language concerning Hon. Ralph C. Harrison, one of the justices of this court; and (2) of language contemptuous of all the other justices of the court, in that it broadly intimates that they may be improperly influenced in deciding said appeal, and boldly threatens them with evil consequences to themselves if they should decide the appeal adversely to the appellant. It also contains language highly reprehensible concerning the learned judge of the superior court who heard and determined the said action at nisi prius; and his answer contains such language concerning another learned judge of the superior court, who decided the other cases mentioned in said Philbrook's answer.

During the year A. D. 1890, the Honorable Ralph C. Harrison, now a justice of this court, was, and for many years prior thereto had been, a practicing lawyer at the San Francisco bar; and during nearly all of that year he was the attorney of one Raveley, executor of said John Levinson, deceased, above mentioned. On the 6th day of September of that year (1890) a settlement was made by and between the said executor, Raveley, and the surviving partners, the said Newmans, at which two certain paper writings were executed, which were in the handwriting of Justice Harrison, and signed by him as a witness. There were articles of copartnership of the said firm of Newman & Levinson, existing and in force at the time of the death of Levinson, which provided, or at least purported to provide, for the disposition of the interest in the firm property and business of either partner upon his death. At that time, and prior thereto, the respondent here, Philbrook, was the attorney for certain legatees of said Levinson; and it appears that Philbrook thought that the estate was entitled to a share of the "good will" of the said firm, while Justice Harrison was of the opinion that, under the said articles of copartnership, the estate of Levinson had no interest in the good will, but was entitled only to its share of the partnership property, to be ascertained as provided in said articles. It is clear that this was the only point of difference existing at the time of said settlement. It was a pure question of law, as to which it was the duty of Justice Harrison to advise his client (the executor) according to his best judgment. But it happened that, a few weeks before the said 6th of September, Justice Harrison had been nominated by one of the two leading and nearly equally powerful political parties of the state as a candidate for the office of associate justice of the supreme court; and upon this circumstance respondent, Philbrook, has built up in his imagination a gigantic conspiracy which, he contends, gives him the right, under the claim of free argument, to assail Justice Harrison while a member of this court by every offensive epithet which his somewhat wide vocabulary supplies, and to ascribe to him the vilest motives and conduct. He assumes and asserts that Justice Harrison, his client Raveley, the Newmans, and their attorneys, Reinstein & Eisner, entered into a conspiracy to do a wrong, which conspiracy was founded upon the considerations that the former had been nominated as a candidate for justice of this court; that he was practically sure of election; and that, if he should draw up said paper writings and witness them, any superior judge before whom any litigation concerning the matter might come would be deterred from doing right by the knowledge that one of the conspirators was a justice of the supreme court, and that upon appeal the other justices of this court would be swerved from their duty because one of the alleged conspirators would be associated with them on the bench. And it is contended that on account of this imaginary state of facts, founded on no evidence, and without any probable cause, respondent had free rein to indulge in whatever insulting and contemptuous language his fancy might conjure up concerning a justice of this court.

It is impracticable to here reproduce any considerable amount of the language used in the brief; but a few specimens will be quoted. Having characterized Justice Harrison as one of the chief conspirators, he denounces what he calls the "secret transaction of September 6th" as "this most impudent and unspeakably wicked scheme." Having said, "There they all were, Ralph C. Harrison, Milton S. Eisner, Wm. J. Newman, Benjamin Newman, and Executor Raveley, secretly assembled, solely by reason of the fact that Ralph C. Harrison was about to become a justice of the supreme court," etc., he asks: "Could a more villainous deed than that be conceived?" He speaks of Justice Harrison and the others as "corrupt, depraved, and wicked persons," and of the former as "particeps criminis." And again he says: "It was done criminally; and it was necessary to the scheme that Ralph C. Harrison should become a justice of the supreme court." Again, he says that "every man present at that secret transaction of Saturday, September 6, 1890, knew what they were all about; knew that he was a participant in one of the foulest and blackest of crimes; that he was helping plant a dagger for the breast of justice." Again, speaking of that transaction, he asks: "Can it be that we shall find in it a clew to the secret of supreme success, the very crown of success, in the practice of the law?" And, again: "Why expect men to wear themselves out with the intemperate study of law books, as they have hitherto been written, when there is open the easier, surer, and more profitable field of low cunning by which helpless women and fatherless children may be betrayed, robbed, and made outlaws by one single stroke?" Again, he asks how far matters have gone "when so vile a scheme is contrived to pervert the courts, when it raises its head openly, plants its vile body openly in the very temple of justice, wears no other disguise than unblushing audacity and brazen impudence." The foregoing quotations give a fair idea of the character of the brief, and of the temper and animus which inspired it; and in all that respondent has presented, in his answer, in his argument, and in the several transcripts which he made parts of his answer, he has been unable to show any ground—any decent pretext—for the outrageous verbal assaults which he has made upon a member of this court. Nothing appears in connection with the transaction so often alluded to in the brief which places Justice Harrison in any other light than that of an upright and honorable lawyer, faithfully attending to the interests of his client, and advising him according to his best judgment. He also gave some testimony at the trial; but section 282, Code Civ. Proc., enjoins upon an attorney "to abstain from all offensive personality, and to advance no fact prejudicial to the honor or reputation of a party or witness unless required by the justice of the cause with which he is charged." The parts of the brief to which we have alluded are therefore contemptuous and unbearable, and entirely unwarranted under any claim of free speech. We appreciate the right of counsel to fully argue their cases, to comment on witnesses, whoever they may be, and to present views and press arguments within any reasonable bounds of propriety. There need be no difficulty in this court on that subject. It would be hard, no doubt, to designate a line that would in all cases properly divide free speech from license. But there is no trouble in the case at bar on that score, for the conduct of the respondent is, beyond doubt, entirely on the side of unbridled license. Of course, the fact that an attorney has been elected a justice of this court does not shield him from any fair criticism of his conduct when an attorney; but, when there is such unwarrantable language as that used by respondent, it is manifest that it was used because the person assailed is a justice of this court, and with intent to commit a contempt of this court. As respondent has, in the same connection, assailed, not only all the members of this court and the two superior judges above referred to, but also certain reputable lawyers, who were at one time associated with him in the litigation, and a special administrator, who was appointed at his own instance and out of his own office, charity might possibly suggest that he is the victim of abnormal suspicion and distrust. But no such defense is made; and, moreover, his brief and argument show a bright intellect and a clear mind. His conduct, therefore, exhibits only a sheer intent to be maliciously contemptuous.

With respect to the other members of the court, the language of the brief is not only generally contemptuous, but contains a direct attempt to influence them by threats of injury unless they shall adopt his views of the case. He says in his brief: "And let this be borne in mind by every justice who takes part in the decision: You were not, any more than I, either directly or indirectly a party to the secret transaction of September 6, 1890; 'and we that have free souls, it touches us not.' It will never be in any, even the slightest, degree, your act, your child, nor will you even in the slightest degree be responsible for it, unless you adopt it as your own. Though it is a lure, prepared to be held out to you as a lure, it touches you not unless you accept it." And again, having said that it is not enough for courts to be pure, but that there must be "the fullest confidence in their purity," he says: "But if this recent transaction of September 6, 1890, is not declared illegal and void, upon the rules and principles declared in Egerton v. Earl Brownlow,[1] then all to whom knowledge of the case may come will no longer merely suspect or even think that the courts may be corrupted; they will know it; they may point to the decision here as full proof of it; for it will be established that such practices are permissible, and, if permissible, they are sure to have their effect." This is a palpable attempt to influence a decision of this court by base appeals to the supposed timidity of its justices, and made, too, by an officer of the court. It is intolerable. It cannot be suffered by any occupant of the bench who has a just sense of his duty to the people to preserve the due dignity of their courts and the free course of justice. An attempt to influence a judge through fear of physical injury is no graver offense than such an attempt against his reputation. A high-spirited man might have perfect physical courage, and yet might possibly, despite all his efforts against it, be, to some extent, insensibly affected by dread of the loss of his reputation and good name. Neither attempt can be for a moment countenanced without a manifest injury to the cause of justice. When people come into courts as litigants, they have the right to expect the best judgments of their judges, uninfluenced except by legitimate arguments made openly before them by counsel. They must expect those errors which will sometimes inevitably be committed by minds which are not infallible; but they should be able to feel sure that the impartiality of the court will not be disturbed by any influence of fear or favor. And clearly nothing tends more to disturb that impartiality than a menace that the decision of a cause a certain way will destroy or greatly injure the good name of the judge who shall make it. And when the punishment of such an offense is clearly within the jurisdiction of the court, as in the case of one of its own officers, it must impose the penalty or neglect its imperative duty.

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[1] 4 H. L. Cas. 1.

We exceedingly regret the necessity of this proceeding. It would have been much more agreeable for us to have devoted the time given to its hearing to other business. But to have overlooked it would have been to violate our duty, invite future disrespect and indignities, and establish a precedent which would have embarrassed the court if offenses of a similar character should be called to its attention in the future. It may be not out of place to say that we have been lenient to the respondent for past offenses of a character similar to the one now before us, though not so flagrant; and that his attention has heretofore been directly called to his disregard of his duties as an attorney in this respect. In a petition for rehearing, he used disrespectful language towards a commissioner of the court who had prepared the opinion in the case, for which, perhaps, he should have been called to account at the time; and more recently we were compelled to strike out his brief in another case for disrespectful language; and even now we regret that we cannot see some escape from the necessity of imposing the penalty which seems to be imperatively demanded.

Our conclusion is that by filing said brief the respondent, Philbrook, has violated his duty as an attorney "to maintain the respect due to the courts of justice and judicial officers," and "to abstain from offensive personality, and to advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which he is charged," as declared in section 282 of the Code of Civil Procedure; and that for such reason he should be suspended from his office of attorney at law.

It is ordered and adjudged that the said respondent, Horace W. Philbrook, be, and he hereby is, suspended from his office as attorney and counselor at law, and prohibited from practicing as an attorney and counselor at law in any and all of the courts of this state, for the period of three years from this date, and thereafter until the further order of this court removing such suspension.

(Jan. 10, 1895.)

BEATTY, C. J. (concurring). My views of this case differ in some particulars from those of my associates. It was not because of Mr. Philbrook's assault upon a member of this court—gross and unjustifiable as I deemed it to be—that I joined in the order citing him to show cause. So far as that part of his offense was concerned, I should have waited until the final determination of the appeal in Rankin vs. Newman before deciding what, if any, action it was necessary or proper to take. But, as is clearly shown in the opinion of the court, Mr. Philbrook did not confine himself to an assault upon Justice Harrison in his character of attorney for Levinson's executor, and as advisor and participant in the settlement of the executor with the surviving partners. He went much further. He distinctly threatened the other members of the court with public infamy and disgrace if they did not decide the cause of Rankin vs. Newman in his favor. This he did, not only in the express terms of that part of his brief set forth in the citation, but indirectly, and by every sort of implication, through page after page of that portion of his brief to which his attention was directed by the reference to the said pages. In his long and carefully prepared answer in writing Mr. Philbrook makes no retraction or qualification of this objectionable language, but, on the contrary, distinctly reavows everything he has said. He claims—and I fully concede the claim—that if a justice of this court has been a party, or attorney, or witness, or in any other manner so connected with a cause which is on appeal here as justly to subject him to criticism, counsel charged with the presentation of such cause must be allowed the same freedom of criticism as in the case of any other person. But the logic of this proposition is that the fact that such party or witness is a member of this court is wholly irrelevant; it has nothing to do with the case. Mr. Philbrook, however, does not hold himself bound by the logic of his proposition. He does not criticise Justice Harrison's conduct as attorney for Levinson's executor the same as if he were not a member of this court, but apparently because he is a member of the court he assails him with the bitterest invective, for the purpose of giving point and force to the proposition to which his whole argument tends,—that we cannot affirm the order of the superior court without making ourselves participants of the fraud which he charges, and thereby giving all men reason to know that the courts of the country are corrupt. In this consists the offense of which, in my opinion, the court was compelled to take cognizance on its own motion, —a step to which, I may say, we resorted with great reluctance. The law which in such cases makes us the judges of offenses against the court places us in an extremely delicate and invidious position, but it leaves us no alternative except to allow the court and the people of the state, in whose name and by whose authority it acts, to be insulted with impunity, or to exercise the authority conferred by law for the purpose of compelling attorneys to "maintain the respect due to courts and justice and judicial officers."

If an attorney were to approach a court or judge with the offer of a bribe to decide a cause in his favor, or if he were to menace a judge with personal violence or pecuniary loss if he decided against him, it cannot be doubted that all men would concede the propriety of depriving him of his privileges as an attorney; and, if this is so, it cannot be denied that some penalty is incurred by an attorney who reinforces his argument by announcing to the court with endless repetition that an adverse decision will make the judges participants of a fraud, and sharers in the infamy of its perpetrators. It is not necessary, however, to elaborate this proposition here. It is plainly enough set forth in the opinion of the court, and does not even need exposition, for it must be obvious to the meanest apprehension that threats or menaces of any character addressed to a court as a part of, or in aid of, the argument upon the law and facts of a case, is an obstruction to the free and unbiased consideration which every cause should receive, and that, if such means of influencing the action of the court should become common, as they might if allowed to pass unrebuked, no rights would remain secure. Mr. Philbrook himself, by his tardy disclaimer, made in the course of his oral argument, seems to admit the justice of these views. But, as above stated, he makes no disclaimer or retraction in his written answer to the citation, which remains a public record of the court. On the contrary, he therein deliberately reaffirms and insists upon the propriety of every word contained in his brief. He claims, of course, never to have understood, until his attention was called to it by a brother attorney during a recess of the court taken just before the close of his argument, that he was charged with having menaced the judges with any disagreeable consequences to themselves in case of an adverse decision. He asks us to believe that, with one of the most offensive passages of his brief set before his eyes in the terms of the citation; and with 10 days for the careful reconsideration, which he says in his answer he has given to the matter, he never saw what is patent to the observation of every one else. It is difficult to credit Mr. Philbrook with such simplicity of understanding, but it may be true that he has become so blinded by his animosity against Justice Harrison, and so dominated by the belief that the "secret transaction of September 6, 1890," as he terms it, was a gross and wicked fraud, that he has lost the capacity of regarding any other aspect of the case. Indeed, his conduct during the hearing of the citation would seem to indicate that this is so, for, after devoting the greater part of two days to a vindication and renewal of his assault upon Justice Harrison, he interrupted the course of his argument for a few moments to inform the court that during the recess a brother attorney, in whom he had confidence, had informed him that to some minds the language of his brief might convey the idea of a threat. He, however, professed not to see it, even after his attention had been so directed to the matter, but offered, if the court differed with him, to cancel the offensive passages in the briefs on file, and in those which he had distributed among his friends. In my opinion, this retraction was wholly insufficient. Mr. Philbrook had not only been informed by a brother attorney of the offensive construction which might be put upon his brief; but he had been notified at the opening of the proceedings, by the argument of Mr. Hayne, that such was the construction placed upon it by the committee of the bar association, and he was plainly informed from the bench that it was understood in the same way by the court. If, in spite of these plain intimations, he was still unable to see what was so clearly apparent to others, it ought to have occurred to him that he would do well to take further advice of those in whom he had confidence as to the propriety of modifying his written answer, and of introducing into that permanent record a plain and unequivocal retraction or disavowal of the intention to threaten the court. That he has never done so, nor offered to do so, leaves his offense entirely unmitigated in my eyes, and imposes upon the court the necessity of inflicting the due penalty. As to the character of the penalty, I concur in the view of the court that it should be suspension of his privileges as an attorney.

Upon the other branch of the case I should have had nothing to say if Mr. Philbrook had not, by devoting himself to that exclusively, and ignoring everything else, challenged the judgment and opinion of the court. Under the circumstances I cannot pass it over in silence without seeming to dissent from the views of my associates, and therefore I feel bound to add that, while I fully concede the right of Mr. Philbrook to attack the settlement between Levinson's executor and the Newmans, and to argue the propositions of fact and of law upon which he arraigns the conduct of Justice Harrison, I see nothing in the case to justify the conclusion that the advice given to the executor as to the construction of the partnership agreement and his duty to settle according to such construction was not entirely proper. The proposition of law for which Mr. Philbrook contends, viz. that, notwithstanding such settlement may have been entirely free from fraud, in fact it must be held fraudulent in law,—a constructive fraud,—because advised and witnessed by a gentleman who was then a candidate for the supreme bench, is one which it is open for him to argue; and since it is involved in the appeal of Rankin vs. Newman I express no opinion concerning it. It appears from Mr. Philbrook's own showing that at the time of the settlement neither he nor his clients, the mother and sisters of Levinson, were claiming, or had ever suggested, that the articles of partnership were invalid. On the contrary, they were then and afterwards asserting their validity, and claiming under them. Nor did they then claim or suggest that the inventory made in pursuance of the said articles was false or incorrect in any particular, except in the omission of the item of the "good will," the whole controversy being merely as to the proper construction of an agreement, then conceded to be valid and binding, with reference to the single question whether or not it embraced or excluded the "good will." As to this matter the difference between them was open, express, and well understood, and there is not the slightest reason to suppose that Judge Harrison's opinion was less honest or less sound than that of Mr. Philbrook. Mr. Philbrook, indeed, is not entirely consistent with himself in this matter, for, unless I have misapprehended his position, he is now claiming that the Newmans, by the exercise of undue influence, induced their dying and partially demented partner to execute an agreement which sacrificed his interest in the good will; and, if this is so, it is scarcely consistent to claim that Judge Harrison misconstrued it, or that he can be blamed for the advice given to the executor at a time when neither Mr. Philbrook nor any one else had ever suggested fraud or undue influence in the procurement of the agreement. I concur in the judgment.

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105 Cal. 327

## ADLARD v. RODGERS. (No. 19,484.)

(Supreme Court of California. Dec. 31, 1894.)

CHATTEL MORTGAGE — VALIDITY AS AGAINST ATTACHING CREDITOR—DELIVERY OF POSSESSION—ACTION AGAINST CONSTABLE—WRONGFUL LEVY.

1. As between a mortgagee, under an unacknowledged and unrecorded mortgage, and an attaching creditor of the mortgagor, the delivery to the mortgagee, by the mortgagor's assignee for creditors, of the key of the building in which the property is located, and the posting on the door of such building, by the mortgagee, of a notice that he is in possession of the property, constitute possession by the mortgagee, when the property consists of the boiler, engine, and other machinery of a steam laundry, though the mortgagee does not go into the building after the key is delivered to him.

2. It is no defense to an action by a mortgagee against a constable, to recover the possession of goods seized under an attachment against the mortgagor, that the assignee for the benefit of the mortgagor's creditors, from whom the mortgagee, who claimed under an unrecorded mortgage, obtained possession, had no right to give such possession.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; Waldo M. York, Judge.

Action by Thomas K. Adlard against Lester D. Rodgers, as constable, to recover the possession of goods seized under an attachment. Judgment was rendered for defendant, and plaintiff appeals. Reversed.

R. A. Redman and Henry P. Wilson, for appellant. Marble & Phibbs, for respondent.

SEARLS, C. This is an action for the specific recovery of certain personal property, to wit, a steam boiler, engine, washing machine, and other articles used in a steam laundry, by plaintiff, as a mortgagee under a chattel mortgage, against the defendant, who justified his seizure and taking thereof, as a constable, under a writ of attachment issued in an action against the mortgagors and their assigns. Defendant had judgment. Plaintiff prosecutes this appeal from the judgment, and from an order denying his motion for a new trial.

On the 15th day of August, 1893, John W. Musselman, Ed. M. Doyle, Charles A. Croman, and Marvin P. Elmore were copartners in conducting the laundry business in the city of Los Angeles, under the firm name of the Peerless Steam Laundry. On the day last mentioned they executed and delivered to Thomas K. Adlard, the plaintiff herein, a chattel mortgage upon the boiler, engine, washing machine, and other machines and appliances in the laundry, to secure the payment of three promissory notes of even date with the mortgage, aggregating $500 (and being given in part payment of the purchase price of said laundry), and payable at three, six, and nine months, with interest at 7 per cent. per annum. The mortgage was executed by the mortgagors in their individual names, and not in the firm name; was accompanied by an affidavit in due form by the mortgagors and mortgagee, as required by the first subdivision of section 2957 of the Civil Code; but was not acknowledged, proved, or certified as required by the second subdivision of said section or otherwise. It was recorded. The first of said notes, being for $150, fell due November 15, 1893, and was not paid. The mortgage provided that, upon failure to make any payment as in said promissory note provided, "the mortgagee may take possession of the said property, using all necessary force to do so, and may immediately proceed to sell," etc. The mortgagors continued in possession of the property until October 3, 1893, when Musselman and Elmore sold their interests therein to one R. Breese, who, to the extent of the interest by him purchased, assumed and agreed to pay the mortgage. Thereafter, Breese, Doyle, and Croman conducted the business under the firm name of the Peerless Steam Laundry until October 19, 1893, when Breese purchased the interests of Doyle and Croman in the property, and assumed the payment of the mortgage. Breese did not pay Doyle and Croman, and they remained in possession, and the business was continued as before, until November 13, 1893, when Breese, Doyle, and Croman made an assignment of the property, for the benefit of their creditors, to one J. B. Watkins, under and by virtue of the provisions of division 4, pt. 2, tit. 3, of the Civil Code of California, etc. Watkins, as assignee, entered into possession of the property. On the 11th of January, 1894, plaintiff herein, through his agent, Henry P. Wilson, demanded possession of the mortgaged property, as per the condition mentioned therein; said property being at the time in the laundry building in which business had been previously conducted. There was at the time no one upon the premises; the building being locked, and the key thereof in the possession of Watkins. The court finds that, upon demand being made, Watkins delivered the key to Wilson, who thereupon posted a notice on the building to the effect that plaintiff was in possession of the property therein contained. The court further finds as follows: "That neither said Watkins or Wilson, at the time of the delivery of said key as aforesaid, were at or near the place where said property was located, nor did they, or either of them, ever go on said premises and examine the same, nor was any one ever put in possession thereof, nor was any other possession thereof ever taken, by said Adlard or Wilson, than by said Wilson, as hereinbefore found." This finding is assailed by the appellant as not being supported by the testimony, and as being against the testimony, and is the foundation of the principal contention in the cause.

On the following day, viz. January 12, 1894, the defendant, as constable, attached the property, except the engine and boiler, in due form, in an action against the laundry firm, in favor of the Los Angeles Oil Burning & Supply Company. No question is made as to the regularity of the attachment. Plaintiff demanded possession, etc., which was refused, whereupon this action was brought.

By section 2957 of the Civil Code, "a mortgage of personal property is void as against creditors of the mortgagor and subsequent purchasers and incumbrancers of the property in good faith and for value unless" accompanied by the affidavit provided for in the same section, and acknowledged, proved, certified, and recorded in like manner as grants of real property. The mortgage here was defective, as a chattel mortgage, in not being acknowledged or proved and certified as in the section provided. It has been held that the mortgage is good between the parties and those having notice, though it does not strictly conform to the statute. Hackett v. Manlove, 14 Cal. 85; Harms v. Silva, 91 Cal. 636, 27 Pac. 1088. We shall assume that, as against the attaching creditor of the mortgagors, the mortgage was void, unless plaintiff had reduced the property to possession. This brings us to a consideration of the sufficiency of the evidence to support finding No. 11, hereinbefore quoted. The eleventh finding, coupled with those preceding it, embodies substantially the facts as stated by the witnesses, with the exception of the statement in said finding that "nor did they, or either of them, ever go on said premises and examine the same, nor was any one ever put in possession thereof." The uncontradicted evidence shows that Wilson, upon receiving the key, went to the premises, locked the door, and posted the notice as found by the court. He states that he thinks he went into the building, but of that he was not certain. We may presume that the court below found against this statement, in which event the finding that the parties did not "go on said premises and examine the same" may be supported. So, too, the expression, "nor was any one ever put in possession thereof," in view of the previous finding, was no doubt meant to indicate that no keeper or other person was left in charge of the property. This view is strengthened by what follows, viz.: "Nor was any other possession thereof ever taken, by said Adlard or Wilson, than by said Wilson, as hereinbefore found." After all is said, however, the fact remains that the findings are as to evidentiary facts, rather than as to the ultimate fact, unless, indeed, the eleventh finding is to be treated as one of an ultimate fact. If so treated, it is not warranted by the evidence. That the parties intended the acts to constitute a delivery of possession is apparent. When Wilson demanded a delivery, Watkins asked for time to consult his attorney; and upon being advised that he should make delivery he consented so to do, and delivered the key to the building to Wilson, who locked it up, and posted the notice as aforesaid. This was a sufficient delivery. Parsons says: "The delivery may be symbolical, or of a part for the whole; and a delivery of the key, the property being locked up, is so far a delivery of the goods that it will support an action of trespass against a subsequent purchaser who gets possession of them." 1 Pars. Cont. p. 531. This doctrine is elementary. The articles were—some of them, at least—ponderous articles, incapable of manual delivery, and as to such a symbolical delivery has always been regarded as sufficient. We think the finding indicated is erroneous, and not in consonance with the uncontradicted evidence in the case.

The fifth conclusion of law is erroneous. It is as follows: "That the possession of the property in said chattel mortgage described by said Watkins was in trust for the benefit of all the creditors of said assignors, and, without the assent of such creditors, he had no authority to transfer the same, or any portion thereof, either to the payment of, or as security for the payment of, the debt owing plaintiff herein, and that, therefore, the delivery of said key to said Wilson, and the subsequent action of said Wilson, did not vest the possession of said property in the plaintiff herein." The error in this conclusion is in supposing that any question arises in the case as between plaintiff and the creditors under the assignment, who were represented by Watkins, their assignee. They are not parties to this action. Defendant does not justify under them, but under the plaintiff in the attachment suit, who is apparently pursuing its remedy, not under the assignment, but in opposition to it. Plaintiff's mortgage was valid, as between himself and the mortgagors. It provided for possession by the former upon nonpayment. Default was made, and he took possession. As against attaching creditors, such possession was valid. Defendant is here justifying by virtue of an attachment sued out by a creditor, and has no rights in the matter, unless he acquired them by virtue of such attachment. See Harms v. Silva, 91 Cal., at page 640, 27 Pac. 1088. It will be time enough to vindicate the rights of the creditors under the assignment, as against the plaintiff,—if any rights they have,—when they become parties to an action involving such rights. The judgment and order appealed from should be reversed, and a new trial had.

We concur: VANCLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, and a new trial granted.

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105 Cal. 273

## HOLT v. THOMAS et al. (No. 15,585.)

(Supreme Court of California. Dec. 29, 1894.)

PAYMENT UNDER MISTAKE—RECOVERY—ASSESSMENT ON BANK STOCK.

1. One in whose name stock of an insolvent national bank stood, paid an assessment thereon under a threat by the receiver to sue therefor, though he claimed that he had sold the stock. More funds were collected than were required to pay the creditors of the bank. *Held*, that such payment could not be recovered as having been made under a mistaken belief by the payor that the whole amount would be required to pay the creditors of the bank.

2. Since, in such a case, plaintiff was prima facie liable for payment of the assessment, the avoidance of litigation with the receiver was a sufficient consideration for the payment.

3. Payment by a person prima facie liable for a debt, under a threat by the debtor to sue therefor unless it is paid, is not a payment under duress.

Department 1. Appeal from superior court, Alameda county; J. C. B. Hebbard, Judge.

Action by C. H. Holt against R. P. Thomas and another. There was a judgment for plaintiff, and defendants appeal. Reversed.

Aylett R. Cotton, for appellants. John Chetwood, Jr., for respondent.

VAN FLEET, J. This is, in substance, an action to recover the sum of $750, upon the ground that the same was paid under a mistake of fact. Plaintiff had judgment, and from this, and an order denying their motion for new trial, defendants appeal.

In December, 1888, the California National Bank became insolvent, and closed its doors, and thereupon the defendant Young was, by the comptroller of the currency of the United States, appointed a receiver to take charge of the affairs of said bank, and pay the creditors thereof, in accordance with the provisions of the national banking act. In order to procure funds with which to pay the creditors, there was levied an assessment upon the capital stock of the said bank, which it became the duty of the receiver to collect. The plaintiff was a director of said bank, and his name, among others, appeared upon the books of the bank as the owner of 60 shares of the stock, and in due course he was notified by the receiver to come in and pay the assessment thereon. In response to this demand he claimed and represented to the receiver that he was the owner in fact of but 10 shares of said stock; that he had sold 50 of the shares standing in his name to R. P. Thomas, the other defendant herein, but that said shares had never been transferred to said Thomas upon the books of the bank. Plaintiff was informed by the receiver, in effect, that the latter had nothing but the books to go by, and that, if the assessment was not paid, it would be his duty to commence suit for its recovery. Thereupon plaintiff concluded to pay the assessment, and by an amicable arrangement between him and the receiver he was permitted to and did pay over to the receiver 50 per cent. of the assessment on the 60 shares, amounting to $1,125, and was given time to pay the balance, but never did so. Immediately after receipt of said payment the receiver remitted the money to the comptroller of the currency, and the same was used and disbursed by the latter in payment of the creditors of said bank. At the date of this payment by plaintiff the fund collected by the receiver lacked something upwards of $60,000 of being sufficient to meet the demands of the creditors. Subsequently other stockholders paid their assessments, some partially, and others in full, and as a result the creditors of said bank have been paid off, and there now remains a surplus of some $5,000, which, under the law, will be returned to the stockholders of the bank. Upon ascertaining that a surplus remained, the plaintiff instituted this action, the substantive averment in his complaint, as we regard it, being that he made the payment "for the special purpose of providing a fund to pay the creditors of said bank; that since making said deposit of $750 the plaintiff has learned, and he alleges the fact to be, that said $750 was not necessary to pay the creditors of said bank, and that a considerable surplus now remains in the hands of said receiver, amounting to the sum of several thousand dollars, and that said fund is being constantly increased." There are averments in the complaint as to a sale of 50 shares of the stock to the defendant Thomas, and other facts relative thereto, but we deem them wholly immaterial. The determinative question presented by the appeal is whether the facts disclosed entitle plaintiff to recover as for money paid by mistake. We do not think they do. There is no question of the right to recover money paid under mistake of a material fact and without consideration, but we do not think this such a case. The payment, in this instance, cannot be said to have been made under a misapprehension or mistake as to the facts. The circumstances calling for the payment were well known to and perfectly understood by the plaintiff. He knew that the assessment was levied and was being collected to procure funds to pay the creditors of the bank, and he made the payment voluntarily with that understanding; and it appears that the money was needed, and was in fact used, for that purpose. The fact that subsequently more funds were collected than were required to pay the creditors in full, and that a surplus now remains, does not disclose such a mistake of fact on the part of plaintiff as entitles him to recover. The stock standing in his name was primarily as liable for the assessment as that of any other stockholder, and, having paid voluntarily, he is no more entitled to recover his money than would be any other one of such stockholders. Nor was there a want of consideration for the payment. Assuming that he did not own the stock, if he saw fit to pay, in order to avoid litigation with the receiver, that was sufficient consideration. A payment thus voluntarily made with knowledge of the facts affords no ground for an action to recover it back. Keener, Quasi Cont. c. 2, and cases there cited; Brummagim v. Tillinghast, 18 Cal. 271. The lower court seems to have proceeded upon the theory that plaintiff made his payment under duress, as it finds that "plaintiff was required, under threat of suit, to pay the same to the receiver for the benefit of the creditors of said bank." But that fact did not constitute duress. It is not legal duress to threaten to or actually take advantage of the usual remedy for the enforcement of a debt or obligation. Brummagim v. Tillinghast, supra; Kohler v. Wells, Fargo & Co., 26 Cal. 606; Bucknall v. Story, 46 Cal. 589; Mayor, etc., v. Lefferman, 4 Gill. 425. And this is true even if the claim be an illegal one. Preston v. City of Boston, 12 Pick. 12. Under the facts disclosed, the plaintiff was not entitled to recover against either of the defendants. If there are any rights or equities as between plaintiff and the defendant Thomas, growing out of the sale of plaintiff's stock, which would entitle the latter to relief against Thomas, they must be litigated in another form of action. The judgment and order denying new trial are reversed.

We concur: GAROUTTE, J.; HARRISON, J.

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(105 Cal. 254)

## INGRAHAM v. LYON et al. (No. 15,514.)

(Supreme Court of California. Dec. 26, 1894.)

LIBEL—PLEADING.

A complaint which, construed liberally under Code Civ. Proc. § 452, alleges a libelous publication by defendants; that such publication conveyed to others a libelous meaning and charge against plaintiff; and that it was made without cause,—states a cause of action.

Department 2. Appeal from superior court, Alameda county; F. W. Henshaw, Judge.

Action by George Ingraham against J. L. Lyon and William P. Lyon. From an order denying his motion for vacation of judgment, plaintiff appeals. Reversed.

Sawyer & Ayer, for appellant. John C. Hughes, for respondents.

DE HAVEN, J. Section 452 of the Code of Civil Procedure provides: "In the construction of a pleading, for the purpose of determining its effect, its allegations must be liberally construed with a view to substantial justice between the parties." The complaint in this action is certainly very loosely drawn, but, applying to it this rule of construction, it may be held to allege, in substance, that defendants intended by the written publication complained of to charge and have it understood and believed "that plaintiff was a person engaged in making accounts which he never paid or intended to pay, and was dishonest and wholly unfit and unworthy of credit"; that said publication was understood by those to whom it was made as conveying such meaning and charge against the plaintiff; and that such publication was made without cause, "and out of pure malice." Thus construed, the complaint states a cause of action. Maynard v. Insurance Co., 47 Cal. 207. See, also, Edwards v. Society, 99 Cal. 435, 34 Pac. 128. Appeal from order denying plaintiff's motion to vacate and set aside the judgment dismissed, and judgment reversed, with directions to overrule the demurrer to the complaint.

We concur: McFARLAND, J.; FITZGERALD, J.

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(104 Cal. 511)

## CHAPELL v. SCHMIDT. (No. 15,786.)

(Supreme Court of California. Nov. 23, 1894.)

ASSAULT AND BATTERY—ACTION BY NON COMPOS MENTIS—INSTRUCTIONS—ADMISSIBILITY OF EVIDENCE.

1. In an action by the guardian of a person non compos mentis to recover for an assault upon his ward, in which defendant answered that such person had entered his garden, and

was picking his flowers, it was not misleading to charge that, if plaintiff's ward was weak in mind, "he should not," as a matter of law, "be held to the same strictness" in doing what he did "as a person mentally sound would be"; the jury having also been charged that he had no right to enter the garden, and that defendant could have used reasonably necessary force in putting him out.

2. Where the defense to an action for assault was that plaintiff had unlawfully entered defendant's garden, and was picking his flowers, at the time the assault was committed, it was not error to exclude evidence of prior commissions of the same trespass.

Department 2. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Action by Henry Y. Chapell, a non compos mentis, by his guardian, against John A. Schmidt, to recover for an assault and battery. There was judgment for plaintiff, and defendant appealed, but pending the appeal plaintiff's ward died, and his administratrix, Edith A. Chapell, was substituted as plaintiff. Judgment affirmed.

Lloyd & Wood and Mastick, Belcher & Mastick, for appellant. Wm. T. Baggett and Walter H. Linforth, for respondent.

McFARLAND, J. This action was brought by Henry Y. Chapell, an incompetent person, by his guardian, to recover damages for an assault and battery committed on his person by defendant. The verdict and judgment were for plaintiff, and defendant appeals. Some time after the judgment was rendered, the said Chapell died, and his administratrix was substituted as plaintiff.

There is no doubt from the evidence that the verdict was eminently just and proper. The jury were fully warranted in finding these facts: Chapell was an infirm old man, with a passion for flowers. On August 9, 1893, he was passing the garden of appellant, in which, about four feet from the gate, there was a fuchsia bush in bloom; and, the gate being open, he went in, and commenced to pick some fuchsias. The appellant, who was in the vicinity, observed Chapell plucking the flowers, and, rushing into the garden, he beat him very severely with a heavy cane over the head, neck, shoulders, and back, without any request to leave, or any warning whatever. Chapell, who was stooping over the bush at the time, made no resistance whatever, and appellant continued to beat him with great force until a lady who witnessed the occurrence sprang in between them, and induced him to desist. Chapell was severely injured by the beating, and never recovered therefrom.

Appellant contends that the judgment should be reversed on account of three rulings which respondent's counsel induced the court to make.

1. The court, at request of respondent, gave the following instruction to the jury: "If you find from the evidence that the plaintiff was weak in mind at the time the alleged assault and beating is claimed to have taken place, then, as matter of law, I charge you that he should not be held to the same strictness in entering the garden of defendant and picking flowers therein as a person mentally sound would be." It is difficult to determine whether or not, as applied to the case at bar, this instruction has any definite meaning. But conceding that it does mean something, and that it was erroneous, we do not see how it could have prejudiced the rights of appellant. There was no question about the right of respondent to enter the garden, and it was not claimed that he had such right. The court instructed the jury in various forms that respondent had no right to go into the garden, and told them, among other things, "that when a person enters within the inclosure of another without the consent of the other, and against his will, that is what is usually known as and called an 'unlawful breaking and entering' "; and that if respondent entered the garden, "and was then and there engaged in breaking flowers or branches of his (defendant's) fuchsia, then I charge you that he was doing an unlawful act, and the defendant had a right to order him out of his premises, and use such reasonable force as might be necessary to put him out." It is not reasonable, therefore, to suppose that an intelligent jury was led astray by the obscure and totally irrelevant instruction about "strictness" above quoted. The question was, did the appellant use unnecessary force in ejecting the respondent? and we are satisfied that the jury so understood it.

2. Appellant contends for a reversal because the court instructed the jury as follows: "I further charge you that, if you find from the evidence in the case that, at the time and place mentioned in the complaint, the plaintiff was in or on the premises of the defendant without his permission, taking flowers therefrom, yet, notwithstanding this fact, I charge you that if you find that the appellant assaulted and beat the plaintiff as alleged in the complaint, without first requesting him to depart from said premises, and warning him to desist from taking the said flowers, then, as a matter of law, I charge you that the defendant was guilty of an unlawful act," etc. We think that, under the facts of this case, the instruction was proper. The respondent was not using such force and violence as would have justified the appellant to assault and beat respondent "as alleged in the complaint" without any warning whatever.

3. Appellant contends for a reversal because the court sustained respondent's objection to the following question asked appellant when testifying as a witness: "What had you seen him [plaintiff] do on your premises prior to the 9th day of August last?" We do not think that the question was relevant. The defense set up in the answer on this point was that "on the 9th day of August,

1893," the respondent unlawfully entered his premises, and was "then and there" engaged in despoiling, etc., and that appellant "gently laid his hands upon" him, and used no more force than was reasonably necessary to remove him. Moreover, appellant, as stated in his points and authorities, did introduce evidence to show "that plaintiff had previously committed similar trespasses on the same premises."

There are no other points made by appellant, although there is an allusion made to the amount of the verdict as excessive. If the point were expressly made, we could not hold that $2,500 was an excessive verdict. The judgment and order denying a new trial appealed from are affirmed.

We concur: DE HAVEN, J.; FITZGERALD, J.

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4 Cal. Unrep. 928

## HALL v. COLE et al. (No. 19,495.)

(Supreme Court of California. Dec. 31, 1894.)

REMOVAL OF BUILDINGS — SUIT FOR RECOVERY—CROSS COMPLAINT—SPECIFIC PERFORMANCE OF CONTRACT—EVIDENCE OF TITLE.

1. Under Code Civ. Proc. § 442, providing that, when a defendant seeks affirmative relief relating to the transaction upon which the action is brought, he may file a cross complaint, a cross complaint in an action to recover buildings removed from plaintiff's land, which alleged that plaintiff purchased the land and erected the buildings for defendants, agreeing to convey the premises to them when they could purchase the same; that defendants tendered him the purchase price therefor, but that he refused to give them a deed thereto,—and which prayed judgment that plaintiff deed the property to defendants, was improperly stricken out.

2. In an action to recover buildings removed from plaintiff's land, wherein defendants admitted that plaintiff purchased the land and erected the buildings, but claimed to own the premises by reason of plaintiff's agreement to sell the same to them, and their tender to him of the purchase price, plaintiff testified that he agreed to sell the premises to defendants, and that they advanced him money to apply in purchasing the land and erecting the buildings, but that they withdrew all of the same soon after; that he let defendants go into possession of the premises without any further transaction; that thereafter defendants tendered him the purchase price of the land, only, and he told them merely that he could not give them a deed, but would have to see the man who then held the title to the property to secure a loan to plaintiff. *Held* that, ownership of the buildings not appearing in defendants, a nonsuit was improperly granted.

Commissioners' decision. Department 1. Appeal from superior court, San Diego county; W. L. Pierce, Judge.

Action by M. Hall against A. R. Cole and another for the possession of buildings. Judgment for defendants, and plaintiff appeals. Reversed.

Wm. Humphrey, for appellant. D. C. Collier, D. L. Murdock, and F. W. Goodbody, for respondents.

BELCHER, C. The plaintiff brought this action to recover the possession or value of a dwelling house and barn, alleged to have been wrongfully moved by the defendant Isabell Cole from a lot of land described as "Lot 34 of La Mesa Colony," in the county of San Diego. The complaint sets up facts showing that the plaintiff purchased and paid for the said lot, and erected the house and barn thereon, and that, without his consent or knowledge, the defendant Isabell Cole moved the same to an adjoining lot owned by defendants, who were husband and wife. The answer denied that the plaintiff was the owner of the said house and barn, or either of them, or entitled to the possession thereof, and alleged that, at all times since the erection of said house and barn, the defendant Isabell Cole had been, and still was, the owner thereof. The answer then proceeded to state, in effect, that the plaintiff purchased the said lot for and on account of the defendant Isabell Cole, for the sum of $900, less $25 allowed him by the owner for making the sale, and that she advanced to him, in part payment therefor, the sum of $550; "that within a few days thereafter the plaintiff stated to the defendants that he had purchased said land for the defendant Isabell Cole, and that there would be a few days' delay in preparing the title to her, but he advised them to take immediate possession of it, and to grub and plow and improve it, and stated to defendant Isabell Cole that he would immediately build for her a house on said land, which would be hers, and a home for her as long as she lived, and that she could pay for it when she got ready, and could have as much time in which to do so as she desired"; that the plaintiff built on the said lot the house mentioned in his complaint, for the defendant Isabell Cole, "and that after the completion thereof, at the request of plaintiff, the defendants moved into, took possession of, and occupied, said house, as their own, and not as the property of the plaintiff, and that said house and said barn were from the first commencement of the erection thereof, and ever since have been, the property of the defendant Isabell Cole, and that said house, at the time of its erection, set upon blocks on the surface of the ground on said lot 34"; that, at the time of making the payment of $550, it was agreed between plaintiff and defendant Isabell Cole that he would, as soon as it could be done, cause a deed to be made to her for said premises, and that she should execute a mortgage for the balance of the purchase money therefor, and that she thereafter repeatedly requested plaintiff to perform and carry out his agreement, but he failed to do so, giving various excuses therefor; that afterwards, and before the commencement of this action, she tendered to plaintiff "the entire balance of said purchase money for said lot 34, and its appurtenant water rights, as agreed upon between them, with all accrued interest thereon, and demanded from plaintiff a deed therefor, whereupon the plaintiff refused to comply with said agreement and refused to make a deed to said defendant for said lot." The defendants also filed a cross complaint, in which they set out the facts, and prayed for judgment against the plaintiff, that he make a good and sufficient deed to the defendant Isabell Cole, conveying to her the said lot, free and clear from all incumbrances. The cross complaint was, on motion of plaintiff, stricken out, and the defendants excepted to the ruling. The case subsequently came on regularly for trial before a jury, and at the conclusion of the plaintiff's evidence the defendants moved for a judgment of nonsuit, "because the plaintiff's evidence does not contain anything tending to show that at the time this suit was commenced the plaintiff was entitled to the possession of the house and barn, for the recovery of the possession or value of which this action is brought, but it does appear from said evidenced that at the time this suit was commenced the plaintiff was not entitled to the possession of said house and barn." The court granted the motion, and entered judgment that the plaintiff take nothing by his action, and that the defendants recover from him their costs. From this judgment the plaintiff appeals.

We think the court erred in striking out the defendants' cross complaint, and also in granting their motion for nonsuit. The complaint and the cross complaint related to alleged rights growing out of the same transaction; that is, the purchase of the lot and payment therefor, and the erection of the house and barn thereon. And the rule is that, whenever the defendant seeks affirmative relief relating to the transaction upon which the action is brought, he may, in addition to his answer, file a cross complaint. Code Civ. Proc. § 442.

At the commencement of the trial, defendants admitted in open court that the plaintiff purchased the land, from which the house and barn were moved, of one Hamilton, on December 12, 1890, and that Hamilton was then the owner thereof, and also that defendant Isabell Cole took and moved the house and barn in question from the said land, to land owned by her, on February 27, 1892. The plaintiff, then, as a witness for himself, testified that he had Mr. Hamilton make the deed of the land to a Mr. Wilson to secure payment of $400, money borrowed by him of Wilson, and that he paid Hamilton the whole of the purchase price for the land, which was $900; that he built the house and barn on the land between the months of January and March, 1891, and paid for them himself, the house costing $1,250, and the barn $50; that the house and barn were taken away by Mrs. Cole without his consent or knowledge; and that on March 19, 1892, he paid Wilson the loan, for the payment of which the land was security, and Wilson then conveyed the land to him, and assigned to him all his interest in the house and barn. The deeds and assignment were offered and received in evidence. The witness further testified that he built the house to assist Mr. Cole, because he was a man of large family and small means; that at the time he bought the land he told Mr. Cole he would build the house, and sell the land and improvements to him for just what they had cost; "that he and Mr. Cole talked about it several times, and, before he bought the land, Mr. Cole, at his request, advanced him $550 to apply in the purchase of the land and the building of the house," and that, within a few days after Mr. Cole advanced the $550, he came to plaintiff's house, and "stated that he had no money or means to keep his family, and asked to draw against the $550 from time to time, which he assented to, and Mr. Cole withdrew all of the money advanced, and more (about $600 in all), within a few months thereafter"; "that he let Mr. Cole into possession of the premises in April, 1891, without any further transaction between them." On cross-examination, the witness testified that Mr. Collier, the lawyer, made a tender to him for Mrs. Cole, and that he simply remarked he could not give a deed, but would have to see Mr. Wilson, and also that: "I was buying the land for Mr. Cole. I told Mr. Kretsinger that I was building the house for Mr. Cole, when I hired him. I first told Mr. Cole and his wife that I owned the property when I was building the house. * * * The $550 was paid to me on December 2, 1890. * * * I might have said to them, after buying the land, 'Well, I have got the land for you.'" On redirect examination the witness was asked, in reference to the tender made by Mr. Collier, "State what was tendered," and answered: "Mr. Collier met me in the California National Bank, and said he wanted to make a tender to me, and stated the amount. It was between five and six hundred dollars. I forget the exact amount. I think he said, '$550 and interest due you from Mrs. Cole on lot 34, La Mesa.' He had some money in his hand. I did not see how much. This was a few days before the house was moved by defendant Mrs. Cole." The above was, in substance, all the evidence on which the motion for nonsuit was made and granted; and, in our opinion, entirely fails to show that either of the defendants was the owner or entitled to the possession of the said house and barn at the time of the commencement of the action, or of the trial. It appears that the lot was purchased and the buildings constructed by the plaintiff to accommodate and assist the defendants, but they were to be paid for by defendants before they would become the owners thereof. There is no pretense that any part of the cost of the buildings had been paid, or offered to be paid; and when Mrs. Cole moved them from the lot, without the knowledge or consent of plaintiff, she did so wrongfully, and the plaintiff at once became entitled to their possession or value. Whether Mrs. Cole had become entitled to a deed of the lot is a question not now involved in this case, and upon it we express no opinion. We advise that the judgment be reversed, and the cause remanded for a new trial, with directions to the court below to permit the defendants to file anew their cross complaint, if so advised.

We concur: SEARLS, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed, and the cause remanded for trial, with directions to the court below to permit the defendants to file anew their cross complaint, if so advised.

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105 Cal. 237

## IRVINE v. TARBOT. (No. 18,286.)

(Supreme Court of California. Dec. 26, 1894.)

PUBLIC LANDS—VALIDITY OF PATENT — RIGHT TO QUESTION.

The issuance by the United States of a patent of government land is conclusive evidence in the state courts that the land was subject to patent.

Commissioners' decision. Department 1. Appeal from superior court, Calaveras county; John F. Davis, Acting Judge.

Action by William Irvine against Mrs. J. C. Tarbot to recover a tract of land. Judgment was rendered for plaintiff, and defendant appeals. Affirmed.

James H. Budd and Paul C. Morf, for appellant. Reddick & Solinsky, for respondent.

SEARLS, C. This is what would formerly have been termed an "action of ejectment" to recover a small tract of land, parcel of 143.23 acres, patented to the plaintiff, October 13, 1890, by the government of the United States, situate at or near Carson Hill, county of Calaveras, state of California. The defense set up was that the locus in quo was and is a part of the town site of Carson Hill, and as such was not subject to patent by plaintiff. The statute of limitations was also pleaded in bar of the action, but as such action was instituted April 13, 1891, within six months next after the issuance of patent, the plea cannot prevail, if plaintiff's patent was valid to convey title. Plaintiff had judgment, from which and from an order denying her motion for a new trial defendant appeals. Plaintiff introduced his patent to the land, proved that the land in dispute was included therein, and rested. Defendant, among other testimony introduced for the purpose of proving a town site, offered in evidence, and against the objection of plaintiff was permitted to introduce, the proceedings had in the United States land office, from which it appeared that in September, 1879, plaintiff, Irvine, settled upon the land, which had been surveyed in 1871. On May 22, 1883, he made homestead entry of said land, and in December, 1885, he made final proof. Against the allowance of the final entry, sundry parties, among whom was appellant, protested upon various grounds, among which were "that the town site of Carson is situate on portions of the lands last aforesaid." Thereupon and thereafter such proceedings were had in the case that, upon an appeal from the local land office to the commissioner of the general land office, it was held, among other things, "that the claim of a town site is not supported by the facts in the case," and reversing the finding of the local land officer that "Carson was a valid and legal town site," which decision was on an appeal affirmed by the secretary of the interior department. Respondent was thereupon permitted to make final proofs, and the patent in evidence issued to him. There was no showing that Carson was ever an incorporated town or village. It was admitted at the trial by counsel for the respective parties that at the time of plaintiff's application, and during the contest, "testimony was taken by the land department as to the existence of a town or town site settlement, or a place of trade or business, upon the land embraced within the boundaries of the patent. It is further stipulated that the land department passed upon these questions prior to the issuance of a patent to plaintiff."

Appellant contends that the town site of 11 acres was reserved from pre-emption or homestead entry, and cites various sections of the Revised Statutes of the United States in support of this theory. Section 2257 provides that "all lands belonging to the United States, to which the Indian title has been or may hereafter be extinguished, shall be subject to the right of pre-emption, under the conditions, restrictions and stipulations provided by law." Section 2258 provides that "the following classes of lands, unless otherwise specially provided for by law, shall not be subject to the rights of pre-emption, to wit: First, lands included in any reservation by any treaty, law, or proclamation of the president, for any purpose. Second, lands included within the limits of any incorporated town, or selected as the site of any city or town. Third, lands actually settled and occupied for purposes of trade and business, and not for agriculture. Fourth, lands on which are situated any known salines or mines." Section 2382 provides that persons who have founded, or may hereafter found, a city or town upon the public lands may file with the recorder of the county a plat thereof, etc., giving name of city or town, showing streets, squares, etc., to be verified under oath, and in one month a verified transcript must be forwarded to the general land office, etc. The subsequent sections of the same chapter provide the modes by which the authorities of incorporated towns, and the county judge in cases of unincorporated towns, may enter and purchase from the government for the use of the inhabitants the lands included within the town sites. The question whether or not the public lands are subject to pre-emption or homestead depends upon the existence or nonexistence of certain facts, among which are, is it more valuable for mining or agricultural purposes? does it include any incorporated town or has it been selected as a town site? is it actually settled upon and occupied for purposes of trade and business? or does it include any known salines or mines? These are all questions of fact to be determined by the land department preliminary to granting a patent to such lands, and, as was said in Smelting Co. v. Kemp, 104 U. S., at page 645: "When the authority depends upon the existence of particular facts, or upon the performance of certain antecedent acts, and it is the duty of the land department to ascertain whether the facts exist or the acts have been performed, its determination is as conclusive of the existence of the authority against any collateral attack as is its determination upon any other matter properly submitted to its decision." To discuss this case at length would involve the restatement of a doctrine which has been enunciated so frequently by this court, and by the supreme court of the United States, that it has come to be regarded as elementary. The rule alluded to is this: "A patent duly signed, countersigned, and sealed for public lands which, at the time it was issued, the land department had, under the statute, authority to convey, cannot be collaterally impeached in an action at law; and the finding of the department touching the existence of certain facts, or the performance of certain antecedent acts, upon which the lawful exercise of that authority may in a particular case depend, cannot, in a court of law, be questioned." The above is quoted, for the sake of brevity, from the syllabus in Smelting Co. v. Kemp, supra, as fairly exemplifying the conclusion reached in that case and many others. Green v. Hayes, 70 Cal. 276, 11 Pac. 716; Quinby v. Conlan, 104 U. S. 420; Doll v. Meador, 16 Cal. 295; Sparks v. Pierce, 115 U. S. 408, 6 Sup. Ct. 102; Stewart v. Sutherland, 93 Cal. 270, 28 Pac. 947; Gale v. Best, 78 Cal. 235, 20 Pac. 550. It follows from all the cases, of which the foregoing are but a fraction, that plaintiff's patent, which is not shown to contain any reservations, was conclusive evidence that the land in question was open to pre-emption and homestead, and that there was no town site thereon or settlement for the purposes of trade and business. The evidence offered by the defendant to reopen the question as to the character of the land in this action at law was not admissible. Its introduction, however, only tended to substantiate the presumption of the patent by showing that the land department did in fact pass upon and decide adversely to the appellant the very question sought to be again litigated here. The judgment and order appealed from should be affirmed.

We concur: VANCLIEF, C.; TEMPLE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

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104 Cal. 506

## BUTTERWORTH et al. v. LEVY et al. (No 15,573.)

(Supreme Court of California. Nov. 23, 1894.)

MECHANICS' LIENS — STATUTORY REQUIREMENTS — SUFFICIENCY OF MEMORANDUM FILED.

The memorandum of a building contract, filed in the recorder's office under Code Civ. Proc. § 1183, which recites that the contract is for the erection of a two-story building, giving its dimensions, "in a workmanlike manner, in conformity with the plans, drawings, and specifications for the same" made by a certain architect, which "are to be kept and remain in the office of said architect," subject to inspection, does not sufficiently state "the general character of the work to be done."

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; Eugene R. Garber, Judge.

Actions by J. B. Butterworth and others against M. B. Levy, as the owner of certain property, one Meyers, as mortgagee thereof, and one Dunning, as the original contractor for the erection of a building thereon, to foreclose separate mechanics' liens held by plaintiffs. Judgment was entered against defendant Dunning by default. From a decree ordering the foreclosure of the liens, and from an order denying them a new trial, defendants Levy and Meyers appeal. Affirmed.

John J. Roche, for appellants. Boyd, Fifield & Hoburg, Parker & Eells, Wm. H. Jordan, and H. C. Wakeman, for respondents.

BELCHER, C. The plaintiff and several other parties commenced separate actions to foreclose mechanics' liens on the same property, and all the actions were consolidated and tried together. The defendant Levy was the owner of the property, the defendant Meyers was a mortgagee thereof, and the defendant Dunning was the original contractor. Levy and Meyers answered, and Dunning suffered his default to be entered. The case was tried, and a decree entered foreclosing all the liens, from which, and from an order denying a new trial, Levy and Meyers appeal.

The contract was to erect a two-story building on a lot in the city of San Francisco, and the contract price was more than $1,000. The contract was not filed in the recorder's office, and the only question is whether the memorandum thereof, which was filed, was sufficient to meet the requirements of section 1183 of the Code of Civil Procedure. That section provides as follows: "All such contracts shall be in writing when the amount agreed to be paid thereunder exceeds one thousand dollars, and shall be subscribed by the parties thereto, and the said contract, or a memorandum thereof, setting forth the names of all the parties to the contract, a description of the property to be affected thereby, together with a statement of the general character of the work to be done, the total amount to be paid thereunder, and the amounts of all partial payments, together with the times when such payments shall be due and payable, shall, before the work is commenced, be filed in the office of the county recorder * * * otherwise they shall be wholly void, and no recovery shall be had thereon by either party thereto; and in such case the labor done and materials furnished by all persons aforesaid, except the contractor, shall be deemed to have been done and furnished at the personal instance of the owner, and they shall have a lien for the value thereof." The only objection to the memorandum in question is that it did not contain a sufficient "statement of the general character of the work to be done." That statement was in these words: "Third. The general character of the work to be done under said contract is as follows, to wit: The said W. R. Dunning, as contractor, agrees with the said M. B. Levy, as owner, to furnish the necessary labor and materials, including tools, implements, and appliances, required in the erection of a two-story building 51.0 by 25.0, and in a workmanlike manner, in conformity with the plans, drawings, and specifications for the same made by John Gash, the authorized architect employed by the owner, and which are signed by the parties hereto, and are to be kept and remain in the office of said architect, subject to the inspection of the parties hereto, and others concerned in said erection."

"The plans, drawings, and specifications" for the building were not filed with the memorandum, nor did the statute expressly require that they should be. But without them, or their equivalent, who can tell what was the general character of the work to be done? Of what materials was the building to be constructed? Was it to be wood, brick, stone, or iron? In Willamette Steam Mills Lumbering & Manuf'g Co. v. Los Angeles College Co., 94 Cal. 235, 29 Pac. 629, it is said: "Whether the document which was filed in the recorder's office is to be regarded as the original contract, or as a memorandum thereof, is immaterial. A memorandum of the contract can have no higher force than the contract itself; and, if the contract fails to comply with the requirements of the statute, the memorandum itself must be equally insufficient. As a memorandum, merely, the document so filed was insufficient, by reason of its failure to set forth 'a statement of the general character of the work to be done'; the only statement in that regard being that it is to be 'conformable to the drawings and specifications made by R. B. Young, architect, and signed by the parties, and hereto annexed,' and that it is to be 'three stories high.' It does not set forth the materials of which the building was to be constructed, or any item from which its 'general character can be ascertained'; and the reference to the drawings and specifications, * * * without having the specifications and drawings filed, renders the document as ineffective for a memorandum as for the contract itself." And in Greig v. Riordan, 99 Cal. 320, 33 Pac. 913, it is said: "'The plans, drawings, and specifications,' in conformity with which the work was to be done, were not filed with the contract. They constituted, so far as the 'general character of the work to be done' was concerned, the very soul and essence of the agreement. Without them, the dimensions and character of the work cannot be determined. Whether it was to be composed of iron, stone, brick, or wood, we cannot tell. A contract to construct a church, build a house, or sink a shaft would be just as definite as the one in question. * * * If we view the contract in the light of a memorandum, the same objections are apparent, and equally fatal."

It is urged for appellants that "the object of the statute, in requiring the contract or a memorandum to be filed, is evidently to afford notice to all concerned of the nature, etc., of the work." And counsel say: "All the parties had notice of the particular fact that the plans and specifications were at the office of John Gash, the architect of the building, open and subject to their inspection. Plainly, by prosecuting the inquiry, and going to the architect's office, the full nature and contents of the plans and specifications would have been disclosed. No one can be heard to complain of lack of knowledge, which could only be the result of his own remissness, willful neglect, and intentional blindness." The obvious answer to this position is that the rights of the parties are entirely statutory, and the statute declares that, if a proper contract or memorandum is not filed, the contract is void. In Kellogg v. Howes, 81 Cal. 179, 22 Pac. 509, a similar point was raised, and the court said: "As to the contention that the fact that respondents had actual notice of the existence of a contract was equivalent to the filing of the same in the recorder's office, this would be so, if the question were one of notice. But it is not. The express provision of the statute is that, if the contract is not filed, it shall be void. This being so, there is in fact no contract, of which the subcontractor is bound to take notice; and his knowledge that a contract was attempted to be made, but was not, cannot affect his rights." In view of the foregoing decisions, we think it must be held that the court below rightly found that no sufficient memorandum was filed, and that the claims of the plaintiffs were therefore valid liens on the property sought to be charged therewith. We advise that the decree and order appealed from be affirmed.

We concur: SEARLS, C.; TEMPLE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the decree and order appealed from are affirmed.

105 Cal. 314

## REA v. WOOD. (No. 15,263.)

(Supreme Court of California. Dec. 31, 1894.)

TRIAL — RECALLING WITNESS — DISCRETION OF COURT—ACTION FOR SLANDER—CHARGES AGAINST PUBLIC OFFICER—MATTER NOT AFFECTING QUALIFICATIONS.

1. Whether a witness may be recalled for examination being, under provisions of Code Civ. Proc. § 2050, within the discretion of the court, a refusal to allow a witness to be recalled will not be ground for reversal, unless there has been a clear abuse of discretion.

2. A statement made as to a state railroad commissioner, that he robbed his father and mother in certain business transactions, did not impute to him a general disqualification for office, within the meaning of Civ. Code, § 46, which includes in its definition of "slander" "a false and unprivileged communication other than libel," which tends directly to injure one in respect to his office, profession or business, "by imputing to him general disqualification in those respects which the office or other occupation peculiarly requires."

3. Charging a person with a single act of dishonesty does not amount to an imputation that he has a general reputation for dishonesty.

Department 1. Appeal from superior court, Santa Clara county; John Reynolds, Judge.

Action by James W. Rea against Uriah Wood. From a judgment for defendant, plaintiff appeals. Affirmed.

Richards & Welch and Geo. A. Knight, for appellant. D. M. Delmas, for respondent.

PER CURIAM. This is an action for slander, and the complaint contains three counts. In the second count, it is alleged that the plaintiff had been a member of the state board of railroad commissioners of the state of California for more than four years, and that at the general election held in the year 1890 he was the regular nominee of the Republican party for re-election to the said office of railroad commissioner, and on the 4th day of November of that year was duly re-elected to that office. It is then alleged that on October 10, 1890, while the plaintiff was holding the said office, and was such candidate for re-election, the defendant, in the county of Santa Clara, spoke to one Milo Conklin, of and concerning the plaintiff, these words: "James W. Rea has robbed his father and mother in certain business transactions connected with the Light & Power Company of the city of San Jose,"—and that in uttering said language the defendant meant, and was understood, to impute to plaintiff such dishonesty, untrustworthiness, and turpitude as would render him unfit to occupy the office or perform the duties of railroad commissioner. The answer denied all the material averments of the complaint.

At the trial the plaintiff called Milo Conklin as a witness, and proved by him that in a conversation had between the witness and defendant on or about October 10, 1890, the latter said, "Mr. Rea had robbed his father and mother out of money in this transaction between the electric light works." And the witness further said that this statement was a portion of a general conversation which referred to Mr. Rea, and his fitness for the office of railroad commissioner. The plaintiff next called George Eustice as a witness, and asked him to state certain conversation relating to Mr. Rea, which he had with the defendant in July, 1890, and again after the commencement of this action; but, on objection of defendant, the answers were excluded. The plaintiff then recalled Milo Conklin as a witness, and asked him to "state the whole of the conversation had between Mr. Rea and yourself upon the 10th of October, so far as it related to the qualifications of Mr. Rea for the office of railroad commissioner." The defendant objected to the question upon the ground that the witness had already been examined upon the same matter, and the court sustained the objection, the plaintiff reserving an exception. At the conclusion of the evidence, the defendant moved for a nonsuit as to the whole case; and the court granted the motion, as to the first and third counts, with the consent of the plaintiff, and denied it as to the second count. The plaintiff then presented, and asked the court to give to the jury, a large number of instructions; but after argument the court refused to give them, and instructed the jury to find a verdict for the defendant. A verdict was accordingly so returned, and judgment was entered that the plaintiff take nothing, from which he appeals.

1. The first point made for reversal is that the court erred in refusing to allow the plaintiff to recall the witness Conklin, and to further examine him as to his conversation with the defendant on October 10th, in regard to the qualifications of the plaintiff for the office of railroad commissioner. The answer to this point is that, under our statute, the question whether a witness may be recalled and re-examined as to matters about which he has already been examined is one left to the sound discretion of the court (section 2050, Code Civ. Proc.), and its action will not be disturbed unless a clear abuse of discretion is shown. Here no such abuse is shown, and error cannot be predicated upon the ruling complained of.

2. It is next urged that the court erred in refusing to give to the jury the instructions asked by the plaintiff, and in instructing them to find a verdict for the defendant. It is not claimed that the words spoken by the defendant were actionable per se, but it is insisted that they constituted an actionable slander because they were spoken of the plaintiff in a conversation in which his fitness for the office of railroad commissioner was the subject of discussion. The Civil Code defines "slander" as follows: "Sec. 46. Slander is a false and unprivileged publication other than libel, which, * * * (3) tends directly to injure him in respect to his office, profession, trade or business—by imputing to him general disqualification in those

respects which the office or other occupation peculiarly requires." Assuming that the words proved to have been spoken were substantially the same as those charged to have been spoken, the question is, did they directly tend to injure the plaintiff in respect to his office of railroad commissioner, by imputing to him a general disqualification to perform the duties of the office, in those respects which it peculiarly required? The powers and duties of a railroad commissioner are prescribed in section 22 of article 12 of the constitution, and in an act of the legislature passed in 1880 (St. 1880, p. 45). In performing the duties of the office, there is no transaction involving pecuniary gain to the officer. Of course, to perform them properly, the officer should be a man of integrity and good moral character, who cannot be influenced by bribery, or the promise of unlawful gains. But honesty and good character are required in all offices and in all callings and business pursuits of life, and not peculiarly required in the office of railroad commissioner. The words spoken charge the plaintiff, at most, with only a single act of dishonesty; and that cannot, in our opinion, amount to an imputation of general disqualification. The rule is uniform that general character cannot be proved by a single act. Again, the complaint shows that the term of office which the plaintiff held when the words complained of were spoken expired before this action was commenced. It also shows that he continued in the performance of the duties of the office, without molestation, until the close of his then term, and so much to the satisfaction of the people that they re-elected him, and he had entered upon his second term. Did the words, then, tend directly to injure the plaintiff in respect to his office? We fail to see how it can be said that they did. The gist of the action was pecuniary loss, and it does not appear that the plaintiff sustained any loss, or was in any way prejudiced. The court did not err, therefore, in charging the jury to return a verdict for the defendant, and the judgment must be affirmed. So ordered.

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104 Cal. 515

## E. M. DERBY & CO. v. CITY OF MODESTO et al. (No. 18,379.)

(Supreme Court of California. Nov. 23, 1894.)

MUNICIPAL CORPORATIONS—VALIDITY OF BONDS—INDEBTEDNESS FOR SEWERS AND WATERWORKS—BONA FIDE PURCHASERS.

1. St. 1889, p. 399, § 2, as amended by St. 1891, p. 94, provides that when the legislative branch of a municipal corporation shall, by ordinance, determine that the public interests demand waterworks, sewers, and other public improvements, the cost of which cannot be paid out of the ordinary revenue, it may, "after the publication of such ordinance for at least two weeks in some newspaper," etc., and at its "next regular meeting after such publication or at an adjourned meeting," by ordinance specifying the amount required, the amount of the bonds, the rate of interest, etc., call a special election to pass upon the question of incurring such indebtedness. *Held*, that either of the ordinances specified in such statute can be passed on the same day it is introduced.

2. Ordinances authorized by such statute, and passed by the board, as proper steps in carrying out the will of the voters, expressed at such special election, are not affected by Act March 13, 1883 (St. 1883, p. 269), § 861, which provides that no ordinance or resolution granting a franchise shall be passed "on the day of its introduction, nor within five days thereafter."

3. The publication of an ordinance for 14 consecutive days is a compliance with St. 1889, p. 399, § 2, as amended by St. 1891, p. 94, requiring an ordinance to be published "at least two weeks" in some newspaper.

4. Act 1889 (St. 1889, p. 400), § 3, provides that the ordinance authorizing the publication of a notice of a special election to determine whether a municipal corporation shall issue bonds for public improvements shall state "the number and character of the bonds to be issued." *Held* that, where such ordinance stated the number of bonds to be 50, of $500 each, the fact that by subsequent ordinance the number was changed to 40 bonds, of $500 each, and 20 bonds, of $250 each, did not render the bonds void.

5. Act 1889 (St. 1889, p. 399), § 2, as amended by St. 1891, p. 94, relating to the issuance of bonds for public improvements, provides that the trustees shall determine the rate of interest, provided the rate does not exceed 7 per cent. *Held*, that the trustees have power to determine whether the interest shall be paid annually or semiannually.

6. The provision of the statute that the notice of special election shall state the amount of the tax levy to be made for the payment of the bonds is satisfied by provisions in the ordinance calling such election that the bonds shall be "serials"; that one-twentieth of the whole indebtedness shall be paid each year, including interest at 6 per cent., payable semiannually; and that "the tax levy for the payment thereof amounts during the full period of 20 years to $97,800" for waterworks bonds, and to $40,750 for the sewer bonds.

7. Municipal bonds, in the hands of a bona fide purchaser, are not affected by mere irregularities in the proceedings pursuant to which they were issued.

Commissioners' decision. Department 2. Appeal from superior court, Stanislaus county; W. O. Minor, Judge.

Amicable action, on an agreed statement of facts, by E. M. Derby & Co., a corporation, against the city of Modesto and others, to determine the validity of certain bonds issued by such city for the purpose of constructing sewers and waterworks. From a judgment for defendants, plaintiff appeals. Affirmed.

R. M. Fitzgerald and Carl H. Abbott, for appellant. C. C. Wright and John Yule, for respondents.

HAYNES, C. E. M. Derby & Co., a corporation and taxpayer of the city of Modesto, claiming that certain bonds issued by said city, to the aggregate amount of $85,000, to be used for the construction of a system of waterworks and sewers, are illegal and void, and, because thereof, that no tax can be lawfully levied or collected to pay the same, agreed with the city of Modesto, the board of trustees of said city, the members of said board, the treasurer of said city, and the Oakland Bank of Savings (a corporation, which was the original purchaser and holder of said bonds), to submit the question of the validity of said bonds to the superior court of Stanislaus county, upon an agreed case, under the provisions of section 1138 of the Code of Civil Procedure. Judgment was given in said court against appellant, from which it appeals upon said agreed statement.

Before considering the points specially made by appellant, it should be observed that this contention was not made by appellant prior to the sale and delivery of the bonds to the Oakland Bank of Savings; but these questions are now presented as between the taxpayers of the city of Modesto and the holder of the bonds after their purchase, and after the city has received the full purchase price. The power of the city to issue the bonds, the proper steps being first taken, is not, and cannot be, questioned; and, if the bonds are valid in the hands of the purchaser, the duty of the city to levy the tax required for the payment of the interest, and each installment of the principal sum, cannot be questioned, and the obligation of the taxpayer to pay the tax levied therefor is perfect.

The bid of the Oakland Bank of Savings for the purchase of said bonds was accepted January 19, 1893, and the full purchase price thereof was, by said bank, paid into the city treasury, and the notice and protest of appellant was not served until March 15, 1894, the first installment of the principal and the interest having been paid by the city in the preceding December. Nor is it asserted by appellant in its said notice, nor does it appear from the statement, that the purchaser of the said bonds had any notice of the alleged defects in the proceedings upon which the issue of said bonds was based.

"The following doctrines are too well settled to be any longer open to question. A bona fide purchaser of negotiable paper, for value, before maturity, takes it freed from all infirmities in its origin, unless it is absolutely void, for want of power in the maker to issue it, or its circulation is by law prohibited. Municipal bonds payable to bearer are subject to the same rules as other negotiable paper." Dill. Mun. Corp. (4th Ed.) § 513, and cases cited in notes. The same learned author, in succeeding sections, referring to the course of decisions in the supreme court of the United States, says: "It has rejected, when necessary to protect the bona fide holders of such securities, narrow and rigid constructions of statutes authorizing the creation of such debts. Against such holders, it has given no favor for defenses based upon mere irregularities in the issue of the bonds, or upon noncompliance with preliminary requirements, not going to the question of power to issue them." Id. § 515. See, also, St. Joseph Tp. v. Rogers, 16 Wall. 644. In the light of the principles enunciated by the foregoing authorities, we will now notice the particular defects in the proceedings leading up to the issue of the bonds, in the order in which they are stated by counsel for appellant.

1. It is claimed that the several ordinances set out in the statement were each passed by the board of trustees of the city of Modesto on the day they were introduced, while it is contended that section 861 of the act of March 13, 1883 (St. 1883, p. 269), requires that no ordinance shall be passed on the day of its introduction, or within five days thereafter. So much of said section as is pertinent reads as follows: "No ordinance and no resolution granting any franchise for any purpose shall be passed by the board of trustees on the day of its introduction, nor within five days thereafter, nor at any other than a regular meeting." That the several ordinances above mentioned were passed on the day upon which they were severally introduced, is not controverted; and appellant contends that this fact renders the ordinance absolutely void, so that it constitutes no step in the proceedings leading up to the issuance of the bonds. His contention is that the restriction as to time applies to all ordinances, and also to those resolutions granting a franchise, while respondent contends that the restriction applies only to ordinances and resolutions granting a franchise. We think, however, it is not necessary to decide between these two constructions. The city of Modesto is a city of the sixth class, to which said section 861 of the municipal government act applies. It is claimed by respondent, however, that the proceedings had with reference to the issue of the bonds in question were taken under the act of 1889 (St. 1889, p. 399), entitled "An act authorizing the incurring of indebtedness by cities, towns and municipal corporations incorporated under the laws of this state for the construction of water works, sewers and all necessary public improvements." Section 2 of said act was amended in 1891 (St. 1891, p. 94). That portion of section 2, as amended, which is pertinent to the question under consideration is as follows: "Whenever the legislative branch of any city, town or municipal corporation shall, by ordinance passed by a vote of two-thirds of all its members, and approved by the executive of said city, town or municipal corporation, determine that the public interests or necessity demands the acquisition, construction or completion of any municipal buildings, bridges, water works, water rights, sewers or other municipal improvements, the cost of which will be too great to be paid out of the ordinary annual income and revenue of the municipality, they may, after the publication of such ordinance for at least two weeks in some newspaper published in said municipality, and at their next regular meeting after such publication or at an adjourned meeting, by ordinance passed by a vote of two-thirds of all its members, and

also approved by the said executive, call a special election and submit to the qualified voters of said city, town or municipal corporation the proposition for the purpose set forth in the ordinance, and no question other than the incurring of indebtedness for said purpose shall be submitted." It will be seen that this statute requires the preliminary ordinance to be passed by a vote of two-thirds of all the members of the board of trustees, and to be approved by the executive,—requirements which are not found in section 861 of the municipal government act. The initial ordinance, No. 104, merely declares that the public interest and necessity demand the improvements therein mentioned, and directs that the ordinance shall be published as required by the statute. There could be no object in requiring that such an ordinance should be introduced five days, or any other time, before its passage. It is itself a mere preliminary ordinance, under which no action can be taken towards the accomplishment of the purpose indicated in it, until it has been notified to the people for a period of two weeks. After such publication, the board of trustees are authorized to pass another ordinance, "at their next regular meeting, or at an adjourned meeting," calling a special election, and submitting to the qualified voters of the municipality the proposition set forth in the ordinance. This ordinance "shall recite the objects and purposes for which the indebtedness is proposed to be incurred, the estimated cost of the proposed public improvement, the necessity for such improvement, and that the bonds of the municipality shall issue for the payment of the cost of such improvement as in such ordinance set forth." As to the second ordinance provided for in the amendment of 1891, it is obvious that no such restriction as that contended for by appellant is imposed, since it is expressly provided that such ordinance may be passed at the next regular meeting after the publication of the first ordinance is completed. This second ordinance, calling the election, and specifying the amount required to be raised, the amount of the bonds, rate of interest, etc., is the important one; and if it may be passed on the day of its introduction, as is clearly the case, no reason can be conjectured why the preliminary ordinance could not be. Ordinance No. 111, providing for the issue, sale, and redemption of the bonds, Ordinance No. 113, amending No. 111, and No. 115, approving and confirming the execution of the bonds and the sale thereof to the respondent, the Oakland Bank of Savings, were all proper steps taken by the board in carrying out the expressed will of the voters, and authorized under the act of 1891, and were not affected by the supposed restriction in section 861 of the act of 1883. The purpose of said section 861, so far as it requires ordinances to be introduced at least five days before their passage, is to give time for consideration, with a view to prevent hasty and ill-considered legislation; but the act of 1891 goes far beyond this requirement, by providing that the first ordinance, which has no effect whatever, unless followed by the other steps required by the statute, must be published for two weeks. The whole machinery of the act is framed with a special view to the intelligent action of the voters of the municipality, in whose hands rests the power to authorize or refuse to authorize the incurring of the proposed indebtedness. The whole proceeding, from beginning to end, is a single, special proceeding, for the accomplishment of a single, special purpose, though consisting of a series of acts, while section 861 of the municipal government act relates to the ordinary and general legislation passed for the government of the municipality, if it be true, as appellant contends, that it applies to ordinances other than those granting franchises.

2. Appellant's second point is that Ordinance No. 104, determining that the public interest and necessity demanded the construction of a system of waterworks and sewers, was published only from October 6 to October 19, 1892, both days included, in a daily newspaper, and that such publication was not a compliance with the statute. St. 1891, p. 94, requires the publication of such ordinance "for at least two weeks in some newspaper published in such municipality," and requires the second ordinance, calling a special election, to be passed "after the publication" of the first ordinance, "for at least two weeks," and this ordinance was passed at a regular meeting held October 20th. A "week" is defined by the Codes to be a period of 7 consecutive days. This ordinance was published on 14 consecutive days prior to October 20th, the date of the second ordinance. We think this complied with the statute. Society v. Thompson, 32 Cal. 347, 351; Misch v. Mayhew, 51 Cal. 516; Hagenmeyer v. Board, 82 Cal. 217, 23 Pac. 14. "A day is the period of time between any midnight and the midnight following." Pol. Code, § 3259. Fractions of a day are not regarded in law, unless justice requires it, or where the order of successive events is to be ascertained. In Bemis v. Leonard, 118 Mass. 502, it was held that "in computing time from the date, or from the day of the date, or from a certain act or event, the day of the date is to be excluded, unless a different intention is manifested." But here there is no date or event suggesting the exclusion of the first day's publication from the computation, and the cases above cited take this case out of the rule stated in section 12, Code Civ. Proc., which excludes the first day and includes the last; but, even under that theory, if the statute required 14 days' notice, and the notice had been served on the 6th, the performance of the act on the 20th would have been regular. The words, "at least," in the statute, do not restrict the meaning of the expression "published two weeks." They are intended

to fix two weeks as the minimum, leaving it in the discretion of the trustees to make a longer publication.

3. Appellant contends that the board had no power to change the number and denomination of the sewer bonds. The ordinance authorizing the publication of notice of special election stated the number of bonds proposed to be issued for that purpose to be 50, of the denomination of $500 each. After it was voted to issue the bonds, the number was changed by a subsequent ordinance to 40 bonds, of $500 each, and 20 bonds, of $250 each. Section 3 of the act of 1889 (St. 1889, p. 400), provides that the ordinance shall state "the number and character of the bonds to be issued." The amount of the bonds, or of the indebtedness to be incurred for the specific purpose, was not changed. Those directions which are not of the essence of the thing to be done, and by the failure to obey which the rights of those interested will not be prejudiced, are not to be regarded as mandatory. Suth. St. Const. § 447. The change did not affect the validity of the bonds, and, as no greater burden is imposed upon the taxpayers, the appellant cannot complain.

4. Appellant also urges that said bonds are void, for the reason that they provide for the semiannual payment of interest. The statute provides that the trustees shall have the right to determine the rate of interest such bonds shall bear, provided that in no case shall it exceed 7 per cent. per annum. The time at which the interest is to be paid, whether annually or semiannually, affects the rate of interest, and is within the power conferred upon the board by the statute; and, the rate being within the statutory limit, the bonds are valid, as against this objection.

5. Appellant further contends that the notice of special election does not contain a sufficient statement of the amount of the tax levy to be made annually. The ordinance calling the election provides that the bonds should be of the character known as "serials"; that one-twentieth part of the whole indebtedness for each purpose should be paid each year, including interest at the rate of 6 per cent. per annum, payable semiannually; that "the tax levy for the payment thereof amounts during the full period of twenty years to $97,800" for the waterworks bonds, and to $40,750 for the sewer bonds. The only provision of the statute touching what the notice of election shall contain in this regard is that it shall state "the amount of tax levy to be made for the payment thereof." It would be difficult to make the notice more specific in this regard. It contains all the data required for the purpose of calculating the precise amount of the levy for each year, and that is certain which is capable of being rendered certain. Besides, there were two propositions to be separately voted for, and as was said in City of San Luis Obispo v. Haskin, 91 Cal. 551, 27 Pac. 929, "the best it could do was to fix the proportion of the indebtedness which should be paid each year."

At the most, these several objections urged by appellant are matters of mere irregularity, which do not affect the validity of the bonds in the hands of the purchaser, and therefore constitute no ground for assailing the levy of a tax to meet the annual installments of principal and interest due thereon. The judgment appealed from should be affirmed.

We concur: SEARLS, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

105 Cal. 284

## CHILDERS v. SAN JOSE MERCURY PRINTING & PUBLISHING CO.

(No. 15,614.)

(Supreme Court of California. Dec. 31, 1894.)

LIBEL—WORDS ACTIONABLE PER SE — PRESUMPTIONS OF MALICE — IN FACT AND IN LAW—DAMAGES—COMPENSATORY—PUNITIVE.

1. The fact that defendant published an article charging plaintiff with the commission of a felony conclusively establishes a cause of action for actual or compensatory damages.

2. The publication of an article libelous per se is conclusively presumed to have been made intentionally, and without just cause.

3. Malice in fact in the making of a publication libelous per se is only prima facie established by evidence of the publication.

4. Upon the establishment of malice in fact in the making of a libelous publication, exemplary damages may be recovered.

5. In an action for libel the existence of malice in fact is for the jury.

Department 1. Appeal from superior court, Monterey county; N. A. Dorn, Judge.

Action by William Childers against the San Jose Mercury Printing & Publishing Company to recover for libel. From judgment for plaintiff, and an order denying it a new trial, defendant appeals.

D. M. Delmas, H. V. Morehouse, and John E. Richards, for appellant. Parker & Nougues, for respondent.

GAROUTTE, J. This is an appeal from a judgment of the superior court of the county of Monterey, in favor of the plaintiff and against the defendant herein, for the sum of $2,000, damages for an alleged libel, and from an order denying the defendant's motion for a new trial. The defendant published in a daily issue of the San Jose Mercury, a newspaper printed and published in the city of San Jose, an article to the effect that the plaintiff, William Childers, had committed the offense of burglary upon the previous night, in said city of San Jose, by breaking and entering a business house of said city. Plaintiff, by his complaint, charged said publication to be a libel upon him, and brought this action for damages.

It is now insisted that the court misunderstood the law bearing upon the questions here involved, and that the following instructions, which were given to the jury, are unsound as declarations of legal principles: (1) "All libels and slanders are conclusively presumed to be in some degree malicious." (2) "Said publication was a libel upon the plaintiff, and entitles him to a verdict in his favor." (3) "Damages in such a case as this are given —First, to compensate the plaintiff for his injuries, if he has suffered any; and, second, as an example to others similarly situated, and as a punishment for a wrongful act done." (4) "In this action, if you find for the plaintiff, and if you find that the defendant has been guilty of oppression, fraud, or malice, actual or presumed, in addition to the actual damages sustained by the plaintiff, you may give him damages for the sake of example, and by way of punishing the defendant. As I have already charged you, the law presumes the existence of malice from the fact of the publication of the false, unprivileged, and defamatory article in a newspaper regarding the person so charged." (5) "The plaintiff in this case has not alleged or attempted to prove any special damages, but simply claims a verdict for exemplary or punitive damages. Such damages are given for the sake of example, and by way of punishing the defendant." The foregoing instructions are taken from various portions of the body of law given by the court to the jury, and are collected and numbered for our convenience. There is no question in this case but that the publication was not a privileged one, and the court was justified in so stating to the jury.

Malice, as pertaining to actions of libel and slander, is a question both intricate and important, and especially so when it, in its various classifications, is considered in connection with the legal principles bearing upon the question of exemplary or punitive damages. Malice may be divided into two distinct classes, to wit, malice in law and malice in fact. Malice in law may be defined as a wrongful act, done intentionally, without just cause or excuse. Bell v. Fernald, 71 Mich. 267, 38 N. W. 910; King v. Patterson, 49 N. J. Law, 417, 9 Atl. 705. Such malice is necessary to the life of every cause of action for libel, and is conclusively presumed in publications of the character here involved. In King v. Patterson, supra, it is said: "On the other hand, where the publication imputes a crime so as to be actionable per se or is actionable only on averment and proof of special damages, if the publication is not justified by proof of its truth, or by the privileged occasion of publication, the law in such cases presumes malice such as is essential to the action. In such cases good faith and an honest belief in the truth of the publication will be no defense. The absence of a malicious motive may protect against exemplary damages, but will not bar the action." Actual malice, or malice in fact, is only material in libel as establishing a right to recover exemplary damages, or to defeat defendant's plea that a publication is privileged. Malice in fact may be defined as a spiteful or rancorous disposition which causes an act to be done for mischief. Lick v. Owen, 47 Cal. 252. As will be observed hereafter, malice in fact may be established by evidence aliunde, or it may appear from the face of the publication itself.

Two classes of damages may be recovered in actions of libel, to wit, actual or compensatory damages and exemplary damages. Special damages, as a branch of actual damages, may be recovered when actual pecuniary loss has been sustained, and is specially pleaded. The remaining branch of actual damages embraces recovery for loss of reputation, shame, mortification, injury to feelings, etc.; and, while special damages must be alleged and proven, general damages for outrage to feelings and loss of reputation need not be alleged in detail, and may be recovered in the absence of actual proof, and to the amount that the jury estimates will fairly compensate plaintiff for the injury done. Wilson v. Fitch, 41 Cal. 386. Exemplary damages may be recovered when malice on the part of the defendant is established as a fact; and, by the express provisions of section 3294 of the Civil Code, this malice may be "actual or presumed." We assume that the word "actual," as used in this section of the Code means "express." In criminal law, malice is an element of murder, and this malice may be either express or implied. It is implied when no considerable provocation for the killing appears, or when the circumstances of the killing show an abandoned and malignant heart. We are inclined to believe that the "presumed malice" of section 3294 closely assimilates to the implied malice of the criminal law. It is an inference of fact to be drawn from the libelous character of the publication; and, if the article is libelous per se, we see no reason why the law should not declare that, upon its introduction in evidence, a prima facie case of malice in fact is established; for, even though it be presumed malice, it is malice in fact, and has all the dignity and gravity of express or actual malice, proven aliunde. We conclude that presumed malice is equally a question of fact with actual malice, and, upon being established equally, forms the foundation for the recovery of exemplary damages.

This publication charged plaintiff with the commission of a felony. It was false, not privileged, and libelous per se. Upon such a state of facts the cause of action for actual damges is conclusively established (Wilson v. Fitch, supra; Dixon v. Allen, 69 Cal. 527, 11 Pac. 179; Mowry v. Raabe, 89 Cal. 609, 27 Pac. 157); and the amount and measure of damages are the only questions left for litigation. In this publication malice in law is not only conclusively presumed, but such malice in fact is implied or presumed as to establish prima facie the right of plaintiff to exemplary damages. In other words, the existence of malice in fact is sufficiently shown by the publication to make the question an issue before the jury. That exemplary damages may be based alone upon a publication libelous per se, we have many authorities from many states. Samuels v. Association, 75 N. Y. 604; Bergmann v. Jones, 94 N. Y. 51; Warner v. Publishing Co., 132 N. Y. 181, 30 N. E. 393; Association v. Tryon, 42 Mich. 549, 4 N. W. 267; Buckley v. Knapp, 48 Mo. 152; Clements v. Maloney, 55 Mo. 352; Schmisseur v. Kreilich, 92 Ill. 347; Snyder v. Fulton, 34 Md. 128; Nolan v. Traber, 49 Md. 460. In Warner v. Publishing Co., supra, the principle is thus declared: "The plaintiff gave evidence of malice when she proved the falsity of the libelous publication; and, in the absence of evidence on the part of the defendant tending to show that it had neither the desire nor the intention to wrong her, it would have been the duty of the court to instruct the jury that the plaintiff might be awarded exemplary damages in their discretion; but testimony was adduced on the part of the defendant tending to prove the absence of actual malice on his part towards the plaintiff, which, taken in connection with the evidence of malice which the law imputed when the falsity of the libel was established, presented a question of fact whether malice existed in the publication. If found to exist, then, in their discretion, the jury could award exemplary damages." While there may be authority in some states opposed to the principle declared in the foregoing citation, yet in this state, in view of section 3294 of the Civil Code, to which we have adverted, there would seem to be no question as to the true rule.

Do the instructions of the court stand the test when gauged by the legal principles we have declared? As to those instructions numbers 1 and 2 are correct. No. 3 is correct if malice in fact is assumed to have been established by the evidence; but the court was not justified in making such an assumption. Malice in fact was an issue before the jury, and, if found by the jury to be an element of the case, then, and then only, was the instruction correct and the case one for exemplary damages. Instruction No. 4 is correct in all save the last clause. The court first tells the jury that if malice, actual or presumed, has been proven, exemplary damages may be recovered, and then commits the error by saying that the publication is such that malice is presumed; in other words, conclusively presumed. This is true of malice in law, but the court, in this instruction, was dealing with malice in fact as bearing upon exemplary damages; and the presumption of malice in fact from the libelous character of the publication is not conclusive but disputable. The defendant had the right to rebut this presumption by any proper evidence. He attempted so to do in this case, and, if he was successful in that regard to the satisfaction of the jury, malice in fact was no longer an element in the case. The fifth instruction is not entirely correct, but probably too favorable to the defendant; for, while the plaintiff did not claim special damages, he did claim compensatory damages to the extent of the injury to his feelings, etc.; and, in the absence of malice in fact under his pleading, these compensatory damages were all that he was entitled to recover.

For foregoing reasons, the judgment and order are reversed, and the cause remanded for a new trial.

We concur: HARRISON, J.; VAN FLEET, J.

## PEOPLE v. LEMON. (No. 21,082.)

(Supreme Court of California. Dec. 31, 1894.)

In bank. Appeal from superior court, Fresno county; M. K. Harris, Judge.

One Lemon was convicted of selling intoxicating liquor to an Indian, and appeals. Affirmed.

Terry & Williams and Sayle & Caldwell, for appellant. Atty. Gen. Hart, for the People.

PER CURIAM. This case presents substantially the same questions as that of People v. Bray (No. 21,062; this day decided) 38 Pac. 731; and on the authority of that case, the judgment and order are affirmed.

105 Cal. 576

## PEOPLE v. CENTRAL PAC. R. CO. (No. 15,600.)

(Supreme Court of California. Jan. 6, 1894.)

Taxation of Railroad — Special Law—United States Franchise—Inclusion in Assessment—Presumption—Suit for Taxes—Interest—Attorney's Fees.

1. Pol. Code, § 3668 et seq., providing for the collection of delinquent taxes assessed on the "franchise, roadbed, rails and rolling stock" of a railroad which passes through more than one county, is not unconstitutional as being a "special law" for the collection of taxes (Const. art. 4, § 25), as the general laws for the general collection of taxes are not applicable to such railways.

2. When a railroad, which has secured a state franchise to operate its road, afterwards receives a federal franchise, the state franchise is not merged in the federal franchise, so as to prevent the taxation of the state franchise, the roadbed, etc., of the railroad.

3. In an action to collect the tax levied against such a railroad, it appeared that the assessment was against the "franchise, roadbed," etc. *Held*, that the decision of the lower court, on conflicting evidence, that the federal franchise was not included in the assessment, was conclusive, though the court erroneously stated that, if the evidence had been otherwise, it would, as matter of law, have held the same way.

4. In such a case, statements by the board of equalization made during the session at which the assessment was made are not admissible to show what was intended to be included by it in the word "franchise."

5. Pol. Code, § 3716, providing that every tax has the "effect" of a judgment against the person, does not, because a judgment bears interest, make taxes bear interest also.

6. In a judgment for delinquent taxes, it is proper to provide that it bear interest from the date of its entry.

7. Though Pol. Code, § 3670, authorizing the controller to sue for delinquent taxes, and authorizing the court to assess such sum for counsel fees as it may determine to be reasonable, may authorize the court to award counsel fees to attorneys employed in such an action by the controller, yet where the attorney general, whose duty it is "to prosecute and defend all cases in which the state or any officer" is a party (Id. § 470), appears in the action, and employs counsel to assist him, fees cannot be allowed them.

McFarland, J., dissenting.

In bank. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Action by the people of the state of California against the Central Pacific Railroad Company for the collection of taxes. There was a judgment for plaintiff, and defendant appeals. Modified and affirmed.

H. S. Brown, J. E. Foulds, and Foshay Walker (Wm. F. Herrin, of counsel), for appellant. Atty. Gen. Hart, A. R. Cotton, and Langhorne & Miller, for the People.

HARRISON, J. Action to recover the amount of taxes assessed against the defendant by the state board of equalization for the fiscal year ending June 30, 1888.

1. The underlying question upon this appeal is the validity of sections 3668, 3669, and 3670 of the Political Code, the appellant contending that the provisions of these sections contravene the provisions of section 25, art. 4, of the constitution, and particularly of subdivision 10 thereof, by which the legislature is prohibited from passing a special law "for the assessment or collection of taxes"; that as these sections take from the operation of the general law for the collection of taxes a certain class of railroads, and are applicable to these railroads alone, they are a special law, within this prohibition. The distinction between a special and a general law may not be capable of being formulated in a definition which will be exhaustive of the subject and applicable to every case; and the question may be better determined upon a consideration of each particular case presented for its application by taking into view the purpose and character of the law, as well as the individuals upon which it is to operate. The legislature, in its function of providing for the public welfare and the benefit of the entire people of the state, must determine the character of the laws which it will enact, and, except in so far as it is prohibited by the constitution, should adapt these laws to the condition or necessities of different portions of the state or classes of its citizens. The constitution does not require that all the laws which the legislature shall pass shall have a uniform operation in every part of the state, nor does it prohibit legislation for different classes of citizens. The requirement that all laws of a general nature shall have a uniform operation, and that the legislature shall not pass special laws upon certain subjects, still leaves open for determination whether any particular statute is a general or a special law. A law which operates only upon a class of individuals is none the less a general law if the individuals to whom it is applicable constitute a class which requires legislation peculiar to itself in the matter covered by the law. The class, however, must not only be germane to the purpose of the law, but must also be characterized by some substantial qualities or attributes which render such legislation necessary or appropriate for the individual members of the class. It may be "founded upon some natural or intrinsic or constitutional distinction" (City of Pasadena v. Stimson, 91 Cal. 251, 27 Pac. 604); but the distinction must be of such a nature as to reasonably indicate the necessity or propriety of legislation restricted to that class. If the conditions of such a class are such as to require legislation which would be inappropriate or injurious to others, or such as to require the enactment of laws which, either in their mode of enforcement or the remedy they provide, are inapplicable to others than the designated class, laws enacted for that class are not special for the reason that they apply to all of the individuals within the conditions. "A law is regarded as general when the provisions apply to all objects of legislation distinguished alike by qualities and attributes which necessitate the legislation to which the enactment has manifest relation." Randolph v. Wood, 49 N. J. Law, 85, 7 Atl. 286. The rule has been formulated by the supreme court of Minnesota in the following terms: "The true practical limitation of the legislative power to classify is that the classification shall be based upon some apparent natural reason, some reason suggested by necessity, by such a difference in the situation and circumstances of the subjects placed in different classes as suggests the necessity or propriety of different legislation with respect to them." Nichols v. Walter, 37 Minn. 272, 33 N. W. 800. It is very clearly expressed by Mr. Commissioner Temple in Darcy v. Mayor, etc., 38 P. 500: "The classification must be founded upon differences which are either defined by the constitution or natural, and which will suggest a reason which might rationally be held to justify the diversity in the legislation, and must be made for the purpose of meeting different conditions naturally requiring different legislation."

For the purpose of collecting delinquent taxes, the railroads upon which the foregoing sections of the Political Code are intended to operate constitute a class distinct from all other railroads, as well as from all other taxpayers. Not only are the sections inapplicable to other delinquent taxpayers, but the mode provided by statute for collecting delinquent taxes from other taxpayers is inapplicable to this class. The constitution has itself established these railroads into a distinct class in providing a special mode of assessment for a portion of their property as the basis upon which their taxes are to be levied; and the form and nature of this assessment render it eminently appropriate, if not necessary, that the taxes levied against them should be collected in a different mode from that provided for the collection of other taxes. A mere examination of the statutes for the collection of delinquent taxes generally discloses the unsuitableness of those statutes for the collection of delinquent taxes from railroads operated in more than one county. Under those statutes, the tax collector is required to pursue a course which would be entirely inapplicable to these railroads. By section 3764 of the Political Code, he is required to publish a delinquent list which must contain a description of the property on which the taxes are delinquent, and, for the purpose of collecting the delinquent taxes by sale of the property, he is required, by section 3773, to sell the least quantity of the property assessed for which a purchaser will pay the taxes and costs. Upon such sale he is to make out and deliver to the purchaser a certificate of sale, which must contain "a description of the land sold," and enter the same description in a book kept by him for that purpose. If there is no redemption from the sale, he must execute to the purchaser a deed containing the same description. The whole proceedings, commencing with the assessment and culminating in the deed, harmonize with each other, and deal with the property as a unit which can be described, levied upon, sold, and taken into possession by the purchaser. Each item of property assessed is treated as an independent item, disconnected with any other, so that upon the sale of one item it can be enjoyed by the purchaser irrespective of the sale of any other item. Such provisions are inapplicable to the railroads under consideration, so far as concerns that portion of their property which is assessed by the state board of equalization. It must be borne in mind that only a portion of their property, viz. the "franchise, roadway, roadbed, rails, and rolling stock" of railroads operated in more than one county, is thus assessed. The depots, stations, shops, and buildings erected upon the space covered by the right of way are assessed by the assessor of the county in which they are situated, and the taxes upon this property are collected in the same mode as are taxes from other individuals. The constitution provides that after the state board of equalization has made the assessment of the franchise, roadway, roadbed, rails, and rolling stock at their actual value, the same shall be apportioned to the counties in proportion to the mileage in the different counties. It is the "value" of the property after it has been assessed that is to be apportioned to the several counties. There is no apportionment to the counties of the property itself, or of any particular part of that property. Upon the assessment book of the several counties, the assessment that is apportioned by the state board of equalization does not contain a description of the property within that county, or any designation of property upon which the taxes that may be levied could constitute a lien. Only the apportioned part of the assessed value is entered on the books of the county auditor as the basis of the taxes to be levied within the county,—the amount upon which the percentage of tax is to be computed, and from which is derived the amount of taxes to be paid by the railroad. The nature of the property required to be assessed by the state board of equalization shows that the property itself is incapable of being apportioned, and that there could be no description entered upon the books which could serve as the basis of a sale or conveyance. Even if the roadway within the county could be described, there could be no apportionment to the several counties of the franchise or of the rolling stock which could serve as a description or be capable of transfer. The franchise is a unit, and can be transferred only as a unit, and the rolling stock has no particular situs in any county, but, in connection with the roadway and roadbed, is essential for the enjoyment of the franchise; while the whole—the franchise, roadway, roadbed, rails, and rolling stock—constitutes an entirety incapable of division. If the taxes for any county that are levied against the railroad upon this apportionment by the state board of equalization are delinquent, there is no description of property within that county which can be advertised or incorporated into a certificate of sale and deed. Even if the roadway and roadbed within the several counties could be made the subject of sale for delinquent taxes, the functions of each tax collector would be limited to his own county, and the purchasers in the different counties might not be the same. If they should be offered for sale, and the tax collector of each county should offer to sell to the one who would take the least portion thereof within his county, and only an undivided portion thereof should be sold in either county, the difficulties and complications that would arise between the several purchasers and the railroad of themselves indicate the necessity of devising some other mode of collecting the taxes. These and many other considerations that might be presented make it manifest that the constitution itself, by reason of the manner in which it has provided for the assessment of the property of railroads operated in more than one county, has made the laws which are appropriate for the collection of delinquent taxes upon property generally inapplicable to these railroads, and that, inasmuch as they require legislation upon that subject peculiar to themselves, the law enacted for them is a general, and not a special, law.

The appellant has cited, in support of the appeal, People v. Central Pac. R. Co., 83 Cal. 393, 23 Pac. 303. In that case the court held that, whether the complaint was to be regarded as an ordinary complaint in a civil action to recover money upon a statutory obligation, or as a complaint under section 3670 of the Political Code, it was insufficient, and that the demurrer to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action was properly sustained. The court also held that a statutory provision for a special form of complaint in an action to recover delinquent taxes contravenes the constitutional prohibition against passing special laws regulating practice in courts of justice; but, as the complaint in the present case is not prepared in that form, that question is not presented. The collection of taxes is not, however, the mere collection of a debt, but is a sovereign act of the state, to be exercised as may be prescribed by the legislature. Whether the tax is collected by an action in court, or by summary sale by the tax collector, is immaterial. The state, through its legislature, can avail itself of the judicial power as the means by which it will collect the tax; and in such proceedings it may prescribe such procedure as may best avail for that purpose, irrespective of the mode of procedure provided for the determination of controversies between individuals, just as it may avail itself of the executive branch of the government by authorizing the sheriff to sell the property upon which the taxes are delinquent, without requiring him to pursue the same course as is required in sales upon judgments between individuals. Although the tax is an obligation from the citizen to the state, it is not of the same character of obligations as exist between citizens, and for the purposes of its collection the state is not limited to the same mode or to the same procedure which it prescribes for individuals in the collection of obligations between themselves. There are matters in the opinion of Mr. Justice Fox, in People v. Central Pac. R. Co., in support of the contention of the appellant; but, after the court had decided that the complaint was insufficient in any aspect in which it might be viewed, its further opinion of the effect of a complaint that would have sufficiently presented a cause of action must be regarded as obiter dicta.

2. It is further urged in support of the appeal that the assessment in question is void for the reason that it includes the franchise received by the appellant from the United States, and in support of this contention California v. Central Pac. R. Co., 127 U. S. 1, 8 Sup. Ct. 1073, is cited. The appellant originally received from the state of California a franchise to construct and operate its railroad within this state, and subsequently it received from the United States a franchise to construct and operate a railroad from the Pacific Ocean eastward; and it is contended that the franchise from the state has been "merged" into that received from the United States. Appellant has not, however, referred us to any authority which holds that the union of the two franchises in the same corporation will operate as a merger of the state franchise, nor has it invoked any principle of law which would authorize us to hold that such merger took place. A license or the right to exercise a privilege which is derived from one authority is not necessarily destroyed or merged by procuring a similar license or right from another authority, any more than is a title to real estate merged by buying in a conflicting title, or taking a conveyance for further assurance from the grantor. The supreme court of the United States, in discussing the right to assess the federal franchise, said in the foregoing action between these parties (127 U. S. 38, 8 Sup. Ct. 1073): "This important grant, though in part collateral to, was independent of, that made to the company by the state of California." It must be conceded that the state franchise is independent of the federal franchise to the extent that it is capable of being revoked by the state. What the effect of such revocation would be, or whether it would in any respect impair the appellant's right to operate its road under the federal franchise, need not be considered. So, too, if the United States, in its visitatorial power, should for any reason recall the franchise which it has conferred upon the appellant, the franchise received by it from the state of California would still remain, and enable it to operate its road. Whether the appellant is operating its road under the franchise derived from the United States, or from the state, is immaterial. The right to operate the road is valuable whether the road is at present operated under the exercise of this right or not. The franchise from the state is still a valid, existing right, and is property which is susceptible of valuation, although its value will depend upon a variety of circumstances. If its exercise is in abeyance while the road is being operated under the federal franchise, it is none the less property, although that circumstance may diminish its taxable value.

The assessment in the present case is upon the "franchise, roadway, roadbed, rails, and rolling stock," and the court finds "that, in making its assessment and valuation therefor of defendant's franchise, said state board of equalization did not include, assess, or value any franchise or corporate power held or exercised by defendant under any act of congress." This finding is fully supported by the evidence. The constitution (article 13, § 10), as well as the statute (Pol. Code, § 3665), requires the state board of equalization to include in its assessment the franchise of the railroad; and in the present case the property of the appellant which was assessed by the state board of equalization is described as "the franchise, roadway, roadbed, rails, and rolling stock of said company within this state." We have seen that the state franchise is property susceptible of valuation, and, as the state board of equalization is directed to assess the franchise of the appellant, it must be assumed, in the absence of any other evidence than the assessment itself, that the board has acted upon property within its jurisdiction, rather than upon property which it has no power to include in the assessment. Section 3670 makes the duplicate record of assessments of railways and the duplicate record of apportionment of railway assessments, or a copy thereof, prima facie evidence of the assessment, and that the forms of law in relation to the assessment and levy of such taxes have been complied with; and, if there were no other evidence than this, the finding of the court would be sustained. The appellant, however, under the provisions of section 3664, had furnished to the state board of equalization a statement signed by its secretary, as required by that section, in which it had given as property for which it was to be assessed a description of its roadway, and had stated, in addition: "The value of the franchise and entire roadway, roadbed, and rails within this state is $12,273,785." While the mention by the appellant in the statement furnished by it of property which the state board of equalization had no authority to assess would not prevent it from resisting an attempt to enforce an assessment upon such property, yet if the property so mentioned in the statement could be assessed, or if, as in the present case, the appellant held two franchises, one of which could be assessed and the other could not, it must be held that the franchise which it included in its statement was the one capable of assessment, and that the appellant ought not to be permitted to say that the other was intended by it, or was included in the assessment. City and County of San Francisco v. Flood, 64 Cal. 504, 2 Pac. 264; Lake Co. v. Sulphur Bank Quicksilver Min. Co., 68 Cal. 14, 8 Pac. 593; Dear v. Varnum, 80 Cal. 86, 22 Pac. 76. The value given by the appellant in its statement was not conclusive upon the state board. It was only a portion of the information which the board was to obtain in order to exercise its judgment in fixing the amount at which the assessment should be made. If the appellant felt aggrieved by the value placed upon the property as a unit, or as an aggregate of the several items included in its statement, the statute itself afforded the means by which it could obtain relief. There was no error in admitting these statements in evidence. Upon the contention by the appellant that the assessment included the federal franchise, it was competent to show that it had been made in accordance with the statement furnished by it at the request of the state board.

Other testimony was introduced upon the issue presented by the answer that the assessment included the federal franchise, but, at the conclusion of the trial, the court made the above finding that no federal franchise had been assessed. As there was evidence before it in support of this finding, it must be treated here as conclusive, nothwithstanding there was other evidence that might be regarded as raising a conflict therewith. It is recited in the statement on motion for a new trial that after the court had determined as a fact, from a preponderance of the evidence before it, that the federal franchise was not assessed, it used the following language in a written opinion upon which the findings were based: "But if the parol evidence offered did not weigh in plaintiff's favor, and if, by a preponderance of such evidence, defendants could have shown that the state intended to and did include a federal franchise in the assessment, I think the court would have to disregard it as incompetent. The effect of such parol evidence would be to contradict the record, which cannot be done. From both the standpoints of fact and of law, the findings must be that a federal franchise was not included in these assessments." From this statement the appellant urges that the evidence offered by it in support of its averment that the assessment includes the federal franchise was disregarded by the court in making its decision, and, as a consequence, that the rule regarding the conclusiveness of a decision upon a conflict of evidence has no application. It clearly appears, however, that the court did not disregard the evidence, but that, after determining as a fact, from the preponderance of evidence before it, that the federal franchise had not been assessed, it stated that, if the preponderance of evidence had been otherwise, it would have held as a matter of law that the assessment must be tested by its own language. The fact that a court, after giving its decision upon an issue, gives its opinion upon the manner in which it would have decided the issue under other circumstances, does not constitute an error to be reviewed in this court.

While Mr. Wilcoxen was being examined as a witness on behalf of the plaintiff, the defendant, in its cross-examination, asked him some questions referring to testimony given by him before the judiciary committee of the assembly in February, 1889; and, the witness having admitted the correctness of the testimony, counsel for defendant then stated to the court that he would read for the court's information the question and answer "upon which" he proposed to interrogate the witness; and, after reading the same, the court stated in substance that the evidence must be confined to the year 1887, to which counsel reserved an exception, and now urges that the court erred in not allowing an examination of the witness as to his previous statement. The court did not, however, refuse to allow the witness to be examined with reference to any previous statement, for the questions and answers were read to the court after the witness had stated that "the testimony is correct all through, the questions and the answers"; nor did the counsel for the defendant present any question "upon" these questions and answers for the ruling of the court, as he had stated was his purpose. If he had desired to question the witness upon any matters relating to other assessments than the one for the year 1887, he should have made a specific offer, or presented a question for the ruling of the court; but, in the absence of such offer or question, there was no error in the court confining the examination to that year.

The court properly excluded the testimony of Maslin concerning the conversations between the members of the state board of equalization during the session at which the assessment was made. The intention of the board or of any of its members, or the signification to be given to the term "franchise," as used in the assessment, could not be shown in this manner, and the evidence could not be used for impeaching purposes unless the members of the board had been previously questioned thereon.

3. The court erred in allowing plaintiff interest on the amount of the taxes. Section 3668 of the Political Code provides that, if the taxes are not paid on the last Monday in December in each year, five per cent. shall be added to the principal sum and paid by the delinquent. This is the only penalty given by the statute, but the court has included in its judgment not only this penalty, but also interest upon the principal sum from the date of the delinquency at 7 per cent. per annum. Taxes do not bear interest unless it is expressly given by statute (Cooley, Tax'n [2d Ed.] p. 17); and the provision in section 3803 for interest upon a certain class of taxes is indicative of an intention upon the part of the legislature to exclude all other classes. A similar question was presented in People v. Northern Pac. Coast R. Co., 68 Cal. 551, 10 Pac. 45, and decided adversely to the claim of the respondent therein, the court saying: "If it had been intended that interest should be collected on all taxes which the controller might sue for and recover, the complaint formulated by the legislature for their collection would, in our opinion, have demanded judgment for that interest, as well as for the five per cent. for nonpayment." The respondent seeks to uphold the judgment by virtue of the provision of section 3716, which declares that "every tax has the effect of a judgment against the person," etc., and argues therefrom that, as a judgment bears interest, the tax will also bear interest. By the same reasoning the plaintiff would be entitled to an execution against the defendant under which the sheriff could satisfy the judgment. The "effect" of a judgment is not to bear interest, although that is one of its incidents. As a judgment, the tax is a "final determination" of the amount of public burden which is to be borne by the property on which it is charged; and the further declaration in the same section that the tax, as well as the judgment, is not removed until the taxes are paid or the property sold, indicates the character of the "effect of a judgment" which is given to the tax. It was proper to provide in the judgment that it should bear interest from its date of entry like any other judgment. Himmelman v. Oliver, 34 Cal. 246.

4. The court also held that the plaintiff was entitled to recover for counsel fees for legal services rendered it by Langhorne & Miller a sum equal to 7½ per cent. upon the principal sum of delinquent taxes, and for legal services rendered it by A. R. Cotton a sum equal to 2½ per cent. upon said principal sum, and rendered judgment accordingly. Langhorne & Miller were the attorneys employed by the state controller to collect these taxes, and commenced this action in January, 1890, and have since that time had charge of the litigation, and acted as the attorneys for the plaintiff. In the early part of 1891 the attorney general requested Mr. Cotton "to take a hand generally" in the suit, and after that time he wrote certain briefs which were filed in the case by the attorney general, and assisted the attorney general upon the argument on the demurrer, and at the trial of the cause as special counsel. Section 3670 of the Political Code authorizes the controller to institute an action for the collection of these taxes after they have become delinquent, and authorizes the court to include in the judgment in such action such sum for counsel fees as it may determine to be reasonable and just. The power of the controller to employ special counsel in the action has not been questioned by the appellant, and it is, perhaps, deducible from the provision for counsel fees above cited. Section 3670 is in accord with the provisions of subdivision 16, § 433, of the Political Code, which makes it the duty of the controller, "to direct and superintend the collection of all moneys due the state," although the latter section, without the direct provisions of section 3670, might not be authority for the institution of the present suit. The appellant, however, insists that the court could not award counsel fees to any other counsel than those employed by the controller, and that the allowance to Mr. Cotton was without authority of law. Section 470 of the Political Code makes it the duty of the attorney general "to attend the supreme court; and prosecute or defend all causes to which the state or

any officer thereof in his official capacity is a party." Whether this limits his duty to the prosecution of such causes in the supreme court, or whether it extends to all the courts in the state, need not be considered. If the controller has the right, under section 3670, to intrust the management of the action to other attorneys than the attorney general, it would seem that the attorney general would be absolved from the duty imposed upon him by section 470, and that any part that he might take in such action would be voluntary and subordinate to the authority of the attorneys selected by the controller. If, however, he has the right, as the law officer of the state, to appear in the action, it is only by virtue of his official duty, and for that he would not be entitled to any compensation other than his official salary. This is the view taken by that officer himself, as he stated at the trial in the present action that, in his opinion, he was not entitled to any compensation. The same reason which would prevent him from being entitled to compensation for the services he might personally render in the action would also prevent him from receiving compensation for any person whom he might employ to assist him; and the court would be no more authorized to award judgment against the defendant for compensation to such assistant than it would be for compensation to the attorney general himself. We have been referred to no provision of law giving to the attorney general authority to employ special counsel to aid him in the discharge of his duties, or authorizing a court to award compensation to such special counsel; and, in matters of taxation, only such burdens can be imposed upon the taxpayer as have been expressly authorized by law, whether the taxes are collected by a sale of his property or by means of an action for their recovery. We hold, therefore, that the court was not authorized to include in the judgment against the defendant the sum for counsel fees awarded to Mr. Cotton.

The court below is directed to modify the judgment by striking therefrom the amount allowed for interest prior to the entry of the judgment, and also the amount allowed for counsel fees to A. R. Cotton; and, as so modified, the judgment and order denying a new trial will stand affirmed.

We concur: BEATTY, C. J.; DE HAVEN, J.; GAROUTTE, J.

VAN FLEET and FITZGERALD, JJ., being disqualified, did not participate in the foregoing decision.

McFARLAND, J. I dissent. Passing other questions, it is sufficient to say that, in my opinion, the assessment in question is void under the decisions of the supreme court of the United States in the cases of California v. Central Pac. R. Co. and California v. Southern Pac. R. Co., 127 U. S. 1, 8 Sup. Ct. 1073, because it includes a federal franchise, and thus attempts to tax "one of the means or instrumentalities employed by the United States government for carrying into effect its sovereign powers." That this cannot be done by a state has been the established law ever since the decision of the United States supreme court in McCulloch v. State, 4 Wheat. 316, which was rendered in 1819. The principle was fully recognized and declared by this court in San Benito Co. v. Southern Pac. R. Co., 77 Cal. 518, 19 Pac. 827, and City and County of San Francisco v. Western Union Tel. Co., 96 Cal. 140, 31 Pac. 10. The only difference between the above mentioned cases in 127 U. S. (8 Sup. Ct.) and the case at bar is that in the former the trial court found that the state board of equalization included in the assessment the value of "all franchises and corporate powers held and exercised by the defendant," while in the case at bar the court below found that said board, in making the assessment for the year 1887, "did not include in its said assessment any federal franchise." But the assessment in both instances was exactly the same, namely, "the franchise" of the railroad. In the former cases it does not appear that the trial court received any evidence on the question as to what the franchise included; and it is probable that the finding was based upon the language of the assessment alone. In the case at bar the court did receive evidence as to what the members of the board intended by the words "the franchise"; and it appears in the record that the court, after having concluded that, "from a preponderance of evidence before it, the federal franchise of defendant was not assessed or included in the assessment," proceeded to say that "if, by a preponderance of such evidence, defendants could have shown that the state intended to and did include the federal franchise in the assessment, I think the court would have to disregard it as incompetent. The effect of such parol evidence would be to contradict the record, which cannot be done." Now, if it was competent to introduce testimony to show the intent of the members of the board when they made the assessment, then the court clearly erred in ruling out certain evidence offered on that point by appellant. Upon that theory the offered evidence of Maslin, secretary of the board for many years, was clearly admissible and material; and so were the questions asked by appellant in cross-examination of the witness Wilcoxen. On the other hand, if the record of the board should be alone considered, then it simply appears that the franchise was assessed; and I cannot possibly see how that phrase can be construed to mean anything else than the whole franchise of the railroad,—all the franchise belonging to it. It means just what the lower court had found it to mean, as above quoted, in said cases in 127 U. S. and 8 Sup. Ct. The words "the franchise" clearly, in my judgment, include the right of appellant to do business, and the whole of that right. That right is a unit and inseparable. The court below found that the board "did assess as a unit, and not separately, the franchise, roadway," etc. And I cannot conceive how a court can, first, separate it, or, second, if it could, how it could determine which part to throw away. Moreover, the main foundation of the doctrine of McCulloch v. State is that the power to tax includes the power to destroy; and thus a state might, under the guise of taxation, destroy or materially cripple an instrumentality of the federal government. And is it not manifest that in the case at bar that principle protects the instrumentality here involved from injury or destruction under the pretense that only that part of the unity which comes from the state is taxed? Are not the effects and consequences the same? In my opinion, therefore, without discussing the other questions involved, the judgment should be reversed.

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105 Cal. 227

PEOPLE v. SOUTHERN PAC. CO. (No. 15,601.) SAME v. NORTHERN RY. CO. (No. 15,602.) SAME v. SOUTHERN PAC. CO. et al. (No. 15,603.) SAME v. CALIFORNIA PAC. R. CO. (No. 15,604.) SAME v. SOUTH PAC. COAST R. CO. (No. 15,605.)

(Supreme Court of California. Jan. 6, 1895.)

In bank. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Actions by the people of the state of California against the Southern Pacific Company, the Northern Railway Company, the Southern Pacific Company and the San Pablo & T. Company, the California Pacific Railroad Company, and the South Pacific Coast Railroad Company for the collection of taxes. There was a judgment in each case for plaintiff, and defendants appealed. Modified.

H. S. Brown, J. E. Foulds, and Foshay Walker (Wm. F. Herrin, of counsel), for appellants. Atty. Gen. Hart, A. R. Cotton, and Langhorne & Miller, for the People.

PER CURIAM. Upon the authority of People v. Central Pac. R. Co. (No. 15,600; this day decided) 38 Pac. 905, the court below is directed to modify the judgment by striking therefrom the amount allowed for interest prior to the entry of judgment, and also the amount allowed for counsel fees to A. R. Cotton; and, as so modified, the judgment and order denying a new trial will stand affirmed.

McFARLAND, J., dissenting.

VAN FLEET and FITZGERALD, JJ., being disqualified, did not participate in the foregoing opinion.

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DEAN et al. v. ROSS et al. (No. 15,647.)

(Supreme Court of California. Dec. 26, 1894.)

Instructions — Invading Province of Jury — Matters of Fact — Lumber Furnished for Boat — Liability of Owner — Declarations — Admissibility.

1. In an action for lumber used in the construction of a vessel of which defendant was alleged to be part owner at the time the lumber was furnished, defendant testified that she bought shares in the vessel of its builder "at the time he started to build it"; that she told him she would take shares "after the vessel was built"; and that she got the shares after the boat was built. There was no other testimony as to the time she took the shares. Her receipts for the purchase price of the shares referred to the vessel as "built." *Held*, that in assuming in his charge to the jury that, at the time the vessel was being built, defendant owned said shares, the court violated Const. art. 6, § 19, prohibiting judges from charging juries as to matters of fact.

2. The court cannot take a fact from the jury unless it is admitted, or the evidence as to its existence is not conflicting.

3. In an action for lumber sold and used in the construction of a vessel, declarations of the share owner who built the boat as to the correctness of the account sued on were not admissible as against one who merely holds shares in the boat.

Department 1. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Action by E. B. Dean and others against William M. Ross, Henrietta G. Witzemann, and others on an account. From a judgment for plaintiff, and an order denying a new trial, defendant Henrietta G. Witzemann appeals. Reversed.

Charles F. Hanlon, for appellant. Henley & Costello, for respondents.

VAN FLEET, J. This is an action to recover a balance due on an account for lumber alleged to have been bought by defendants from plaintiffs with which to construct a schooner. Defendants other than Henrietta G. Witzemann made default. The latter answered, and at the trial verdict and judgment were against her. She appeals from the judgment and an order denying her motion for new trial.

1. The contract for the lumber was made by the defendants John and William M. Ross, at plaintiffs' mill in Oregon, and the vessel was built at Coos Bay, in that state, under the immediate supervision of the Rosses, or one of them. The appellant, who lives in the city of San Francisco, in this state, had no direct dealings with the plaintiffs, and was not known to them in the transaction when they sold the lumber, but the theory on which the action proceeded against her was that she was a part owner in the vessel at the time the lumber was bought, and hence, jointly with the other defendants, liable therefor. The only evidence tending to connect appellant with the transaction was that given by herself. She was called as a witness on behalf of plaintiffs, and testified: "I have four shares in the schooner Maggie Ross. Have had them since I bought them from Captain Ross, five years ago, just at the time he started to build it. That is one-sixteenth. Captain Ross came to me, and said he was going to build a vessel, and I told him I didn't want any vessel built, but, if he wanted to build a vessel, he could do so, and I would take

four shares. I did this at the time he was building the vessel. I do not own them now. I held the shares only a couple of years. * * * I took them when it was built, and Captain Ross built the vessel, and I paid him all my bills, and I got my receipts to show I paid it to Captain Ross." Called as a witness on her own behalf, she further testified: "I never ordered any lumber from the plaintiffs in this action, or for any purpose mentioned in the complaint, and never agreed with any of the plaintiffs in this case to pay them for any lumber. I never authorized Captain Ross or any other person to buy lumber from them on my account, or to build a schooner for me, or any part of it for me. * * * Captain Ross came in with his bills, and I paid the bills to him at different times. He said he wanted to build a vessel. I told him all right, if he wanted to build one, why, after the vessel was built, I would take some shares from him. * * * When Captain Ross first told me he was going to build a vessel, I told him he could build a ship, but not on my account; if he wanted to build one, he had to build it himself." The bills referred to by appellant as having been paid by her to Captain Ross were for her shares in the vessel, for which she paid in four installments. The receipt for the first installment was put in evidence, and reads: "San Francisco, April 5, 1888. Received of Mrs. H. G. Witzemann $312.50, being the first payment of twenty per cent. on four shares in new steamer built in Coos Bay. [Signed] John Ross." Appellant testified that the last installment was paid after August, 1888. "After I paid my said four installments, I then became the owner of four shares. Don't know when the last payment was made; it is so long ago. Paid between $1,500 and $1,600 in all."

Upon this evidence, the court below charged the jury: "Now, gentlemen, this case simply presents this question, so far as you are concerned: It appears from the evidence and pleadings in this case the plaintiffs here furnished lumber during a period from the early portion of 1888 until September of that year for the purpose of building this schooner, the Maggie Ross. It appears from the testimony here that certain persons were holding different shares in this vessel, and this defendant, Mrs. Witzemann, became the owner of four shares in the vessel, and therefore was part owner in the vessel. So, as a matter of law, I charge you that she is responsible for this lumber that may have gone into it; consequently there is no dispute on that proposition." At the conclusion of the charge, and before the jury retired, the appellant's attorney said: "I wish to note an exception to the charge of the court that she is found to be an owner of the vessel, or any part of it, at the time the bill was incurred. That is a question that should have been left to the jury. The Court: There is no question of fact here to be submitted to the jury as to the question of ownership." Appellant excepted to this feature of the charge, and now complains that it is obnoxious to section 19 of article 6 of the constitution of this state, which prohibits judges from charging juries upon questions of fact. We think it a very plain transgression of the line which separates the functions of the judge from those of the jury, and therein falls within the denunciation of the provision in question. It assumes as proven the essential fact upon which, under the theory upon which the case was tried, the right of plaintiffs to recover against appellant depended. It is conceded that, if appellant bought her shares after the vessel was built, she would not be liable, and the question, therefore, as to when she did become interested, was the vital fact in the case. This fact the instruction of the court assumes to have been established in accordance with plaintiffs' theory. The evidence by no means warrants that assumption. To the contrary, the evidence on the point at issue was such that, had the jury seen fit to find in favor of appellant's contention, it could not be held that the finding was wholly unsupported. Appellant was testifying to an event some time past. She said, speaking of the purchase of the shares: "I bought them from Captain Ross five years ago, just at the time he started to built it [the vessel]. He said he wanted to build a vessel. I told him all right, if he wanted to build one, why, after the vessel was built, I would take some shares from him." In another place she said she got the shares after the boat was built; and the language of the receipts given her by Ross would tend at least to bear out the claim that she got her shares subsequent to the time the vessel was constructed; the vessel being therein referred to as "built at Coos Bay." Admitting that appellant's evidence is open to the charge of equivocation, it was nevertheless such as at least to leave the fact in issue, and she was entitled to have the issue found by the jury. Withdrawing it from their consideration, as the court did, was prejudicial error. It is only where the fact is admitted, or there is no shadow of conflict of evidence with respect to it, that the court is justified in taking it from the consideration of the jury. People v. Phillips, 70 Cal. 68, 11 Pac. 493; Vulicevich v. Skinner, 77 Cal. 239, 19 Pac. 424.

2. We think the court erred in admitting, against appellant's objection, the testimony of the witness Wilcox as to the declarations of Capt. Ross about the correctness of the bill for the lumber. They were not joint defendants in any sense which would make his declarations binding upon appellant; and the evidence did not tend to establish any such legal relation between them as to make his declarations admissible as against her.

The other points made do not require to be noticed. The judgment and order denying new trial are reversed.

We concur: GAROUTTE, J.; HARRISON, J.

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105 Cal. 321

## ADAMS v. GRAND LODGE OF A. O. U. W. et al. (SMITH, Intervener). (No. 15,350.)

(Supreme Court of California. Dec. 31, 1894.)

MUTUAL BENEFIT INSURANCE—NOMINAL AND REAL BENEFICIARY—DECLARATION OF TRUST—CHANGE OF BENEFICIARY—WAIVER OF CONDITION.

1. Where a certificate of insurance in a mutual benefit association, made payable to a member of a firm to which insured is indebted, is intended by all parties to be for the benefit of the firm, it will, as against the heirs of insured, be entitled to the proceeds of the certificate, though the nominal beneficiary died before the insured.

2. The provision in the constitution of a mutual benefit association, that an application for change of beneficiary in a certificate shall be filed within 30 days of its date, may be waived by the association, and is waived by issue of certificate naming the new beneficiary.

3. Where, in an action for the amount due under a certificate of insurance in a mutual benefit association, the administrator of the nominal beneficiary is made a defendant, and in a verified answer denies that such beneficiary was a trustee for plaintiff as to the certificate, a declaration of trust made by such beneficiary is admissible.

Department 1. Appeal from superior court, city and county of San Francisco; John Hunt, Judge.

Action by L. S. Adams against the Grand Lodge of the Ancient Order of United Workmen and others. Caroline H. Smith intervenes. Judgment for plaintiff, and intervener appeals. Affirmed.

W. H. Cobb and Clinton L. White, for appellant. William H. Jordan, for respondents.

GAROUTTE, J. The plaintiff, as successor in interest of the firm of Adams, McNeill & Co., brought this action to recover the sum of $2,000, due and payable upon a beneficiary certificate issued by a society known as the "Ancient Order of United Workmen." The party insured was Joshua H. Smith, and the original beneficiary named in the certificate of membership was Caroline H. Smith, his wife, the present intervener and appellant. Subsequently Smith requested the grand lodge to substitute one John McNeill as the beneficiary in the place and stead of his wife, Caroline. This request was complied with, and said McNeill received a new certificate, made payable to himself upon the death of Smith. A few years thereafter McNeill died, and in about a like period after McNeill's death Smith died. No new beneficiary was named in Smith's certificate of insurance after the death of McNeill, and upon this ground the intervener and appellant, Mrs. Smith, representing the heirs and devisees of her late husband, appears in the action, claiming that the insured died without a named beneficiary, and that, therefore, the proceeds of the certificate belong to the heirs of the insured. The defendant the grand lodge appeared in the action by answer, and offered to pay the money to whomsoever the court might decree upon final judgment, while the defendant Bronner, administrator of the estate of John McNeill, deceased, answered, but failed to appear at the trial. Respondent Adams' claims are fairly illustrated and dependent upon the following facts, which we quote from the findings made by the trial court, and which, in our opinion, are fully supported by the evidence introduced at the trial. After finding that Smith was indebted to the firm of Adams, McNeill & Co. in a large sum of money, the findings further declare: "(1) That the said beneficiary certificate, so issued to the said Joshua H. Smith, and so made payable to the said John McNeill, was intended by the said Smith and the said McNeill for the benefit of the said firm of Adams, McNeill & Co., and not otherwise; and that the said certificate was held by the said John McNeill in trust for the said firm of Adams, McNeill & Co., of which said firm the said McNeill was at said time a member, as heretofore found, and that the same was so held in trust by the said McNeill with a full knowledge and consent of defendant the Grand Lodge of the Ancient Order of United Workmen of California. (2) That it is a fact that the said firm of Adams, McNeill & Co. received said beneficiary certificate, and caused the same to be held by the said John McNeill in trust for them, as aforesaid, in payment of the said indebtedness to the said firm of the said Joshua H. Smith, and not otherwise; and that since the issuing of said certificate the said firm of Adams, McNeill & Co., and plaintiff, as its successor in interest, have furnished the funds with which to pay all assessments and dues required of the said Joshua H. Smith by the defendant Grand Lodge of the Ancient Order of United Workmen to keep the said beneficiary certificate in full force and effect."

The application of principles of law to litigation arising out of mutual benefit associations is a matter of very recent growth, and especially is this so of that branch of mutual benefit law which directly presents itself for our consideration in the present case. By reason of these things, and by reason of the additional fact that litigation involving these questions is to a great extent at the present time engrossing the attention of courts all over the country, and demanding decision largely without the aid of precedent, we find ourselves, to some extent at least, journeying upon untrodden and devious paths. At the same time we see no reason why those broad and benign principles of equity, which, as it were, are the guardians of the law, should not deal with this case as with other cases, and likewise weigh and measure its merits, rendering unto all parties that justice to which they are entitled. The Ancient Order of United Workmen is not an active party to the litigation. It has no interest whatever in the result. In effect, it has paid the fund into the hands of the court, and is now a stranger to the action. We, then, have a certain fund of money to which the plaintiff and the intervener both claim title, and their respective claims of ownership are to be litigated in the same way, and finally adjudicated and determined upon the same general principle, as though the common source of title of this money came through a bequest or gift, rather than from a mutual benefit association. We had occasion in the recent case of Jory v. Supreme Council, 38 Pac. 524, to give some of the matters here involved careful attention, and in that case we arrived at the conclusion that the relations existing between the insured and the beneficiary might be such as to create equities in favor of the beneficiary which the insured would be estopped from defeating, at least as against any subsequently named beneficiary who possessed no equities. Under the authority of that case, it cannot be questioned but that, if McNeill was a beneficiary possessing such equities, no subsequent act of Smith's, even though it had culminated in the issuance of a new certificate by the order to another beneficiary, could have defeated his equities; conceding, of course, this last beneficiary to be a pure volunteer.

According to the findings of fact, McNeill was the beneficiary in name only, and the real beneficiary was Adams, McNeill & Co. Even conceding that, as against the order, McNeill was the real and only beneficiary, that is not the condition here presented. The order is not here as an aggressive party, standing strictly upon its legal rights, and demanding the letter of its bond. As we have said, it is practically not a party to the action at all. But the conditions facing us are simply these: Two litigants, standing upon a common level, submit to a court of equity their respective claims of ownership to a special fund of money, and ask that court to do justice in the light and under the guidance of those equitable principles which form the glory of that forum. Looking at the case from that standpoint of vision, it presents but little difficulty. If McNeill in terms had been named beneficiary in the certificate, as trustee for Adams, McNeill & Co., there would be no question as to the ownership of the fund. Neither can there be any question but that a certificate could be made payable to McNeill, as guardian of a named minor, or as trustee of Adams, McNeill & Co. If McNeill had lived until the death of Smith, and litigation had arisen between him and Adams, McNeill & Co. as to the ownership of this fund, a court of equity, without hesitation, would have given it to the partnership, and the fact that the trust was not expressed upon the face of the certificate would have been wholly immaterial. The court, under such circumstances, would declare that McNeill was a mere naked trustee of the real beneficiary, and that the real beneficiary was entitled to the money. Such is the principle governing here, and, in the eyes of a court of equity, the fact that the trustee died prior to the death of Smith makes no difference in the conditions. The real beneficiary still lived, and was alive at the death of Smith, and he is the one it is the duty of the court to protect. It is insisted that the certificate issued to McNeill by the order was invalid, for the reason that the application for a change of beneficiary was not filed in the grand lodge within 30 days of its date, and thus was not filed in compliance with the provisions of the constitution of the order. A sufficient answer to such contention by the intervener is that this provision of the law was one that could be waived by the order, and when the order issued the certificate upon the application the provision was waived. The declaration of trust made by McNeill, defining his relations with the firm as to the beneficiary certificate, was properly admitted in evidence. The administrator of McNeill's estate was a party defendant, and filed a verified answer denying the trust relations, and under these circumstances the paper was competent evidence. There is nothing further disclosed by the record demanding our attention. The judgment and order are affirmed.

We concur: HARRISON, J.; VAN FLEET, J.

105 Cal. 646

## In re BATES' ESTATE. (No. 19,509.)

(Supreme Court of California. Jan. 18, 1895.)

Decree of Distribution—Appeal.

Where deceased bequeathed to her daughter certain named personal property, and the residue of her estate to a charitable institution, under Code, § 1313, precluding testatrix from disposing by will of more than one-third of her estate, it must be shown, on appeal by the daughter from a decree of distribution rendered in accordance with the terms of the will, that such "residue" amounted to more than one-third of the whole.

In bank. Appeal from superior court, Los Angeles county; W. H. Clark, Judge.

Proceedings in the probate of the will of Annie Bates, deceased, from a decree of distribution, in which her daughter, Mary Dunbar, appeals. Affirmed.

Lawson & Ardis, for appellant. Bicknell & Trask, for respondent.

HARRISON, J. The decedent left a last will and testament, making the following dispositions of her property: "Secondly. I give and bequeath to my daughter, Mary Dunbar, the wife of Edwin Dunbar, the household furniture, beds, and clothing, and all articles in my late residence in the township of Compton, in said county of Los Angeles, state of California. Thirdly. I give and bequeath to the Los Angeles Infirmary, a corporation for the care of the sick and feeble persons, all the remainder and residue of my estate, real, personal, and mixed, of which I die seised or possessed, the said infirmary having benevolently cared for me during my illness, and have agreed and covenanted to bury my body as above provided." Upon the final settlement of the accounts of the executor, the court made a decree of distribution, in which, after reciting that "the residue of said estate consists wholly of real property," it ordered that the residue of said estate, consisting of two parcels of land situated in Los Angeles county, described in said decree, be distributed to the "Los Angeles Infirmary, a corporation for the care of sick and feeble persons, organized and existing under the laws of the state of California." From this order the daughter of the decedent has appealed, upon the ground that by virtue of the provisions of section 1313, Civ. Code, the testatrix was precluded from disposing by will of more than one-third of her estate.

The inventory of the estate is not set forth in the record, nor is there any bill of exceptions or data from which the amount of the estate of the decedent can be determined. For the purpose of sustaining the order of the court, we must assume that any matters which would support the order, if they had been before the court, were presented to it, and made the basis of its action. Caruthers v. Hensley, 90 Cal. 559, 27 Pac. 411. In the absence of any facts showing it to be erroneous, the order of the court must be assumed to be correct, and the burden of showing error is upon the appellant. The items of property bequeathed to the appellant may have been of more than twice the value of the property left to the corporation, and the "residue" distributed to the corporation may have been less than one-third of the distributable portion of the estate. As the contrary is not made to appear, the presumption that the order is correct must prevail. The order is affirmed.

We concur: BEATTY, C. J.; McFARLAND, J.; GAROUTTE, J.; VAN FLEET, J.

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105 Cal. 621

## PEOPLE ex rel. HOFFMAN v. HECHT et al., Board of Freeholders. (No. 16,005.)

(Supreme Court of California. Jan. 16, 1895.)

Preparation of City Charter — Election of Board of Freeholders—Ineligibility of Persons Elected—Effect — De Facto Officers—Authority.

1. Under Const. art. 11, § 8, one who has not for five years been a qualified voter of the city for which a charter is to be prepared is ineligible to a position on the board of freeholders chosen for that purpose.

2. Where 2 of the 15 freeholders chosen to prepare a city charter, as provided by the constitution, are ineligible, the remaining 13 members are competent to organize and act as such board.

3. Though 2 of a board of 15 freeholders chosen to prepare a city charter are ineligible, the fact that they have been duly elected and commissioned as members of such board makes them de facto members.

4. The acts of de facto members of a board of 15 freeholders chosen to prepare a city charter are valid as to the public and third parties until their right to their seats is judicially passed upon.

Commissioners' decision. In bank. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

Quo warranto by the state, on the relation of Henry N. Hoffman, to determine the status of the board of freeholders elected for the purpose of preparing a charter for the city of San Francisco. From judgment for defendants, after an order sustaining two separate demurrers to the complaint, the state appeals. Modified and remanded.

Robt. Ash, for the State. H. T. Creswell and H. N. Clement (Wm. F. Gibson, of counsel), for respondents.

SEARLS, C. This is a proceeding by quo warranto, brought in the superior court, to determine by what authority the defendants, as individuals or as a board, are acting as a board of 15 freeholders to prepare and propose a charter for the city and county of San Francisco. Two several demurrers were interposed to the complaint; one by and on behalf of William B. Bourn and I. W. Hellman, two of the defendants, and the other by all the defendants. The demurrers and each of them were sustained by the court, and, the relator declining to amend, final judgment went for the defendants, from which judgment the plaintiff appeals.

The complaint, which, for the purposes of this case, is to be taken as true, avers in substance as follows: (1) The city and county of San Francisco is, and at all the times herein mentioned has been, a municipal corporation, duly organized and existing under and by virtue of an act of the legislature of the state of California approved April 19, 1856, and the several acts of said legislature amendatory thereof, and supplementary thereto, and contains a population of 300,000 inhabitants. (2) On the 11th day of September, 1894, the properly constituted authorities of said city and county of San Francisco, by due proceedings, ordered that a board of 15 freeholders, who shall have been at least five years qualified electors thereof, should be elected by the qualified voters of said city and county, at the general election on the 6th day of November, 1894, whose duty it should be to prepare and propose, within 90 days after such election, a charter for such city and county, under and by virtue of section 8 of article 11 of the constitution of the state of California. (3) Thereafter, and in due time, 43 persons were regularly nominated as candidates for the said officers of board of freeholders, certificates of such nominations duly filed as required by law, all of whom were believed to possess the qualifications required by law to fill said offices. (4) The names of the persons so nominated were placed upon the ballots as candidates for said office. (5) On the 25th day of October, 1894, a proclamation was duly made, issued, and published by the proper officers, as required by law, that there would be chosen and elected on the 6th day of November, 1894, a board of 15 freeholders. (6) At the general election of November 6, 1894, the said persons so nominated were voted for by the qualified voters of said city and county, each receiving the number of votes mentioned in the complaint. (7) The vote was duly canvassed, and the defendants herein declared duly elected to fill said office. (8) Thereafter defendants, and each of them, received certificates of election, duly qualified, and organized as a board of 15 freeholders, and entered upon the discharge of their duties as such board, and are still so acting, and preparing a charter. (9) The defendants are not now, and never have been, a legally constituted board of 15 freeholders, but have usurped the functions of said board, without authority or right. That no board was chosen by the voters, as required by the election and article of the constitution referred to herein, for the reasons: (a) Defendant I. W. Hellman was ineligible to said office in that he had not been for at least five years a qualified elector of said city and county; that he had been such qualified elector for but three years, and that prior to said three years he had been a resident and elector of the city of Los Angeles, Cal. (b) The defendant W. B. Bourn was ineligible because he had not been for five years a qualified elector of the city and county of San Francisco, as required by the constitution; that he had been an elector but two years, and that prior thereto he was a resident and elector of the county of Napa, Cal. (c) The remaining defendants and members of the board are but 13 in number, and do not constitute a board of 15 freeholders. (d) The above-named 13 defendants are all eligible and qualified to hold the office as members of the board aforesaid, and have accepted the certificates and acknowledged the right of said defendants Bourn and Hellman as members of said board, and are sitting with said Bourn and Hellman as members of said board, and claim that said persons are and constitute a board of 15 freeholders.

The general demurrer of all the defendants is upon the ground "that said complaint does not state facts sufficient to constitute a cause of action." The separate demurrer of Hellman and Bourn is upon the ground that the "said complaint does not state facts sufficient to constitute a cause of action against these defendants, or either of them." Section 8 of article 11 of the constitution of the state of California, as amended, and the ratification thereof declared December 30, 1892, is in part as follows: "Any city containing a population of more than three thousand five hundred inhabitants may frame a charter for its own government, consistent with and subject to the constitution and laws of this state, by causing a board of fifteen freeholders, who shall have been for at least five years qualified electors thereof, to be elected by the qualified voters of said city at any general or special election, whose duty it shall be, within ninety days after such election, to prepare and propose a charter for such city, which shall be signed in duplicate by the members of such board, or a majority of them," etc.

The first question for consideration relates to the eligibility of the defendants I. W. Hellman and William B. Bourn as freeholders under the constitutional provision. They had not been for at least five years qualified voters of the city and county in which the election was held, and for which the charter was to be prepared. The language used by the framers of the constitution in relation to the qualification essential to eligibility to the office or position of a freeholder is plain and unequivocal, and the authority to prescribe the qualification is not open to doubt. The reason of the rule is apparent, and need not be stated. The defendants Hellman and Bourn, not having been for at least five years qualified electors of the city and county of San Francisco, were ineligible to the office of freeholder, and their separate demurrer should have been overruled.

2. Do the remaining 13 members who were regularly elected constitute a legal board, with authority to act? The contention of appellant is that in order to constitute a valid board it is essential that 15 qualified

members be elected, and that without such number thus qualified there can be no constitutional board, and hence that the 13 members should be inhibited from acting, either with or without the two who are disqualified. We think this position is unwarranted under the language of the constitution, and not in consonance with public policy or the analogies in similar cases. It is true the constitution provides for the election of a board of 15 freeholders; but the persons who are, when elected and qualified, to constitute such board, are elected and must qualify as individuals, and the entity known as the board has no legal existence until it is organized by the individuals who come clothed with the insignia of authority afforded by a certificate or other adequate proof of an election. The electors select the persons who are to constitute the board, but do not create the board. That is done by the organization of the members. When the electors have elected, by a plurality of all the votes cast, 15 members to constitute the board, and furnished them with the evidence of said action, their power in the premises is exhausted, and the requirement of the constitution is so far complied with that it only remains for the persons so selected, or a majority of them, to organize and exercise the power which by virtue of their election is vested in them. An interpretation which holds that the ineligibility or death or unwillingness to act of a single member thus selected invalidates the entire election would work great hardship, and tend to thwart the will of the electors in many instances, and should not be indulged unless rendered imperative by the mandate of the constitution. The same constitution (section 5, art. 11) provides that the legislature, by general and uniform laws, shall provide for the election or appointment in the several counties of "boards of supervisors," etc. Other portions of the constitution provide for a supreme court, "which shall consist of a chief justice and six associate justices." Again, "the senate shall consist of forty members and the assembly of eighty members." It would, we think, hardly be contended that, because the constitution provides for a board of supervisors, an election for supervisors, in which a single member elected was disqualified would either invalidate the election of other members, or prevent their organizing and acting as a board. Like considerations apply to the election of members of the senate and assembly, and to the election, organization, and action of the supreme court. The Code provides that "words giving a joint authority to three or more public officers or other persons are construed as giving such authority to a majority of them, unless it is otherwise expressed in the act giving the authority." Pol. Code, § 15. The earlier doctrine was that where a board of commissioners was created by the legislature, and discretionary powers conferred upon them to decide upon matters of public interests, and the law had made no provision that a majority should constitute a quorum, all must be present and consult, though a majority might decide. People v. Coghill, 47 Cal. 363, and cases cited. The rule prior to its modification by the Code may be stated thus: The power or authority given to public officers, commissioners, or committeemen was a joint authority to be exercised by all of them, and (except as provided by statute) all must meet and deliberate; but, this done, a majority could decide. To the exercise of this joint authority it was sometimes held, and it would seem logically, that the existence of a full board was necessary. If the authority was, in contemplation of law, to be exercised by all the members, then there should be members capable and competent to its exercise; but under our codes this authority, although joint where given to three or more, is to be "construed as giving such authority to a majority of them," unless it is otherwise expressed in the act giving the authority. If a majority possesses all the authority of the whole, then such majority must be competent to its exercise. For all practical purposes, the majority becomes the full board. It is the receptacle—the reservoir—of all the authority conferred upon the whole, and its action, it is submitted, cannot be stayed by the nonaction, failure to qualify, absence, death, or want of eligibility of the minority. These were the very obstacles intended to be surmounted by the statute.

Since the enactment of the Code it was held in People v. Harrington, 63 Cal. 257, that the action of a quorum was the action of the board of supervisors, and that the action of a majority of such quorum, though not constituting a majority of the board, was valid and binding. In State v. Huggins, Harp. 139, court of appeals of South Carolina, the facts were that of 18 managers of elections appointed by the legislature 2 had refused to qualify, 1 was dead, and 1 disqualified to serve, and the court held that a majority, viz. 8 of the remaining 14, properly formed a board to determine on the validity of a contested election; a majority of the managers qualified to serve being all that is required by the legislature. Colcock, J., in the course of his opinion, said: "Now, if necessity and public convenience may require that, where all the managers of these elections are alive, and have qualified, a majority may act, does not the same reason operate to authorize the managers of an election to act where some of those who have been nominated are dead or have not qualified?" Words giving a joint authority to three or more public officers will be construed as giving it to the majority, unless otherwise expressed. Talcott v. Blanding, 54 Cal. 289. If the authority is given to and may be exercised by the majority, and the minority, if present and acting, cannot defeat it, it must follow that such minority cannot, by absence or failure to qualify, defeat the will of the majority. This doctrine was illustrated in City of Oakland v. Carpentier, 13 Cal. 540, where it was argued that, as the charter provided that a board of five trustees should be elected, etc., and as only four qualified, their acts were void for want of a legal organization. The court disposed of the question by saying: "We can see no reason for holding that a majority of the members elected to this board should not as well be held empowered to act at the first as at any subsequent meeting of it." There is nothing inherent in the duties to be discharged by the freeholders to invoke a more strict rule of construction against them than would be called for in the case of other boards or bodies invested with public functions. The provision of the constitution is self-acting. People v. Hoge, 55 Cal. 612. The constitution does not in terms require the joint action of all the members of the board of freeholders. It does provide that the charter prepared by them must be "signed in duplicate by the members of such board or a majority of them."

Under the doctrine which was formerly upheld by many of the courts, that all the members of a board, committee, or commission must meet and deliberate, though a majority could decide, the contention of appellant in support of the theory that the presence and action of all the members is necessary to an organization may be upheld. The consensus of modern opinion, however, is believed to be that, where a majority may act, such maj ority may organize and act. This is believed to be the very object of the fifteenth section of the Political Code. Again, the office of freeholder is created by the constitution. It is a de jure office. When Hellman and Bourn were elected by a plurality of the qualified electors, received their certificates of election, and qualified and participated in the action of the board, they were there under color of office, and presumptively entitled to the office. They were de facto officers in the discharge of the duties of a de jure office, and as such their acts while they remained such were as valid and binding as those of de jure officers. There must be a de jure office to be filled, before there can be a de facto officer. If the former exists, and the latter holds it under and pursuant to a regular commission purporting to empower him to act, his acts in such office, until his right thereto is judicially determined, the law holds, upon principles of policy and justice, to be valid, so far as they involve the public and third parties, notwithstanding the personal liability of the incumbent for intruding into such office. A leading case upon the subject of officers de facto is that of State v. Carroll, 38 Conn. 449, in which Butler, C. J., after an exhaustive discussion of the doctrine, and a review of the English and American cases, uses the following language: "A definition sufficiently accurate and comprehensive to cover the whole ground must, I think, be substantially as follows: An officer de facto is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid, so far as they involve the interests of the public and third persons, where the duties of the office were exercised: First. * * * Second. * * * Third. Under color of a known election or appointment, void because the officer was not eligible, * * * such ineligibility * * * being unknown to the public."

We reach the following conclusion:

1. The 13 freeholders, constituting as they do a majority of all the members of the board, were competent to organize and act as a board of freeholders under the constitution and law, and may lawfully prepare and propose a charter for the city and county of San Francisco.

2. I. W. Hellman and William B. Bourn were not eligible to the office of freeholder, and, although regularly elected and commissioned, are not de jure officers of the board.

3. Said Hellman and Bourn, having been elected and commissioned, became de facto members of the board, and as such their acts were and are valid as to the public and third parties.

We are asked by the counsel, in the event of holding that Bourn and Hellman are not entitled to their seats, to indicate: (1) Whether or not Patrick Reddy and J. C. Whiting, who received the next highest number of votes, are entitled to demand and receive certificates of election; and, if not, then (2) how shall the vacancies be filled? The first query seems to be settled in this state. Saunders v. Haynes, 13 Cal. 145; Crawford v. Dunbar, 52 Cal. 36. We must, however, decline to pass upon either of the foregoing propositions, for the reason that they are not involved in the issues presented in the case, and anything which might be said would be mere obiter dictum, and of no binding force should the same questions again arise.

The judgment appealed from should be affirmed as to all the defendants except I. W. Hellman and William B. Bourn, and reversed as to said two last-named defendants, with directions to the court below to overrule the separate demurrer of said I. W. Hellman and William B. Bourn, with leave to answer.

I concur: HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed as to all the defendants except I. W. Hellman and William B. Bourn, and reversed as to said two last-named defendants, with directions to the court below to overrule the separate demurrer of said I. W. Hellman and William B. Bourn, with leave to answer.

(105 Cal. 335)

### PEOPLE v. WARD. (No. 21,094.)

(Supreme Court of California. Dec. 31, 1894.)

CRIMINAL LAW—CONTINUANCE—EXAMINATION OF JURORS—HOMICIDE—EVIDENCE—INSANITY AS A DEFENSE.

1. Where an attorney, appointed for the defense on the day the trial occurred, made application for a continuance, to become better acquainted with the case, but did not accompany the application with a verified statement, a denial by the court was proper.

2. Counsel appointed for defense on the day of trial, who knew that defendant had been examined on the claim of insanity, but not that the cause was alleged to be excessive drinking, being denied a continuance, proceeded to the examination of, and accepted, six jurors, not having examined them as to their views on the plea of insanity caused by excessive drinking as a defense, and the court then adjourned for four days. After the resumption of the trial, he failed to show cause, or call to the attention of the court his desire, to further question or challenge the six jurors. *Held*, that his action was a waiver of defendant's right so to do.

3. Evidence by a police officer, witness for the prosecution, in a trial for murder, that he telephoned "to have the harbor police arrest any of the race-track boys that tried to cross the ferry, particularly Richard Ward" (defendant), not being an expression of opinion by witness that defendant is guilty, is competent.

4. The record in an examination on a plea of insanity in a trial for murder, being evidence of defendant's mental condition at the time of examination, is not admissible to prove his mental condition on the date of the killing.

5. Where circumstantial evidence is relied upon to establish guilt, it should be sufficient to exclude, not every other hypothesis, but every other rational hypothesis, than guilt.

6. An instruction asked, containing the words, "that the evidence against defendant is purely and wholly circumstantial," when in fact it is not, is properly denied.

7. Defendant is presumed to be sane until he, by a preponderance of evidence, establishes affirmatively his insanity.

8. The doctrine of reasonable doubt has no application to the determination of an issue of the sanity of the accused, in criminal cases.

Commissioners' decision. In bank. Appeal from superior court, city and county of San Francisco; William R. Dangerfield, Judge.

Richard Ward, convicted of murder, appeals. Affirmed.

Augustus Tilden, for appellant. Atty. Gen. Hart, for the People.

SEARLS, C. Defendant was informed against upon a charge of the crime of murder, alleged to have been committed at the city and county of San Francisco. Upon his plea of not guilty, a trial was had, which resulted in a verdict of guilty of murder in the first degree, with punishment fixed by the jury at imprisonment for life. The appeal is from judgment upon such verdict, and from an order denying a motion for a new trial.

The cause was called for trial in the superior court on the 2d day of November, 1893, when Augustus Tilden, Esq., counsel for defendant, asked for a continuance upon the ground that he had recently come into the case as the attorney of defendant, and desired time to familiarize himself with the facts. It thereupon appeared that the cause had been continued repeatedly for some three months; that, upon a suggestion of the insanity of the defendant, a jury had been impaneled, and a trial had, which resulted in a verdict that defendant was sane. Thereupon, and on the 1st day of November, 1893, James Smith, Esq., who had acted as attorney for defendant, retired from the case; and on the following day, to wit, November 2, 1893, said Augustus Tilden, Esq., was by the court appointed attorney for defendant. The motion for a continuance was not supported by an affidavit, or other written evidence, so far as appears. The motion for a continuance was denied; the court remarking, in substance, that the matter of impanelment of a jury needed no long preparation. After six jurors had been examined and accepted, the panel being exhausted, additional jurors were ordered summoned; and the cause was continued for four days, when the jury was completed, and a further postponement, of one day, was had. The refusal of the court to grant the continuance, as prayed for, is assigned as error. In view of the fact that no statement upon which the continuance was asked was verified, it cannot be said that there was any abuse of that broad discretion which is lodged in trial courts, in refusing a continuance before the jury was impaneled. Practically, defendant's counsel had a continuance of five days, within which to prepare for the trial of the cause upon its merits. This was sufficient to remove the question from the realm of doubt, did any exist, as to the propriety of the action of the court.

The contention that the plea of defendant was insanity arising from the excessive use of intoxicating drinks; that his counsel examined and accepted the first six jurors, after questioning them as to their views of the plea of insanity in general, and only discovered that the claim of insanity on the part of the defendant was based upon the foundation of drunkenness, after the examination of said jurors,—cannot prevail. The record shows that counsel for defendant was aware of the particular phase or alleged cause of defendant's claim of insanity at the time of the killing, at the resumption of the trial after the adjournment of four days; and assuming, without legal proof, that he previously knew of the claim of insanity, but not its cause, the fact yet remains that he did not ask, or in any way evince a desire, to further examine the six jurors, which indicates pretty clearly that the matter was not at the time regarded as important. In civil cases it has been held that a juror may, for cause, be excused by the court after having been once accepted. Grady v. Early, 18 Cal. 109; Lawlor v. Linforth, 72 Cal. 205, 13 Pac. 496. In criminal cases, challenges, whether peremptory or for cause, "must be taken when the juror appears, and before he is sworn to try the cause, but the court may for cause permit it to be taken after the juror is sworn, and before the jury is completed." Pen. Code, § 1068. The authority of the court to permit a challenge to a juror in a criminal case, after he is sworn, has been upheld. People v. Scoggins, 37 Cal. 676. Failing to show cause, or call to the attention of the court his desire, to further question or to challenge the six jurors already accepted, was, under the circumstances, a waiver on behalf of defendant of his right so to do.

It is further urged that the court erred in permitting John A. Maloney, a police officer, and one of the officers who arrested defendant, to testify, on behalf of the prosecution, that he telephoned "to have the harbor police arrest any of the race-track boys that tried to cross the ferry, particularly Richard Ward." The objection to this testimony is that it "amounted to an expression of an opinion by the witness that Ward was guilty." If the theory of counsel is correct, then testimony of an officer that he arrested one charged with crime would show the formation and expression of an opinion as to his guilt, and subject to a like objection. To direct the arrest of a man is, or may be, as much an act as the actual arrest, and how either can be fairly viewed as an expression of opinion is not readily perceived. The testimony in question was a part of the narrative of the arresting officer as to the steps taken by him to arrest the defendant, and, while it was of no importance, except to make a connected whole in a statement by the officer, it could not have injured the defendant.

It is also urged that the district attorney was guilty of misconduct during the trial, prejudicial to defendant. This alleged misconduct consisted (1) in asking defendant, on cross-examination, when a witness in his own behalf, if he had been in the prize ring; and (2) in offering in evidence, in rebuttal, the record of an investigation as to the sanity of defendant, and the verdict of the jury pronouncing him sane. The testimony was, in the last case, ruled out by the court, and in the former was withdrawn by the district attorney, upon objection by defendant, and upon suggestion by the court that it was not proper cross-examination. In this conduct, no element of misconduct or oppression is perceived. Defendant had testified in chief that on the evening of the homicide he and the deceased "had met in Ritter's saloon; had a friendly boxing match. I hit Kelly [the deceased], in the nose and he took off his gloves." He then described meeting Kelly, later, at the race-track stable where they slept, and that Kelly there hit him, and tried to hit him, and he (the defendant) ran out in the alley, etc. The prosecution had introduced evidence tending to show that, at this very place and time, defendant had beat Kelly to death with a pitchfork. Under such circumstances, it was quite natural for the district attorney to desire to show that defendant had been a prize fighter, as tending to show skill in self-defense against such an attack as he claimed had been made upon him, and hence that there was no need of his resorting to the use of a deadly weapon. Concede that it was not admissible evidence, and still the circumstances divest the offer of apparent evil motive. Like considerations apply to the offer of the record upon the trial of the question of the insanity of defendant. Evidence had been taken at the trial tending to show that at the time of the homicide, and for some time prior thereto, defendant had been an habitual drunkard, and that his mind had been impaired thereby so as to render him irresponsible. The proceeding touching his sanity, evidenced by the proffered record, related to the time when such proceeding was had, and not to the date of the homicide, and was taken under Pen. Code, §§ 1367–1369, to determine whether or not defendant was in such mental condition as to warrant his trial on his plea of not guilty. The record was evidence of defendant's mental condition at the date when it was made, but not at the date of the killing, and hence was not admissible.

There seems a disposition on the part of counsel for defendants, in all criminal cases, since the decision in People v. Wells, 100 Cal. 459, 34 Pac. 1078, to count upon the alleged misconduct of the prosecution as cause for reversal. That was an extreme case, in which this court was of opinion the assistant district attorney had willfully and persistently offered incompetent evidence, to the prejudice of defendant, well knowing its inadmissibility. The animus of the prosecution there was so apparent, and its effect so pronounced, that the court deemed it but just to stamp with the seal of its disapprobation, not only for that case, but as a warning against like conduct in other cases,—a course of proceeding militating against justice, and the fair and orderly conduct which should characterize judicial proceedings in criminal cases. It is only in extreme cases, of which this is not one, that the remedy there administered applies. The attack in that case was not upon error by the prosecution, but upon willful error, persisted in for an illegitimate purpose, followed by injustice to the prisoner.

The following instruction, asked by defendant, was refused, and such refusal is assigned as error: "I also instruct you that the evidence against defendant is purely and wholly circumstantial. Such evidence must exclude every other hypothesis than the guilt of defendant; otherwise, it is insufficient to convict. Therefore, in summing up the evidence, if you can find any explanation of the homicide, inconsistent with defendant's guilt, you must acquit." The instruction is marked: "Refused. Rational hypothesis. W. R. D., Judge." From the note of the judge, it may be inferred that the refusal to give the instruction was because the word "rational" did not precede the word "hypothesis." Where circumstantial evidence is relied upon to establish guilt, it should be sufficient to exclude, not every other hypothesis, but every other rational hypothesis, than guilt. An hypothesis is a supposition,—a proposition or principle which is supposed or taken for granted, in order to draw a conclusion or inference for proof of the point in question. Something not proved, but assumed for the purpose of argument, or to account for a fact or an occurrence. Webst. Dict. "An hypothesis being a mere supposition, there are no other limits to hypotheses than those of the human imagination." Mill. In law, the meaning of the word does not vary from its usual significance. Black, Law Dict. See People v. Cronin, 34 Cal. 202; People v. Hardisson, 61 Cal. 378; People v. Eckman, 72 Cal. 582, 14 Pac. 359; People v. Nelson, 85 Cal. 430, 24 Pac. 1006. There is another reason why the instruction was properly refused. It informed the jury "that the evidence against defendant is purely and wholly circumstantial." Such was not the fact. The prosecution, after proving the death of John Kelly, that he was known as "Red Kelly," that defendant and Kelly were together, and that the witness heard blows and exclamations, called as a witness Albert Ivey, who met defendant just after the supposed killing, when the latter said, "I have done that damned red son of a bitch." The witness then said: "He said he referred to John Kelly, known as 'Red' at the race track. I asked him if he had killed him, and he replied, 'I don't know if he is dead, but I stuck this pitchfork in him.'" There was more testimony of like character, which, clearly, was not circumstantial, but direct, evidence.

The defendant having introduced evidence tending to show that he was insane at the time of the killing, the court, having instructed the jury in relation thereto, proceeded to instruct as follows: "(12) In the matter of insanity, the doctrine of reasonable doubt does not apply. That is to say, gentlemen, the burden of proof of insanity is not on the people of the state of California, as it is with the other issues in this case, but it is on the defendant, to show by a preponderance of evidence that he was insane at the time of the alleged homicide. If you believe that the preponderance of evidence is in favor of the people, you must decide for the people on that issue; and, if you believe that the preponderance of evidence is in favor of the defendant, you must decide for the defendant on that issue." The contention of appellant is that the doctrine of reasonable doubt applies to the question of insanity, and hence that the instruction was erroneous. We need not stop to discuss the question here, as it has been foreclosed against the contention of appellant by the previous rulings of this court. See People v. McNulty, 93 Cal. 427, 26 Pac. 597, and 29 Pac. 61; People v. Travers, 88 Cal. 233, 26 Pac. 88; People v. Eubanks, 86 Cal. 295, 24 Pac. 1014; People v. Kernaghan, 72 Cal. 609, 14 Pac. 566; People v. Messersmith, 61 Cal. 246; People v. Wilson, 49 Cal. 13; People v. McDonell, 47 Cal. 134; People v. Coffman, 24 Cal. 231; People v. Meyers, 20 Cal. 518. The doctrine of these cases is that in criminal cases the defendant is presumed to be sane until the contrary is made to appear, and his insanity, if relied upon as a defense, must be established affirmatively, by a preponderance of proof, as in civil cases; and, this being so, the question of reasonable doubt, either in favor of or against the defendant, as to his sanity or insanity, has no application to such issue. The instruction upon the question of reasonable doubt, upon the whole case, was full and complete, and in substantially the language of Shaw, C. J., in Com. v. Webster, 5 Cush. 320. The court, in instructing the jury upon the subject of insanity, informed them "that the doctrine that in some forms of insanity the patient or sufferer knows the nature of his act fully, but at the same time cannot prevent it, through paralysis of the will power," and which is known as "uncontrollable impulse," has no legal standing in this state, etc. The instructions on the subject of insanity, taken together, are in consonance with the doctrine enunciated in People v. Hoin, 62 Cal. 120, and are not objectionable.

The modifications of defendant's instructions Nos. 1, 2, 3, 4, were merely verbal, and in no sense added to or detracted from the principles involved in them, as asked.

A careful study of the whole case leads to the conclusion that the defendant was fairly tried, and properly convicted. The judgment and order appealed from should be affirmed.

We concur: TEMPLE, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

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105 Cal. 219

## GRAND GROVE OF UNITED ANCIENT ORDER OF DRUIDS OF CALIFORNIA v. GARIBALDI GROVE, NO. 71, OF UNITED ANCIENT ORDER OF DRUIDS et al. (No. 15,529.)

(Supreme Court of California. Dec. 26, 1894.)

BENEVOLENT SOCIETIES—SUSPENSION OF SUBORDINATE BRANCH—APPEAL.

1. The constitution of a benevolent association provides that the grand grove may suspend any subordinate grove "for good cause shown"; that charges may be preferred in writing to the grand grove, and a copy thereof and a notice of hearing thereon furnished the grove complained of; and that a certain officer may, during a recess of the grand grove, "whenever he shall deem it necessary," suspend an offending grove, "such suspension to hold good until annulled by the grand grove." *Held*, that such officer cannot suspend a grove unless written charges have been preferred against it, and, together with a notice of hearing thereon, served upon it.

2. Where a benevolent association's constitution provides that a certain officer may, during a recess of the grand grove, "whenever he shall deem it necessary," suspend an offending grove, when a grove has been suspended by said officer, without the notice required, the court's finding, in a subsequent action by the association to recover the suspended grove's effects, that the defendant was in fact an offending grove, does not validate the illegal suspension.

3. Where the court refused to permit a complaint in intervention to be filed, and the defendant excepted thereto, but the proposed interveners did not appeal, the ruling is not open to review.

Department 1. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Action by the Grand Grove of the United Ancient Order of Druids of California against the Garibaldi Grove, No. 71, of the United Ancient Order of Druids, C. Duchein, and others, to recover certain funds. From a judgment for plaintiff and an order denying a new trial, defendant C. Duchein appeals. Reversed.

E. C. Chapman, G. H. Perry, and W. C. Burnett, for appellant. A. B. Hunt, for respondent.

HARRISON, J. The plaintiff is the supreme tribunal of Druidism in California, and the defendant Garibaldi Grove, No. 71, is a subordinate grove of Druids, of which the appellant, Duchein, is the treasurer. The relation between the plaintiff and the subordinate grove is established by the constitution and by-laws of the order, by virtue of which the grand grove is given "sole right and full power to grant charters to subordinate groves, to receive appeals and redress grievances, and, in its discretion, for good cause shown, to suspend groves, arrest charters," etc. By section 15 it is provided that when any subordinate grove shall violate the terms of its charter, or refuse or neglect to obey the direction and laws of the grand grove or the general laws of the order, charges thereof may be preferred in writing to the grand grove, and that a copy thereof shall be furnished to the grove complained of, and notice when and where to appear for trial. The grand grove holds an annual session on the third Tuesday of June in each year, and it is provided in section 9 of article 20 that, "during the recess of the grand grove, the noble grand arch may, whenever he shall deem it necessary, suspend a delinquent or offending grove, such suspension to hold good until annulled by the grand grove." On the 5th of September, 1892, the noble grand arch of the plaintiff suspended Garibaldi Grove, No. 71, for the reason that he considered it was an "offending grove," and issued a proclamation of this fact to the other subordinate groves within the state. Article 19 of the rules of the order provides that the trustees shall be the custodians of the property of the grand grove, and that "it shall be their duty to execute all orders of the noble grand arch, to receive, by legal process or otherwise, all moneys, papers, and other property of dissolved or suspended groves in this jurisdiction," etc. In December, 1892, the noble grand arch reported this suspension to the trustees of the plaintiff, and directed them to commence the present action for the possession of the books and records of the suspended grove, and for the moneys belonging to it. The court found that the appellant, Duchein, as treasurer of Garibaldi Grove, had in his possession $954.15, moneys belonging to said grove, which he refused to deliver upon the demand of the trustees therefor, and rendered judgment directing him to pay the said money to the plaintiff herein, or to its trustees. From this judgment and an order denying a new trial Duchein has appealed.

The articles of association, or the constitution and by-laws of a benevolent or social organization, are in the nature of the terms of contract which the members thereof have entered into, and for the violation of any of these terms the articles themselves ordinarily provide a penalty and the mode of its enforcement, as well as a tribunal which shall determine whether the penalty has been incurred. But, as the payment of money or the delivery of property cannot be enforced by the machinery of these organizations, the aid of the judicial tribunals of the state is required. In order, however, to invoke this aid, it is incumbent upon the plaintiff to show a right in itself to the money or property sought, and that the defendant is under an obligation to comply with its demand therefor. The appellant, as the treasurer of Garibaldi Grove, No. 71, came lawfully into the custody of the money sued for, and, as against the plaintiff, is entitled to retain such custody, unless it can be shown that, by reason of some provision in the rules of the order, he is under an obligation to deliver it to the plaintiff. The only provision of these rules by which it is claimed that such obligation has been shown is the authority given to the noble grand arch to suspend the grove, and the proceedings taken by him under the authority so conferred.

It is a principle of natural justice that no one shall be condemned without an opportunity to be heard in his defense. Whoever would claim the right to deprive another of property or privilege, without giving him an opportunity to defend the same, must show some consent on his part to such action. It is well settled that a member of a benevolent association cannot be expelled without being given a hearing, and that a by-law which authorizes such a course is unreasonable and without effect (Fritz v. Muck, 62 How. Pr. 69; Wachtel v. Society, 84 N. Y. 28; People v. Musical Mutual Protective Union 118 N. Y. 108, 23 N. E. 129; Bac. Ben. Soc. § 101); and the same rules are applicable whether the action of the body is an absolute severing of the relations, or a suspension by which the rights of the suspended party are destroyed or impaired. There is no distinction in principle between expelling a member from a subordinate grove and revoking the charter of the grove itself or suspending its charter. It appears from the record herein that the suspension of Garibaldi Grove was made without any written charges having been preferred against it, and that there was given to it no notice of any complaint, or any opportunity to be heard thereon. The noble grand arch testified at the trial that, "from reports conveyed to him by individual members of the order, he considered it an offending grove, and accordingly suspended it. He did not serve or cause to be served any notice upon it; nor was there any notice of any kind given of his intention to suspend the grove; neither was there any trial had. He simply issued the proclamation, based upon what he had heard about the grove." It is claimed by the respondent that section 9, aforesaid, of article 20, gave this officer authority in his discretion to suspend an offending grove during the recess of the grand grove, without giving any notice of his purpose. We are of the opinion, however, that the rules of the plaintiff do not authorize an arbitrary suspension of a subordinate grove by him; but that, whenever he proposes to take such action, the grove which is charged with an offense for which he is authorized to suspend it has the right to be informed of such charge, and to be heard in its defense before he can act under this section. The limitation upon the power of the grand grove to itself suspend a subordinate grove "for good cause shown" implies that formal charges must be presented and sustained; and the provision in section 15 that, when charges are made against a subordinate grove, a copy of the charges shall be furnished to it, and an opportunity given to be heard, show that the general principles under which a suspension may be had require such notice and hearing. The power of suspension which is conferred upon the noble grand arch is to be exercised by him only during the recess of the grand grove, and, in the absence of express terms, ought not to be construed as greater than that of the grand grove itself, or to be exercised in any other mode than that provided for the grand grove. The authority given to this officer is not limited to a suspension until the next session of the grand grove, but holds good "until annulled" by the grand grove. This provision indicates that it is to have the same effect as if the suspension had been made by the grand grove; since, unless some action in the nature of an appeal is taken from the act of the noble grand arch, the grand grove is never required to exercise its will upon the subject.

The finding of the court that Garibaldi Grove was in reality an offending grove, and that there was sufficient ground for its suspension, does not remedy the defect. The jurisdiction to determine this fact was by the rules of the order conferred upon the noble grand arch, and, as his determination of that fact under those rules could not be reviewed by the court, neither could his suspension of a grove in violation of the rules be validated by any judgment of the court. We hold, therefore, that the action of the noble grand arch in suspending Garibaldi Grove, No. 71, was not in accordance with the rules of the order; and consequently, as the grove was not properly suspended, there was no obligation upon Duchein to pay to the plaintiff the money which he had in his hands as treasurer of the subordinate grove.

At the trial the court was asked to permit a complaint in intervention to be filed on behalf of certain members of the Garibaldi Grove, including Duchein. Objection being made thereto, the court sustained the objection, to which Duchein excepted. No exception appears to have been taken by the interveners, and, as they have not appeared, the correctness of the ruling is not open to review.

The judgment and order are reversed.

We concur: VAN FLEET, J.; GAROUTTE, J.

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4 Cal. Unrep. 933

## ROBERTS v. BALL et al. (No. 15,622.)

(Supreme Court of California. Dec. 31, 1894.)

FINDINGS—HARMLESS ERROR.

Failure to find on certain issues raised by the pleadings, and making findings outside the issues, is harmless error, where the findings made on material issues warrant the judgment whatever the findings on the other issues.

Department 1. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Action by W. G. Roberts against A. E. Ball, administrator, and another. Judgment for defendants. Plaintiff appeals. Affirmed.

Maxwell, Dorsey & Soto, for appellant. H. I. Kowalsky, for respondents.

PER CURIAM. This appeal by the plaintiff is from the final judgment upon the naked judgment roll, which contains no bill of exceptions; and the only error assigned is that the court did not find on all the issues of fact raised by the pleadings. After a careful examination of the voluminous pleadings and findings, we think the court substantially found upon every material issue, except upon that raised by defendants' plea of the statute of limitations. But, even if the court had expressly found in favor of the plaintiff upon this issue and all others upon which he contends there should have been findings, still the facts actually found would have been controlling, and amply sufficient to uphold the judgment. In other words, the facts expressly found support the judgment, and are entirely consistent with all averments in the complaint not negatived by an express finding, and also consistent with a finding in favor of plaintiff upon any issue tendered by the answer upon which there is no express finding. If, as contended by counsel, some of the findings are outside of the issues, this is immaterial, since the judgment finds ample support by findings upon the material issues. Himmelman v. Henry, 84 Cal. 104, 23 Pac. 1098; Winslow v. Gohransen, 88 Cal. 450, 26 Pac. 504; Brison v. Brison, 90 Cal. 323, 27 Pac. 186; Dolliver v. Dolliver, 94 Cal. 642, 30 Pac. 4. Upon the authority of these cases, the judgment is affirmed.

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4 Cal. Unrep. 919

## In re SMITH'S ESTATE. (No. 15,754.)

(Supreme Court of California. Dec. 26, 1894.)

RECORD ON APPEAL—COMMUNITY PROPERTY—DISPOSAL BY WILL—ACCEPTANCE BY WIFE.

1. Where, on appeal, there is neither a bill of exceptions nor a statement of the evidence, the findings of fact will be accepted as true.

2. A will of a married man, in terms disposing of all the community property, which states that it "is made with full knowledge of property rights of husband and wife, and with the knowledge and consent of my said wife," indicates the intention of testator to dispose of all his property, including the interest of his wife.

3. Where a will shows that testator meant to dispose of community property, the conveyance by testator's widow of a life estate devised by the will operates as an acceptance by her of the provisions thereof.

Commissioners' decision. Department 2. Appeal from superior court, San Benito county; James F. Breen, Judge.

Accounting by Robert Cardiff as administrator with the will annexed of the estate of Robert Smith. From the decree made, the administrator and Mary Smith, widow of testator, appeal. Affirmed.

Briggs & Hudner, for appellants. Montgomery & Jefferson, for respondent.

VANCLIEF, C. Robert Smith, who died April 31, 1892, disposed of all his property by his last will as follows: "I give and bequeath to my daughter, Mrs. Mary Cardiff, now of San Benito county, California, a life estate in my home ranch in San Benito county, California, the same being described as follows, to wit, being the southwest quarter of section 6, township 15 south, range 7 east, M. D. M.; also all live stock, farming utensils, household furniture, and in fact all personal property that may be on the said ranch, excepting money on hand, securities, and other evidences of money due me; to have and hold and use during her natural life as her own, and at her death to pass in fee to her sons, Robert Cardiff and Geo. H. Cardiff, and to their heirs in fee simple. But, in the event I survive my said daughter, Mary Cardiff, then, at my death, said property to pass directly to her said sons, Robert and George Cardiff. This bequest, however, is not to take effect during the lifetime of my wife, Mary Smith, who is now residing with me on the above-described property. In the event she survives me, she is to have full and free use and absolute control of said real property and personal herein referred to, and after her death to pass as above provided. This is made with full knowledge of property rights of husband and wife, and with the knowledge and 'consent of my said wife.'" The will further bequeathed one dollar to each of four grandchildren of the testator, and the residue of testator's personal property, consisting of money and securities, as follows: To his son William R. Smith, four-tenths thereof; to his son John A. Smith, three-tenths thereof; and to his daughter Jessie Smith, three-tenths thereof. The will nominated said William R. and John A. joint executors thereof, and on May 2, 1892, they were duly appointed as such by the probate court. Both qualified and entered upon the performance of the duties of the trust, but both died before the settlement of their final account,—John A., October 19, 1892, and William R., June 25, 1893, though the latter had filed an account which purported to be a final account, on June 1, 1893. On July 22, 1893, Robert Cardiff, son of Mary Cardiff, and grandson of the testator, was appointed administrator with the will annexed, who, on December 18, 1893, filed his final account, and his petition representing that the estate was in condition to be closed, and praying that his final account be allowed, and that the estate be distributed. While the matter of settling the final account of the administrator was pending, to wit, January 31, 1894, Mary Smith, widow of the testator, filed in the probate court her written claim and notice that all the property of which the testator died seised or possessed was community property, and that she claimed one-half thereof as not subject to testamentary disposition by her late husband. The widow of John A. Smith, as executrix of his estate and as heir of her husband, filed written objections to the final account of the administrator, and also objections to the claim of Mary Smith to one-half of the estate of the testator, alleging that Mary Smith had elected to take under the will, etc. The court, after settling the final account of the administrator, found that all the property of the testator was community property of husband and wife, but that the wife of the testator (Mary Smith) had elected to take under the will, and that she had so taken, and had sold, conveyed, and released to Robert Cardiff and George H. Cardiff, her grandsons, who were also reversionary devisees of all the estate devised and bequeathed to their mother (Mary Cardiff) and to their grandmother (Mary Smith) during their lives; and thereupon the court decreed that the whole estate be distributed in strict accordance with the will. The administrator, Robert Cardiff, and Mary Smith, widow of the testator, appeal from the order settling the administrator's final account, and also from the decree of distribution.

The appeals come here on the judgment roll, consisting of the final account as rendered by the administrator, the petition of the administrator for the allowance of his account and for distribution of the estate, the written objections to the account, the written notice of Mary Smith that she claimed one-half of the entire estate, the written findings of the court, the order of the court settling the administrator's final account, and the decree of distribution. Estate of Isaacs, 30 Cal. 106; Estate of Page, 57 Cal. 240; Miller v. Lux, 100 Cal. 609, 35 Pac. 345, 639. There is no bill of exceptions, nor any statement of evidences, though it appears that the findings of fact are based upon evidence produced by the parties. Therefore the findings of fact, at least so far as they are self-consistent, must be accepted as true. The appellants contend that the court erred in distributing the property according to the will of Robert Smith to the prejudice of the right of appellant Mary Smith to one-half of all the property, real and personal, described in the will. In support of this point they claim that the language of the will does not sufficiently evince an intention of the testator to devise more than his own half of the community property to overcome the presumption to the contrary as held in the cases, In re Gilmore, 81 Cal. 240, 22 Pac. 655; In re Gwin's Estate, 77 Cal. 313, 19 Pac. 527; and Estate of Silvey, 42 Cal. 210. But I think this is a mistake, and that the language of the will clearly indicates the intention of the testator to dispose of all the property therein described, including the interest of his wife. On the construction given it by appellants, no single provision of the will as expressed can be executed without disturbing and partly defeating all others. Besides, it is expressly stated that the will "is made with full knowledge of property rights of husband and wife, and with the knowledge and consent of my said wife." This indicates very clearly that he actually knew what he is presumed to have known, namely, the law governing the rights of husband and wife as to community property; and that he intended to dispose of her interest in the property in a way which would not be valid without her consent. And, conceding that this would not be competent evidence of her consent, it is nevertheless competent and satisfactory evidence of his intention specifically to dispose of each parcel of property described in the will.

It is contended, however, that the widow never elected to take, and never did take, under the will. But, as above shown, the findings of the court below are conclusive upon these points. As to her election, that court found the naked ultimate fact "that said Mary Smith, widow of said Robert Smith, has elected to take under said will"; and also the probative fact that after the death of her husband, and prior to January, 1894, she said to Robert Cardiff that "she wished the will to stand." As to the actual taking of the property under the will the court found: "That since the death of said Robert Smith said Mary Smith, his widow, conveyed all her interest in said property, mentioned in said will as vesting a life estate therein upon said widow, to Robert and George Cardiff. * * * She has remained in possession of said real property, and said personal property upon and about said real property, being the property described in the will as bequeathed to her a life estate, until the year 1893, when she conveyed all her interest therein as hereinbefore stated." It should be observed here that Mary Cardiff, to whom was devised the second life estate in the land and personal property thereon, died after the death of the testator, so that her life estate never vested; and therefore, the effect of the conveyance or release of the life estate of Mary Smith to Robert and George Cardiff, the reversioners in fee, was to invest them with the absolute title to all the land and personal property thereon under the will. But if the will is not valid as to the widow's half of that property, then her life estate and the reversion to Robert and George Cardiff were restricted to the testator's half of the land and personal property thereon. Another effect of restricting the will to the testator's half of the property would be to deprive William R., John A., and Jessie Smith of one-half of the specific legacies bequeathed to them. I think the findings of fact bring this case under the rule announced in the case of Morrison v. Bowman, 29 Cal. 347, affirmed in Noe v. Splivalo, 54 Cal. 207. In the former of these cases Mr. Justice Curry, after reviewing the authorities, stated the rule as follows: "A testamentary provision in lieu of a devisee's or legatee's proprietary right, in order to render it such upon acceptance of it, must be declared in terms to be given in lieu of such right; or that intention must be deduced by clear and manifest implication from the will, founded upon the fact that the claim to such proprietary right would be inconsistent with the will, or so repugnant to its dispositions as to disturb and defeat them. * * * The intention of the testator must be kept in view as the pole star in the construction or interpretation of his will; and it is not to be presumed, in the absence of a manifest intent on his part, that he designed to make disposition of any property not his own. But when it does so appear, and the owner of such property accepts a legacy or devise under the will, which acceptance necessarily operates to give effect to the will as an entire disposition by the testator, such acceptance must, by the conditions on which it is founded, be held to be a confirmation of the dispositions of the will." None of the cases cited by appellant conflict with that of Morrison v. Bowman. I think the order settling the administrator's final account and the decree of distribution should be affirmed.

We concur: SEARLS, C.; TEMPLE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order settling the administrator's final account and the decree of distribution are affirmed.

105 Cal. 353

## COCHRANE et al. v. BURTON et al. (No. 19,513.)

(Supreme Court of California. Jan. 2, 1895.)

SALE OF DECEDENT'S LAND — PROPRIETY OF CONFIRMATION—FINDINGS AS TO MARKET VALUE.

1. Where a sale of land to pay a decedent's debts is legally made, and the amount bid is not disproportionate to its value, and no increased offer for the land is made after the sale, and there is no prospect of securing a better offer if a new sale be ordered, the sale is properly confirmed.

2. A finding by the court, on a motion to confirm a sale of land to pay a decedent's debts, that, but for the fact that the heirs circulated a report that the purchaser at the sale would not acquire a good title, the market value of the land would have been a certain sum (which was much more than the amount realized), is not a finding that such sum was the market value of the land.

In bank. Appeal from superior court, San Diego county; W. L. Pierce, Judge.

Proceeding by Henry H. Burton, as administrator of the estate of Henry S. Burton, to sell decedent's lands for the payment of debts. From an order confirming the sale, Elizabeth Lull Cochrane and others appeal. Affirmed.

J. M. Nougues, W. T. McNealy, and Haines & Ward, for appellants. McDonald & McDonald, for respondents.

GAROUTTE, J. This is an appeal from an order of the superior court of San Diego county, made and entered on the 22d day of March, 1894, confirming the sale of the Rancho Jamul, made by the respondent Henry H. Burton, as administrator of the estate of Henry S. Burton, deceased, to the respondent J. Wade McDonald, on the 24th day of February, 1894. The objections to the confirmation of the sale were made by the heirs of the deceased, and they now prosecute this appeal. For a reversal of the judgment they rely upon the claim that the sum bid, and for which the sale was made and confirmed, was disproportionate to the value of the land sold. Upon the hearing of the application for confirmation, and the objections thereto, the court took testimony and made findings of fact to the following effect: (1) That after due notice given said property was sold at public auction at the courthouse door, in the city of San Diego, for the sum of $38,000. (2) That said sale was in all respects fairly and legally conducted and made, and that said sum bid was not disproportionate to the value of the property. (3) That no sum exceeding such bid 10 per cent., or exceeding said bid in any sum or amount whatsoever, can be obtained if a new sale was had, and no offer of any kind in excess of the aforesaid bid has been made to the court. (4) "That prior to said sale, and at the time thereof, the said objectors to the confirmation of said sale had by the commencement of certain litigation in respect of said property and the previous orders of this court with reference thereto, and which litigation is still pending and undetermined, and by public threats of further litigation, and notification publicly made at the time and place of said sale that any purchaser of said land at the same time would 'purchase a lawsuit,' and other declarations of like character and effect, created such a feeling of distrust and uncertainty as to the title that any purchaser of said property at said sale should or might acquire thereto by virtue of said sale and the confirmation thereof by this court, and the execution and delivery of an administrator's deed for said property, that the said sum of $38,000 so bid by the said J. Wade McDonald therefor was and is the full market value of said property, although but for such feeling of doubt and uncertainty, so created by said objectors, the market value of said property would then and there have been the sum of $80,000, or thereabouts, as claimed by said objectors." In the face of these findings, the judgment must be affirmed, for every element of a probate sale necessary to make it binding and legal is present in this case. We see no course that the trial court could have pursued other than the one taken. The debts of the estate must be paid, and there does not appear, either by the record or by appellants' briefs, to be even a prospect of securing a more advantageous offer if a new sale were ordered. The sale was legally made. It was a public sale. The amount bid was not disproportionate to the value of the property. No increased offer was subsequently made to the court prior to confirmation, and it was the full market value of the property. Upon such a state of facts there was but one thing for the court to do, and that was to confirm the sale. In finding 4 the court declares that if it had not been for certain things the market value of the property would have been $80,000. This finding is in no sense a statement that the market value was at the time of the sale $80,000. It is no finding of value at all. The court may as well have said that if the tract was highly cultivated its market value would be $80,000, or, if land in San Diego county was selling at the boom prices of a few years ago, the market value of this property would be $80,000. The reasons for the depreciation in the market value, or for the present market value, in no way control a court in its judgment as to whether or not a sale should be made. The reasons for the present market value are alike immaterial, whether they be good or bad. It is the fact with which the administrator and the court had to deal, and the reasons for the existence of the fact were matters of minor importance, and hardly incidental to the investigation going on. In conclusion it is sufficient to say that this finding of a conditional fact is not equivalent to a statement of the present value of the land, and the present value of the land is the important and controlling element of the case. For the foregoing reasons the judgment and order are affirmed.

We concur: VAN FLEET, J.; HARRISON, J.; FITZGERALD, J.; McFARLAND, J.

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4 Cal. Unrep. 934

MORROW et al. v. NORTON et al. (No. 15,530.)

(Supreme Court of California. Dec. 31, 1894.)

ASSUMPSIT—PLEADING—LIMITATIONS.

1. The fact that the complaint, in an action by an assignee of an account for goods sold against copartners, after alleging the incurring of the liability by defendants, also alleges that one of the defendants promised to pay the same, does not render it demurrable, as the latter allegation may be treated as surplusage.

2. In an action on a contract, required by the statute of frauds to be in writing, the complaint need not allege that it was in writing.

Department 1. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Action by George S. Morrow and others against W. H. Norton and another. There was a judgment for plaintiffs, and defendant Norton appeals. Affirmed.

John A. Wall, for appellant. Warren Olney, for respondents.

VAN FLEET, J. We deem this appeal frivolous. Judgment was for the plaintiffs in the court below, and the defendant Norton appeals from the judgment, and from an order denying his motion for a new trial.

1. The only point made against the judgment is that the demurrer to the complaint should have been sustained for want of facts sufficient to constitute a cause of action. There is nothing in the point. The complaint counts on two several promissory notes made by the firm of McBride & Pease to plaintiffs, and an account for merchandise sold and delivered by a third party to defendants and assigned to plaintiffs. These several obligations are set up in separate counts, each complete in itself, setting forth that at the time of incurring them defendants were carrying on and conducting a livery stable business as partners under the name of McBride & Pease, and that the notes were made and the account incurred by defendants as such partners, and that they have not been paid. It is then further alleged that since the making of the notes and the account defendant Norton has promised to pay them. It is urged that the original obligations of McBride & Pease and the separate promise of Norton cannot both be counted on in the same action. But the point does not arise under the demurrer. The complaint states a cause of action against the defendants jointly, and the allegation of the independent promise of Norton might be disregarded as surplusage, and yet leave the complaint sufficient. It is further urged that the separate promise of Norton was one which, under the law, must be in writing, and it is not so averred. Assuming this to be true, the failure to so allege does not make the complaint demurrable. Where a contract is alleged which, under the law, is required to be in writing, and the complaint is silent as to the manner in which it was made, the implication is that it was made in the manner required. Barnard v. Lloyd, 85 Cal. 131, 24 Pac. 658.

2. The second and only other point made is that the evidence does not sustain the finding that the defendants were partners. We have examined the evidence, and it is sufficient to say that, while somewhat conflicting, we think it amply sufficient to warrant the finding in question, and the judgment cannot, therefore, be disturbed. We think the character of the record in this case should not pass unnoticed. The statement on motion for new trial covers about 150 pages of the transcript. It is plainly nothing more nor less than a copy of the shorthand reporter's notes of the trial, with a head and tail attached. It is replete with all the unnecessary repetition and irrelevant side-bar matter which so readily and almost unavoidably finds its way into the record at the trial in the lower court under our present system of verbatim stenographic reporting. Nothing in the way of unnecessary matter seems to have been eliminated, or even permitted to escape. There is not a pretense, from beginning to end, of stating anything in narrative form. Everything is by question and answer, just as it came from the reporter, apparently. This is inexcusable. In order to pass intelligently upon the objection made to the findings, we have been compelled to wade through this whole mass of 150 pages of matter, good, bad, and indifferent, while all that is relevant and material to appellant's case, as presented here, could have been fully, and much more advantageously for him as well as the court, stated in not to exceed 20 pages. The proper method of preparing statements and bills of exceptions is so clearly indicated in the statute, and has so often been adverted to and pointed out by this court, that it need not be restated here. It is enough to say that this statement not only wholly fails to comply with the statute, but is one of a character that has been most frequently criticised and condemned. It should be the aim of counsel in preparing a record to facilitate, rather than impede,

the ready and intelligent examination of the case. Certainly it is in the interest of the litigant that this should be so. The law at best is not an exact science, and its proper administration is sufficiently beset by difficulties without additional burdens cast by carelessly prepared records. The judge of the court below would have been fully justified in refusing to settle this statement in its present form; in fact, it was his duty, without objection, to require the party to put the statement in the form required by the statute before certification. The judgment and order are affirmed, with $100 damages.

We concur: GAROUTTE, J.; HARRISON, J.

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## PEOPLE v. GOODRICH. (No. 21,083.)

(Supreme Court of California. Dec. 31, 1894.)

In bank. Appeal from superior court, Yolo county; W. H. Grant, Judge.

One Goodrich was convicted of selling intoxicating liquor to an Indian, and appeals. Affirmed.

Ross Campbell, for appellant. Atty. Gen. Hart, for the People.

PER CURIAM. Upon the authority of People v. Bray (No. 21,062, the opinion in which has been this day filed) 38 Pac. 731, the judgment and order are affirmed.

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105 Cal. 368

## In re CROCKER'S ESTATE. (No. 5,730.)

(Supreme Court of California. Jan. 2, 1895.)

PARTIAL DISTRIBUTION—BOND BY DISTRIBUTEES—WHEN REQUIRED—DISCRETION OF COURT—SUFFICIENCY OF PETITION.

1. Under Code Civ. Proc. art. 1, c. 11, §§ 1658–1663, empowering the court to order partial distribution before final settlement, where the petition for partial distribution is not filed until more than a year after letters were issued, all the claims allowed have been paid, and the court withholds from distribution property of such estate and of another estate, whose value greatly exceeds the amount of a contested claim for which both estates, if either, are jointly liable, the refusal of the court to require the distributees to give bond to the executrix, as provided by section 1661, is a proper exercise of its discretion.

2. In the statute requiring the court to find that "the estate is but little indebted," the quoted words are intended to be used relatively, and as referring to a condition of things in which the debts are small as compared with the value of the estate, and not absolutely, so as to require the estate to be but little indebted regardless of its value.

3. A petition by devisees and legatees for partial distribution is not defective because it describes petitioners as "heirs at law."

4. It is no objection to a petition for partial distribution that it is filed by several claimants, instead of one.

Department 2. Appeal from superior court, city and county of San Francisco; Walter H. Levy, Judge.

Petition by the heirs at law, who are also devisees and legatees of Clark W. Crocker, deceased, for a partial distribution of deceased's estate. From an order of partial distribution, the holders of a rejected and contested claim against such estate appeal. Affirmed.

A. N. Drown and D. M. Delmas, for appellants. Mastick, Belcher & Mastick, for respondent.

FITZGERALD, J. On November 23, 1893, the heirs at law of Clark W. Crocker, deceased, who are also devisees and legatees under his last will and testament, made their application to the superior court, sitting in probate, for an order of partial distribution. In their petition they allege, among other things, the appointment of Julia A. Crocker, the surviving wife of the decedent, and one of the petitioners, as executrix of said last will and testament, and that letters testamentary were issued to her from the court on the 22d day of July, 1890, which letters have never been revoked, annulled, or set aside; that there is now in the hands of said executrix the sum of $13,232.74, in money, and certain real estate and personal property, all of which is fully set forth and described in the schedule hereunto annexed, marked "Schedule A," and made a part of this petition; that the estate of said deceased is but little indebted; and that the shares of petitioners in the said estate and property, excepting, however, the two parcels of land situated on Mission street, in the said city and county of San Francisco, set forth and described in items 14 and 15 of said schedule, may be allowed to them without loss to the creditors of said estate; concluding with the usual prayer. The petition was resisted by the appellants, who, in their answer thereto, claim to be creditors and persons having claims against the deceased in his estate, but whose claim was rejected by the executrix, and an action is now pending thereon. The grounds of objection and contest to the application are: "First, that the estate of said decedent is largely indebted; second, that the shares of said estate of the said parties so applying by said petition cannot be allowed to them without loss to the creditors of said estate; third, that the legacy or share of the estate of said decedent to which either of the parties so applying is entitled cannot be allowed to either of the said parties so applying without loss to the creditors of the said estate; fourth, that no part of the shares of the parties so applying can be allowed to them without loss to the creditors of said estate; fifth, that no part of the share or portion of the estate of said decedent to which either of the parties so applying is entitled can be allowed to him or her without loss to the creditors of the said estate." At the hearing, the court made an order allowing and directing a distribution of the estate of said decedent, and payment to petitioners of their legacies and distributive shares of said estate, except the real property embraced in items 14 and 15 of the schedule referred to in the petition, and valued at $216,000; the same being withheld from distribution by the court to await the result of the action pending upon contestants' rejected claim. The court, in its said order of partial distribution, found "that the estate of said deceased is but little indebted; and that the property and estate hereinafter described may now be set apart and distributed to said heirs at law without loss to the creditors of said deceased; and that there will remain in the estate of said deceased, undistributed, and in the hands of said executrix, after such distribution, sufficient property to pay in full all claims against and all creditors of said estate, and also all expenses of administration thereof; and that it is not necessary to require a bond of or from any of said heirs at law." From this order the appeal is taken by contestants, with a bill of exceptions.

It appears: That the contestants are the sole heirs at law of William H. Wallace, deceased, who died, intestate, on the 2d day of October, 1881. On that day, and for many years prior thereto, he was associated with said Clark W. Crocker, deceased, and one Albert W. Sisson, also deceased, as copartners, under the firm name and style of Sisson, Wallace & Co., who, as such, were engaged in carrying on a mercantile business. That said copartnership was dissolved by the death of said Wallace, and the said Sisson and Crocker thereby became and were the surviving partners thereof. That the claim of contestants upon which the joint action referred to was originally brought against the said Sisson and Crocker, as surviving partners of Sisson, Wallace & Co., and now pending against their personal representatives, is based entirely upon their alleged acts as such in relation to the partnership business, and for an accounting, and is for the sum of $162,500, together with interest thereon, and for their costs and disbursements in said action, amounting in the aggregate, as claimed, to about $300,000. It further appears that this same claim upon which said action is now pending was presented to the executors of the will of said Sisson, deceased, and by them rejected; and that there is now in the hands of said executors property of the estate of the value of $200,000; and that all claims against that estate have been paid except the rejected claim in question.

The power of the court to make an order of partial distribution before final settlement is expressly conferred by statute (sections 1658-1663, inclusive, of article 1 of chapter 11 of the Code of Civil Procedure). But it is claimed that the order appealed from is void, because it did not require that "each legatee or devisee obtaining such order should execute and deliver to the executrix a bond," etc. Code Civ. Proc. § 1661. The record shows upon its face that more than one year had elapsed from the issuance of the letters testamentary to the filing of the petition in this proceeding; "that all claims allowed have been paid"; and the court finds that no injury can result to the estate by reason of such partial distribution. The existence of these statutory conditions mentioned in section 1663 of the Code of Civil Procedure, and the proviso to the first subdivision thereof, coupled with the joint and several liability of the estates of said Sisson and Crocker for the full amount of contestants' alleged claim, and the withholding from distribution property of both estates aggregating in value the sum of $416,000, to await the result of the action pending thereon, show that the court properly exercised the discretion vested in it by the statute in dispensing with the requirement of a bond. In re Levinson's Estate, 98 Cal. 654, 33 Pac. 726.

The finding by the court that the estate was but little indebted is objected to by appellants, upon the ground that these words are intended to "operate only where as a matter of fact and absolutely the estate, no matter what its size, was but little indebted." These statutory words were intended to be used relatively, and not absolutely, and they merely refer to a "condition of things in which the debts are small when considered in connection with the value of the estate." Hence it follows that the contention of appellants on this point cannot be sustained.

Nor is the objection well founded that the petition is defective, because it describes the petitioners as "heirs at law." This proceeding is but a step in the ordinary course of administration; and the fact that petitioners are described in the petition as heirs at law, instead of devisees and legatees under the will, is entirely immaterial, the court having judicial notice of the will at every stage of the proceeding.

The further objection to the petition that it is nugatory, because not presented by a single claimant, is equally untenable. The remaining questions discussed by counsel, orally and in their briefs, are not necessary to be considered. Let the order be affirmed.

We concur: DE HAVEN, J.; McFARLAND, J.

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105 Cal. 372

## FREEMAN v. BADGLEY et al. (No. 15,511.)

(Supreme Court of California. Jan. 2, 1895.)

APPEAL—DECISION—REVERSAL—INCONSISTENT FINDINGS.

Where the findings of the trial court are inconsistent and confusing, so that its intent cannot be certainly determined, the judgment will be reversed.

Commissioners' decision. Department 2. Appeal from superior court, Santa Clara county; John Reynolds, Judge.

Action by Frank Freeman, as assignee of George H. Tay & Co., against Charles Badgley and R. H. Quincey, on an account. From a judgment for plaintiff, and from an order denying a motion for a new trial, defendant Quincey appeals. Reversed.

H. V. Morehouse and Hiram Tuttle, for appellant. Crandall & Biddle, for respondent.

TEMPLE, C. Appeal from the judgment and from an order denying a new trial. Plaintiff, as assignee of George H. Tay & Co., sues to recover the balance of account for goods sold and delivered. The court found that the business was conducted by Charles Badgley and Charles F. Schettler, under the firm name of Schettler & Co., until November 17, 1888, when Badgley bought out his partner, and conducted the business until December 4, 1888, when he formed a partnership with R. H. Quincey, who is respondent here. When the firm of Schettler & Co. was dissolved, it was indebted to George H. Tay & Co. in the sum of $3,250.30, which indebtedness was then assumed by Badgley, who incurred a further indebtedness to the same firm before he formed the partnership with Quincey of $174.05, making the entire debt at that time $3,424.35. That in the partnership agreement executed by Badgley and Quincey, December 4, 1888, among other things, it was agreed as follows: "And to that end and purpose the said parties hereto are each to be equal partners, and each own one-half of the stock, tools, good will, contracts now entered into by said Badgley, or by the firm of Schettler & Co., the predecessors of said Badgley in said business, and each is required to pay one-half of the obligations and demands now existing against said Schettler & Co., and said Badgley in said business, which indebtedness said Badgley hereby guaranties shall not exceed the sum of $2,949.33." It was also found that on the trial plaintiff disclaimed any right to recover upon the partnership agreement, or any part thereof, but based his right solely upon an agreement made subsequently to the partnership. That Quincey paid to creditors of Badgley, and of Schettler & Co., other than George H. Tay & Co., $1,440.94. That George H. Tay & Co. sold to Badgley and Quincey goods of the amount of $2,498.89, all of which had been paid. That on the 8th day of December, 1888, the firm of Badgley & Quincey agreed to pay George H. Tay & Co. $4,861.77, of which sum they have paid $4,807.50, leaving $54.27 still due and unpaid, for which sum judgment was ordered. Plaintiff in his motion for a new trial claims that the finding to the effect that the sum of $2,498.89 has been paid is not supported by the evidence.

Looking at the statement, it is quite evident that the court did not intend to find that on the 8th day of December, 1888, Badgley & Quincey undertook to pay George H. Tay & Co. $4,861.77, or any other sum, as an indebtedness then accruing. The contention was that the new firm thereby assumed the old debts. The old debts, added to the then existing debts of the new firm, did not amount to that sum by more than $1,100. On the other hand, the court did not intend to find that Badgley & Quincey had paid $4,807.50 of the money agreed to be paid on the 8th of December, 1888, and $2,498.99 for goods subsequently purchased by the new firm. The total amount which the new firm paid to George H. Tay & Co., was $4,807.50. Respondent denies that he ever undertook to pay any sum of money to George H. Tay & Co., or to the creditors of Badgley, except as provided in the articles of copartnership by which the new firm assumed such debts to the extent of $2,949.33. The evidence shows that Badgley & Quincey have already paid more than that sum to such creditors. The agreement upon which suit is brought is charged to have been made after the contract of partnership was made. At the trial, and now; plaintiff disclaims any right based upon the partnership agreement, but says his action is founded upon a subsequent agreement. I find no evidence which tends to prove a subsequent agreement to that effect, or such as the court has found. Where a new partner is taken into an old firm, it may be shown by circumstances that the new firm assumed the former liabilities. But proof that the new firm recognized the debts of the old firm as its debts does not tend to prove an assumption of the old debts subsequently to the formation of the new copartnership, but that at the time of the formation of the last copartnership the new firm assumed the old debts; that the liability of the new partner for them was a part of the consideration paid by him for his interest in the partnership. This proof, however, by circumstances, only raises a presumption which may be rebutted by direct proof as to what the copartnership agreement was. Such proof is furnished here by the written articles of copartnership. The plaintiff, therefore, to avoid the effect of that proof, claimed that his cause of action against Quincey did not arise from the partnership agreement, but from a contract made subsequently. That would be an agreement to pay the debt of another, and must be established in compliance with the statute of frauds. Quincey pleaded that the agreement was without consideration. There is no express finding upon that issue. The findings are inconsistent and confusing; so much so that I think a new trial should be awarded. Apparently it is found that Badgley & Quincey agreed to pay George H. Tay & Co. a sum greater than was due them. Other findings, however, show that no such effect was intended. Very likely the attorneys are to blame for this confusion, but I think justice requires that a new trial be awarded.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, and a new trial granted.

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105 Cal. 350

## CROWE v. DOBBEL. (No. 15,665.)

(Supreme Court of California. Dec. 31, 1894.)

Department 2. Appeal from superior court, San Mateo county; George H. Buck, Judge.

Action by James Crowe, administrator, against F. W. Dobbel. Judgment was rendered for defendant, and plaintiff appeals. Affirmed.

Geo. C. Ross and Henry W. Walker, for appellant. Edw. F. Fitzpatrick, for respondent.

FITZGERALD, J. The complaint in this case shows a state of facts like those presented in the case of In re Dobbel's Estate (Cal.) 38 Pac. 87, and upon the authority of that case the judgment herein is reversed, with directions to the court below to overrule the demurrer.

We concur: McFARLAND, J.; DE HAVEN, J.

(Jan. 2, 1895.)

FITZGERALD, J. The judgment filed in this case on December 31, 1894, reversing the judgment appealed from, was entered through inadvertence, and the same is, therefore, vacated, and set aside; and now, upon the authority of the case of In re Dobbel's Estate (Cal.) 38 Pac. 87, the judgment of the court below is affirmed.

We concur: McFARLAND, J.; DE HAVEN, J.

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105 Cal. 379

## HANSEN v. SOUTHERN PAC. CO. et al. (No. 15,500.)

(Supreme Court of California. Jan. 3, 1895.)

RAILROAD COMPANIES — USE OF TRACK AS PATHWAY—ACQUIESCENCE OF COMPANY — PRESUMPTION—INJURY TO PERSON ON TRACK.

1. Where, in an action against a railway company for personal injuries, there is evidence that a large number of people crossed defendant's right of way at a certain point at all hours of the day, the question whether plaintiff was at such point on the right of way with the company's consent is for the jury, though defendant's witnesses testify that the company boarded up the right of way, and did everything in its power to warn people from crossing it.

2. Where a railroad company permits the public to use its right of way for the purpose of travel, it is liable to one who, while crossing the right of way, is injured by a dangerous contrivance placed by the company at a point so used.

3. Where a certain part of the right of way of a railroad company has been used by the public for more than 20 years as a footpath for travel, with the knowledge of the company, the acquiescence of the company in such use will be inferred.

4. Where a person is on the right of way of a railroad company with its consent, the company is bound to use reasonable care to avoid injuring him.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; Charles W. Slack, Judge.

Action by Charles J. Hansen against the Southern Pacific Company and another for personal injuries. Judgment was rendered for plaintiff, and defendants appeal. Affirmed.

W. H. L. Barnes, for appellants. Joseph Leggett and James G. Maguire, for respondent.

SEARLS, C. This is an action to recover damages for personal injuries alleged to have been sustained by the plaintiff, an infant of the age of about seven years, through the wrongful acts, negligence, and default of the defendants, their agents and servants. The cause was tried before a jury. Plaintiff had a verdict for $10,000, upon which judgment was entered in his favor. Defendants appeal from the judgment and from an order denying their motion for a new trial.

The complaint contained two causes of action. According to the first count or cause of action set out in the complaint, the defendant the Southern Pacific Railroad Company, a corporation, was and is the owner of a railroad, roadbed, track, etc., extending from San Francisco south to and beyond the southerly limits of the city and county; that the other defendant was and is the lessee of said railroad, and operates the same; that said lessee placed and maintained upon said railroad, near Thirtieth street, San Francisco, a cattle guard which is described at length, and as being so constructed as to be dangerous in character to persons crossing or attempting to pass over the same, all of which was well known to defendants; that at the place where this "dangerous trap" was placed and maintained it was, and for many years had been, the custom of the public generally, with the knowledge and consent of defendants, to pass and travel upon and over said railroad, roadbed, and right of way, and turnstiles had, with the knowledge and consent of defendants, been placed in the fences on each side of and inclosing the right of way; that on the 20th day of June, 1889, plaintiff, an infant of the age of seven years, with the consent of defendants, entered upon said right of way and track, and in attempting to pass over said "trap" his foot was caught, and firmly held thereby, and a passing train of defendant ran over and crushed his leg, so that amputation was necessary. The second cause of action states the facts up to and including the statement as to the plaintiff being caught in the cattle guard or "trap," as it is designated, and then counts upon the wanton and willful negligence of the engineer of defendant as the cause of his injury, stating in apt terms facts tending to show that, but for the gross carelessness of such engineer, the train might have been stopped before reaching plaintiff. The answer of defendants denies all the material allegations of the complaint.

Upon the close of the testimony on the part of plaintiff defendants moved for a nonsuit upon the grounds: "(1) That the evidence failed to show that either the public or the plaintiff ever acquired, with the consent, assent, or permission of defendants, the right to a user of the railroad as a way for travel, or as a playground or place of rendezvous for children. (2) That the evidence fails to show any negligence in the construction, equipment, or maintenance of the cattle guard in which the foot of plaintiff was caught at the time of his injury; that the track was fenced and barricaded against the passage of animals and human beings. (3) That there is no evidence of negligence on the part of the engineer of defendants' train, but that, on the contrary, it is affirmatively shown that said engineer did all in his power, aided by all the best appliances that machinery and science could furnish, to avoid doing the infant plaintiff any harm." The motion was overruled, an exception noted, and this action of the court is assigned as error.

The evidence showed without contradiction that from Twenty-Fifth street to Thirtieth street in the city of San Francisco, the railroad of the defendant runs most of the way upon an embankment varying in height from a few feet up to say 20 feet, with trestles or bridges under which travel upon the cross streets passed. The road curves to the left or east going south, and is fenced on both sides with a board fence, consisting of posts set in the ground with four boards placed horizontally, and a cap on the top of the posts. There is a somewhat heavy up grade going south or towards San Jose, and a reverse curve commences a little south of Thirtieth street. Just south of Thirtieth street the defendant had placed a cattle guard, the slats or bars of which were of iron or steel, placed with their edges upward, say three inches, more or less, apart, with an excavation of a few inches under them. Cross fences ran from the side fence up to the ends of this cattle guard in the usual manner. On or about June 20, 1889, the infant plaintiff, a boy of about seven years of age, was upon the right of way and embankment of defendants' road, and in attempting to cross said cattle guard his left foot passed between the slats thereof, was caught and held, and a south-bound passenger train of defendant, running on schedule time, and, so far as appears, at its regular rate of speed, ran over and crushed the left leg of said plaintiff so that amputation of the limb was a necessity. The train was stopped so that only the forward wheels of the engine passed over plaintiff. There was also evidence tending to show that for a number of years prior to and up to the time of the accident complained of a large number of people residing in the vicinity were accustomed to use the embankment and right of way of the railroad as a route over which to pass on foot, and for egress and ingress from and to their homes, and that this user was so general that people could be seen at all hours of the day passing over the said road. At several points boards were off the fences, through which they passed in going to and from the road. That there were between Twenty-Eighth and Thirty-First streets two or more turnstiles, two or three gates through the railroad fence, and one place at which stairs were erected over the same. The inference may be fairly drawn from the evidence that hundreds of people daily passed over this portion of defendants' road and right of way on foot, and that such user was known to defendants. There was evidence tending to show that plaintiff could have been seen, and the fact that he was caught in the cattle guard, at a point on the road 150 feet north of the position he occupied. James Hewitt, the engineer in charge of the train by which the injury to plaintiff was occasioned, was called as a witness on behalf of the plaintiff, and testified, in substance, that he was running at his usual rate of speed, say 18 to 20 miles per hour; saw the boy at say a distance of 150 feet, but did not discover his predicament until within, say 50 feet, of him, when he immediately reversed his engine, applied the "emergency stop" (which he described as being the best modern appliance for suddenly stopping a train), and brought his train to a stand just as it passed over the leg of the boy. To use his language: "There was nothing I could have done that I did not do to stop the train when I saw that he was caught." The witness testified to always seeing people on the track at and near this point, and described at considerable length the conduct of boys who would stand in front of approaching trains, and then suddenly jump aside, and various antics well calculated to deceive and distract those in charge of trains by causing them to believe said boys to be in peril, and all for their own amusement. The weight of testimony was to the effect that the boy had been playing on and about the track for nearly an hour before the accident, with two other boys. Plaintiff, however, denied this, and said, in substance, that he went to a point near where the accident occurred by previous appointment to meet another boy; failing in which, he met and talked with two small girls, looked on at the work of some men employed near the track, and started for home, when he was caught in the guard, where he stood, screamed, and motioned to stop the approaching train, but in vain. The testimony as to the dangerous character of the cattle guard was confined mainly to a model, and to showing that its slats were elastic, and that plaintiff was caught and held fast by it. There was also testimony tending to show that defendants had notices posted on or near the railway track in the vicinity of the accident, forbidding trespassers upon the company's grounds, and requesting parents to prevent their children from attempting to board cars in motion, and to keep them away from the company's grounds.

The contention of defendants is, in substance, that defendants were entitled to the sole and exclusive user of their road and right of way; that, having fenced it, and forbidden the public to trespass thereon, they had done all within their power to prevent such trespasses; and the fact that many persons continued to intrude upon their right of way did not constitute such persons other than trespassers, and the evidence of such intrusion was not admissible in evidence to prove acquiescence on the part of defendants, and did not, under such circumstances, tend to prove a license to the public to use the right of way. It seems to us that to say there was no evidence of an invitation on the part of the company to make use of the track at the point where the accident occurred is to assume the question of fact involved in the case,—to assume the very fact which it was the duty of the jury to determine. That the testimony on this subject objected to by defendants was admissible, we cannot doubt. In Townley v. Railway Co., 53 Wis. 626, 11 N. W. 55, it was held to be error to exclude evidence offered to show that persons living near the track, and other people, men, women, and children, had for years immediately preceding the accident been in the habit of passing back and forth upon the same pathway where the plaintiff (a little girl) was hurt by a moving car. Cassida v. Navigation Co., 14 Or. 551, 13 Pac. 438, is to like effect. Noyes v. Railroad Co., 92 Cal. 285, 28 Pac. 288, although differing widely in its facts, involves a like principle. A multitude of cases tending to the same end might be quoted. We content ourselves with stating the rule thus: The question whether or not the infant plaintiff was upon the road with the consent of defendants was an ultimate fact which went to fix the measure of diligence required of defendants in determining the question of negligence. Had the fact been conceded one way or the other, or established without contradiction, a question of law only would have been involved; but, the testimony being contradictory, the fact to be deducted therefrom was for the jury, under the instruction of the court as to the law applicable. Langhoff v. Railway Co., 19 Wis. 489; Cooley, Torts, p. 670; Noyes v. Railroad Co., supra; Wilson v. Railroad Co., 62 Cal. 172. The evidence, being properly admitted, established a sufficient showing, notwithstanding the fencing of the right of way and notices given by the company, to entitle its submission to the jury. As circumstances indicative of the nonconsent of defendants to the public use of its property as a way for foot travel, the facts indicated are potent. On the other hand, the continued user by the public, coupled with the facilities for such user, such as gates, stairs, and turnstiles, and openings in the fences, long continued, are cogent circumstances tending to an acquiescence in such user; hence the propriety of submitting the question to the jury.

Manifestly, if the jury found in favor of the theory of acquiescence by the company in the use by the public of its track and grounds as a way for travel, the character of its cattle guard, as to being dangerous or otherwise, became a factor in the problem. What it might lawfully do, as against trespassers upon its property to whom it owed no duty, it could not do with impunity to those having rights thereon. The character, material, and mode of construction of the cattle guard afforded means, coupled with the fact that the infant plaintiff was caught and held by its blades, by which to determine, to some extent at least, the question of its safe or dangerous character in such a place. In Railroad Co. v. Stout, 17 Wall. 657, it was said: "That the turntable was a dangerous machine, which would be likely to cause injury to children who resorted to it, might fairly be inferred from the injury which actually occurred to the plaintiff. * * * When the jury learned from the evidence that he had suffered serious injury by his foot being caught between the fixed rail of the roadbed and the turning rail of the table, they were justified in believing that there was a probability of the occurrence of such accidents." A like inference was deducible from the accident here. The evidence that the engineer might have seen the boy at a distance of 150 feet or more, and might at that distance have determined his situation, afforded some evidence of such negligence as would have rendered defendants liable in certain aspects of the case, and, coupled with the other facts and circumstances in proof, justified the court below in its denial of the motion for a nonsuit.

Defendants introduced evidence on their part tending to show: (1) That the cattle guard in question was of approved design, well calculated to promote the object of its construction, and that it had received the sanction of leading railway men of the country. (2) That they had kept notices posted on their road, warning the public from trespassing thereon; had constantly repaired breaks in their fences, only to have them renewed; had nailed up gates, employed special policemen, who, with the regular police of the vicinage, had labored in vain to keep people, and more particularly boys, from their track and right of way. As illustrative of the testimony in this behalf, Timothy Sullivan, a section man on this portion of the road, after testifying at length as to their efforts in keeping the fences in repair, stated as follows: "A year ago we repaired that fence near the Fairmount school as good as new. Carpenters came and repaired it, and, as soon as the carpenters repaired it, it was cut the following day. It was always repaired according as we see holes. I never kept any account of how many times that hole has been repaired. I know myself, sometimes at Twenty-Seventh and Dolores street, that we nailed up one gate. One gate that is there we nailed up every day for three months, and it would be cut in the morning. There was a watchman put there at night, and those nights it was not cut. As long as the watchman remained in sight it was not cut, but as soon as he was away it was cut. I believe there was 1,000 feet of lumber lost in repairing of those holes, taking no account of the nails or labor." The testimony of the policemen was quite full and specific in the detail of their efforts to keep people, and especially boys, off of the right of way of the railroad. The most that can be said is that there was a substantial conflict in the evidence on this branch of the case, and, while we might come to a different conclusion from that reached by the jury were the question submitted to us as an original proposition, we are not authorized for this reason to override the deliberate action of the jury, supported as it is by that of the court before which the cause was tried.

Exceptions are taken by the appellants to the instructions given to the jury on behalf of the plaintiff, and to those refused to be given on behalf of the defendants. These instructions are too lengthy to be reproduced in full. The following will give the scope and tenor of those given on behalf of plaintiff: If you find from a preponderance of evidence "that the defendants permitted and consented to the use of their tracks and right of way by the public for the purpose of travel along and across the same at the place where the cattle guard was maintained, and that the plaintiff was so using the track and right of way at the time that the injury occurred, then I charge you that the plaintiff was not a trespasser, and the defendants owed him a duty not to obstruct the track and right of way with a dangerous contrivance; and if you further find that the cattle guard was a dangerous trap, and that the defendants knew, or ought to have known, that it was dangerous, you will find for plaintiff on said first cause of action, provided you find that the injury was caused by the said cattle guard, without fault on the plaintiff's own part." The court further instructed the jury, in substance, that if for more than 20 years the locus in quo had been used by the public as a footpath for travel with the knowledge of said defendants, and without protest or objection from them, then the jury might infer that such use of the track and right of way was with the acquiescence and permission of defendants. Upon the second cause of action the instruction was, in substance, that if plaintiff was upon the track by the consent and permission of defendants, then they were bound to exercise reasonable care in keeping a proper lookout and otherwise, and if they failed therein, and by reason of their negligence, and without the fault of plaintiff, he was injured, the jury should find for plaintiff; and that, if plaintiff was not on the track or road by permission of the defendants, he was a trespasser, and the defendants owed him no duty, except to use ordinary care to avoid injuring him when they discovered him on the track; and if, under such circumstances, they exercised such care, the verdict should be for defendants on the second cause of action. The instructions at which we have glanced, taken as a whole, embodied the law applicable to the case with great clearness, and were in no wise objectionable. The fault of the instructions asked by defendants and refused by the court, so far as important, was that they steadily assumed the fact that plaintiff was a trespasser, and therein were objectionable. The other objections raised are not tenable, and the judgment and order appealed from should be affirmed.

I concur: BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

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105 Cal. 409

## WARNER v. F. THOMAS PARISIAN DYEING & CLEANING WORKS.

(No. 15,266.)

(Supreme Court of California. Jan. 3, 1895.)

NEW TRIAL—VERDICT—VACATING—STATEMENT OF CASE—AMENDMENT.

1. The granting a new trial for insufficiency of the evidence will not be disturbed unless there was a clear abuse of its discretion.

2. When, in the opinion of the trial court, the verdict is against the weight of conflicting evidence, it is its duty to grant a new trial.

3. Where a verdict covering two independent causes of action for the recovery of a money judgment was for one entire sum, and was erroneous as to one cause of action, it was properly set aside in toto, although as to the other cause of action it was right.

4. Under Code Civ. Proc. § 659, requiring the trial judge, in settling the statement on appeal, to make it "truly represent the case, notwithstanding the assent of the parties to any inaccurate statement," where, after a statement was settled, certain material exhibits were alleged to have been omitted, the judge could vacate his certificate of settlement, and insert the same in the statement.

Department 1. Appeal from city and county of San Francisco; John Hunt, Judge.

Action by Seth Warner against the F. Thomas Parisian Dyeing & Cleaning Works. There was a judgment for plaintiff, and defendant moved for a new trial. From an order granting that motion, plaintiff appeals. Affirmed.

Horace W. Philbrook, for appellant. Reinstein & Eisner, for respondent.

PER CURIAM. The complaint in this case contains two separate causes of action, and judgment is asked for the aggregate sum of $1,321. The case was tried before a jury, and the plaintiff recovered a verdict for the sum prayed for, on which judgment was entered. The defendant moved for a new trial, upon the ground, among others, of the insufficiency of the evidence to justify the verdict; and the court granted the motion upon that ground, as shown by its opinion found in the transcript, and in which the evidence is very thoroughly reviewed. The plaintiff appeals from the order thus made.

The rule is settled in this state that a motion for new trial on the ground of the insufficiency of the evidence to justify the verdict or other decision is addressed to the sound legal discretion of the trial court, and its action in granting the motion will not be disturbed on appeal unless it appears that there was a clear abuse of such discretion. It is also settled law that, when the evidence is conflicting, the trial court is authorized to review it; and if, in its opinion, the verdict is against the weight of the evidence, it is its duty to grant a new trial. Bjorman v. Redwood Co., 92 Cal. 500, 28 Pac. 591; Domico v. Casassa, 101 Cal. 411, 35 Pac. 1024, and cases cited. Here there was a clear conflict in the evidence; and, as appears from the opinion filed, the court was of the opinion that the verdict was contrary to the weight of the evidence, and hence should be set aside. In all this no abuse of discretion appears.

It is claimed, however, that there are in the statement of the case no sufficient specifications of the insufficiency of the evidence, and hence that the court was not authorized to consider the statement or examine the evidence. We have carefully looked at the specifications, and, in our opinion, they are quite sufficient to meet the requirements of the statute.

It is also claimed that the verdict covered two independent causes of action, and that, as to one of those causes of action, it is conceded to be right, and therefore it was error to set aside the entire verdict. But the second cause of action was for $71, and the verdict was for an entire sum, without any mention of the separate items. It was not error, therefore, to set the whole verdict aside.

It is further claimed that the settlement of the statement by the court was a gross abuse of discretion, and therefore the statement should not be considered. It appears that, after the statement of the case had been settled by the judge and filed with the clerk, it was brought to the notice of the court that the statement was incomplete, in that several exhibits referred to therein had not been engrossed at length, although it was recited in the statement that it contained all the material evidence taken at the trial of the action. The defendant's attorneys thereupon moved the court that the settlement and allowance of the statement be vacated, and that they be allowed to re-engross the same, and place these exhibits therein. This motion was resisted by the attorney for the plaintiff, but, after a hearing of the parties, was granted; and the plaintiff's attorney excepted to this action of the court. We see no error in this proceeding. Courts of justice are organized for the purpose of determining the controversies between litigants according to their respective rights; and rules of procedure are intended to facilitate this purpose, rather than to hamper or obstruct the action of the court in determining which of the parties is entitled to a judgment. Section 659, Code Civ. Proc., makes it the duty of the judge in settling the statement to make it "truly represent the case, notwithstanding the assent of the parties to any inaccurate statement." If the judge shall become satisfied that a statement as settled by him does not truly represent the case, he is authorized, and it is his duty, to make such corrections therein as will cause it to conform to the facts. In the present case the defendant's attorney, in preparing the proposed statement, had included therein a reference to these exhibits by inserting the words, at the place where they were referred to, "Here insert plaintiff's exhibit," so that the plaintiff's attorney was not misled in preparing amendments thereto; and, when the attention of the judge was drawn to the fact that the exhibits had not been engrossed in the statement, he was authorized to vacate his certificate of settlement, and direct that they be engrossed therein, so that his certificate might conform to the facts. Whether the omission to engross them was the result of inadvertence or carelessness on the part of the defendant's attorney did not deprive the court of a discretion to settle it correctly; and, for the purpose of determining what exhibits were in reality referred to in the statement, it was authorized to make such investigation as would enable it to settle the statement according to the facts.

There are no other points requiring special notice. The order is affirmed.

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4 Cal. Unrep. 901

## VERMONT MARBLE CO. v. BLACK. (No. 15,591.)

(Supreme Court of California. Jan. 4, 1895.)

OPENING DEFAULT—DECISION ON APPEAL.

On reversing an order denying a motion to set aside a default judgment, the appellate court will not direct the imposition of terms on the opening of the default, this being a matter for the lower court.

On motion for rehearing. Denied.

For prior report, see 38 Pac. 512.

PER CURIAM. Rehearing denied. We are asked, in case of denial of a rehearing, at least to modify our judgment so as to direct the imposition of terms upon the opening of the default. This, however, is a matter for the superior court, and there is nothing in our decision to prevent the imposition of such reasonable terms as may seem proper.

105 Cal. 425

RUCKER et al. v. HALL et al. (No. 15,421.)

(Supreme Court of California. Jan. 4, 1895.)

PLEADING — ELECTION BETWEEN COUNTS — FACTS UNKNOWN TO PLAINTIFF — SALE OF LAND — AGREEMENT FOR COMMISSIONS—CONSTRUCTION.

1. In an action to recover commissions for a sale of real estate under a contract for payment thereof at a certain rate if certain facts were true and at another rate if other facts were true, and all the facts are peculiarly within the knowledge of defendant, plaintiff may state his cause of action in different counts accordingly, and should not be compelled to elect on which he will proceed.

2. A contract running for one year provided that if plaintiff effected a sale of defendant's property he was to receive a certain commission, and in case a sale was made without his aid, or the property was withdrawn from sale, one-half such commission. *Held*, that a lease by defendant for five years, with the exclusive privilege to the lessee of purchasing at a fixed price at any time before the expiration of the lease, was a sale within the meaning of the contract, entitling plaintiff to one-half the commission.

Commissioners' decision. In bank. Appeal from superior court, city and county of San Francisco; Walter H. Levy, Judge.

Action by J. E. Rucker & Son against Mrs. Hall and another to recover commissions on a sale of real estate. Judgment for defendants, and plaintiffs appeal. Reversed.

Jackson Hatch, for appellants. Lloyd & Wood and J. G. Maguire, for respondents.

HAYNES, C. The plaintiffs were real-estate brokers at San Jose, doing business as J. E. Rucker & Son. The defendant Mary Hall in writing appointed the plaintiffs her agents for the sale of certain lands, and which authorization contained the following clauses: "The said J. E. Rucker & Son shall have complete control of all sales to purchasers furnished by them or through their agency, and I agree, in case I shall sell or dispose of such property to any customer furnished by said J. E. Rucker & Son, to pay them three per cent. commission on such sales. Should I find a purchaser independent from said J. E. Rucker & Son, or withdraw the property from sale, I agree to pay the said J. E. Rucker & Son one-half of the above commission as compensation for their services in advertising," etc. This contract and appointment was made August 24, 1886, and was "to run for one year, and thereafter until withdrawal of same in writing." This action was brought to recover commissions under said instrument. The complaint contained two counts, the first based upon the second clause above quoted, alleging a sale by Mrs. Hall, made January 11, 1887, and claiming one-half of 3 per cent. commission, amounting to $300; and the second count was based upon the first clause, alleging that plaintiffs, being ignorant of the sale above mentioned, on the 24th day of August, 1887, found a purchaser, and notified Mrs. Hall thereof, but that she refused, etc. The defendants answered each cause of action, specifically denying each allegation of the complaint. The cause was tried by the court without a jury, and findings and judgment went for defendants, and this appeal is from an order denying plaintiffs' motion for a new trial.

Before any evidence was offered, plaintiffs were required by the court, upon defendants' motion, to elect upon which of the two counts contained in the complaint they would offer evidence and rely for judgment, upon the ground that said counts required different testimony; that evidence which would support one would not support the other. Plaintiffs excepted to the order, and elected to rely upon the first count, and offered no evidence under the second count. The first cause of action was based upon an alleged sale of the property by Mrs. Hall in January, which, if made, entitled the plaintiffs to one-half of the commission they were to receive in case of a sale made by themselves, Mrs. Hall having retained the right to sell to purchasers not furnished by plaintiffs. The second cause of action was based upon a sale made by plaintiffs in accordance with the terms of their contract with Mrs. Hall, which would have entitled them to full commissions. This sale was alleged to have been made in ignorance of the alleged sale by Mrs. Hall some seven months before, and which it is alleged Mrs. Hall concealed from them. Plaintiffs' right to recover under the first cause of action depended upon the fact of a sale having been made by Mrs. Hall. If such sale had in fact been made, their right to recover was clear; while, if no sale had been made by Mrs. Hall, they would as clearly have been entitled to full commissions upon proof of the facts alleged in the second count or cause of action. These causes of action were based upon the same contract, and upon the face of the complaint it would appear clear that the plaintiffs were entitled to recover upon one or the other, according as the proof might be. The allegation of a sale by Mrs. Hall in January was based, as appears from the evidence on the part of the plaintiffs, upon a lease for the term of five years, "with the sole and exclusive privilege of purchasing" the same property upon payment of the sum of $19,000; Mrs. Hall agreeing to accept payments at any time of $1,000 or more, but no conveyance to be executed until at least $5,000 had been paid. This lease and agreement further provided that the lessees should pay rent for the premises at the rate of $125 per month, payable quarterly in advance, and, in default of such payment of any installment of rent for 30 days after it became due, the right to purchase the lands should terminate, and the lessor, the defendant here, should "have the right to claim an abandonment thereof." Whether the lessees had made payments entitling them to a conveyance, or whether a conveyance had in fact been made, or whether they had forfeited the right to purchase, and, if so, whether Mrs. Hall had exercised the right to claim an abandonment of the contract of purchase under the terms of the contract, were facts peculiarly within the knowledge of the defendants, and which could not be certainly known to the plaintiffs. The subject of the action was the recovery of commissions under a single contract for the payment thereof at a certain rate under one set of circumstances and at a different rate under different circumstances. I think all the facts might properly have been stated in a single count, as, under those facts, the ultimate question was as to the amount of commissions to which the plaintiffs were entitled. But the defendants could not have been prejudiced by the more logical and technical mode of pleading adopted by the plaintiffs. The uncertainty as to the facts above noticed justified that mode of pleading, and the court erred in requiring the plaintiffs to elect between the counts, and to rely upon one only. Wilson v. Smith, 61 Cal. 209; Sadler v. Olmstead, 79 Iowa, 121, 44 N. W. 292; Longprey v. Yates, 31 Hun, 432; Blank v. Hartshorn, 37 Hun, 101; Whitney v. Railway Co., 27 Wis. 327. In the case last cited it was held that, where the plaintiff cannot know, before the evidence is all in, the precise nature and limits of defendant's liability to him, he may state his cause of action variously in different counts of the complaint, and should not be compelled to elect upon which he will proceed.

The court found that plaintiffs accepted the said contract or authorization orally, and advertised said property for sale, but did not perform any other covenant or condition therein agreed by them to be performed. So far as the first cause of action is concerned,—and upon that alone the cause was tried,—the latter part of the finding is outside of any issue; since, by the contract, if Mrs. Hall sold the property to a purchaser not procured by plaintiffs, she was to pay one-half commissions as a compensation for advertising. The finding is, therefore, that, so far as their right to recover upon that count is concerned, they fully performed the contract on their part.

The fifth finding is not justified by the evidence in so far as it finds that Mrs. Hall did not find a purchaser or sell the property while her agreement with plaintiff was in force. It is true, the lease for five years, with the exclusive privilege of purchasing, did not bind the lessee to purchase; but Mrs. Hall bound herself to sell to the lessees at any time during the continuance of the lease, and to convey upon payment of $5,000 of the purchase money. She thus placed it out of her power to complete any sale plaintiffs might make for the space of five years, or forever, as the case might be. Such contracts must have a reasonable construction. The transaction must be considered as to its effect upon her contract with the plaintiffs, and not simply as to whether she had made a contract of sale such as she could, in any event, enforce against a purchaser. This is apparent from the further provision of the contract with the plaintiffs that, if she should withdraw the property from sale, she was bound to pay plaintiffs the same commission as though she had made a sale to an independent purchaser. If the fifth finding had set out the lease with the contract therein giving the lessee the exclusive privilege of purchasing for the period of five years, it would have required, as a conclusion of law, that plaintiffs were entitled to recover under the first count. The latter part of that finding, to the effect that Mrs. Hall is not indebted, etc., is a conclusion of law.

The eighth finding is against the plaintiffs upon the second cause of action, upon which they were not permitted to offer any evidence, and which was not tried.

Some other questions are discussed by appellants, but they need not now be considered. No brief was filed by respondents. The order denying a new trial should be reversed, and a new trial ordered.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order denying a new trial is reversed, with directions to set aside the order requiring the plaintiffs to elect between the causes of action stated in the complaint; and a new trial is ordered.

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105 Cal. 376

## BANK OF MARTINEZ v. HEMME ORCHARD & LAND CO. et al.

(No. 15,621.)

(Supreme Court of California. Jan. 2, 1895.)

COMMERCIAL BANKS—POWERS—LOANS ON REAL ESTATE.

1. In the absence of a prohibitory statute, a commercial bank may loan money on real-estate security.

2. The word "banking," as used in Const. art. 4, § 34, prohibiting the legislature from passing any act granting any charter "for banking purposes," and Id. § 35, commanding the legislature to prohibit any person, association, or corporation from "exercising the privilege of banking or creating paper to circulate as money," refers merely to the issuance of bank bills or paper to circulate as money.

Department 1. Appeal from superior court, Contra Costa county; Jos. P. Jones, Judge.

Action by the Bank of Martinez against the Hemme Orchard & Land Company and others to foreclose a mortgage. Judgment for plaintiff, and defendants appeal. Affirmed.

Earll H. Webb, for appellants. W. S. Tinning, for respondent.

PER CURIAM. This appeal was taken by the Hemme Orchard & Land Company from an order refusing a new trial. The plaintiff is a corporation incorporated under the laws of this state in 1873. The articles of incorporation specify that the corporators desire to incorporate under the laws of the state of California in relation to the formation of corporations "embraced in title 1, pt. 4, div. 1, of the Civil Code of this state"; and, further, "that the purposes for which said corporation is formed are to engage in and carry on the business of banking to such extent and in such branches as may legally be done under the constitution and laws of the state of California." The action was brought to foreclose a mortgage given by defendants August and Minerva E. Hemme to plaintiff to secure a loan made to them by plaintiff. Appellants contend that the mortgage is invalid because ultra vires, and illegal because forbidden by sections 34, 35, art. 4, Const. 1849,[1] which was in force when plaintiff was incorporated.

1. So far as the first point depends upon the provisions of the Civil Code, we are unable to see any force in it. The Code authorizes banks of deposit and discount, and prohibits the issuance of paper to circulate as money. Banks of deposit had from time immemorial been almost universally banks of loan and discount. Discount is a mode of loaning. No reason is suggested why they might not as well loan upon land security as any other. We are unable to see any point in the suggestion that because savings banks may loan on real estate therefore commercial banks may not. It might as well be argued that such banks cannot loan on personal security because savings banks are authorized to do so. The power to loan on real estate is not what distinguishes a savings bank from a commercial bank. In some states such loans are prohibited to commercial banks, either expressly or by the language of the charters. Cases arising under such laws have no force here.

2. The second point is no longer open. In Bank v. Fairbanks, 52 Cal. 196, it is said: "Under article 4, § 34, of the constitution of the state, deposit and loan associations may be formed which do not issue paper to circulate as money; and such are not 'banks,' within the prohibition of the constitution, although they may be called 'banks.'" We cannot follow the appellants in their attempted discrimination between that case and the one in hand. We perceive no essential difference. That decision was made while the constitution of 1849 was in force, and rights have grown up under it. Even if it did not meet our approval, we should not now feel at liberty to disturb that conclusion. But we think that conclusion correct. The provisions of the constitution of 1849 must be viewed in the light of 1849. The framers of that instrument had a vivid realization of the evils of bank bills issued by private corporations to circulate as money. Practically, they had never known any other money than bank bills till they came to California. The inconvenience arising from such currency was always very great, but the framers of the constitution of 1849 had known the utter prostration of business which resulted from the panic of 1837, when every bank in the United States suspended. As their bills constituted the entire currency of the country, the calamity can be better appreciated than described. The people of California were elated by the possession of rich gold placers, and probably believed that no other currency than gold and silver would be required. The reiteration of the idea shows that they desired above all things to prohibit the circulation of bank bills. This is what they meant by "banking," for while prohibiting it they authorized the formation of associations for the deposit of gold and silver, which, however, shall not put in circulation paper "of any bank" to circulate as money. Section 35 is but the counterpart of section 34, and requires the legislature to prohibit to any person or persons, as well as to corporations, the privileges of banking, which by the preceding section were denied to corporations. The two sections must be taken together, and it cannot be supposed that the convention intended to nullify the express exception made in the same provision. Besides, if the phrase "privileges of banking" includes all functions of banking, it would prohibit any person in the state from drawing a bill of exchange, giving a promissory note, or even collecting a debt, for those and many other transactions, essential to civilization as society is now constituted, are and have for centuries been the usual functions of banks. This is the reductio ad absurdum which shows the conclusion false. The legislature of 1849-50 passed a law prohibiting any corporation from performing even these acts. Section 3, "Act Concerning Corporations," passed April 22, 1850. But private persons were not prohibited from doing such business. On the contrary, an act was passed at the same session regulating demand, protest, etc., of bills of exchange and other paper. But the matter need not be pursued further, for it is absurd to attribute to any civilized modern community any such intent. The order appealed from is affirmed.

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[1] Const. art. 4, § 34, provides that the legislature "shall have no power to pass any act granting any charter for banking purposes; but associations may be formed under general laws for the deposit of gold or silver but no such associations shall make, issue or put in circulation any bill, check, ticket, certificate, promissory note or other paper, or the paper of any bank, to circulate as money." Section 35 provides that the legislature shall prohibit "any person or persons, association, company or corporation from exercising the privileges of banking or creating paper to circulate as money."

105 Cal. 600

## LEVY v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO et al. (No. 15,577.)

(Supreme Court of California. Jan. 6, 1895.)

CONSTITUTIONAL LAW — COMPELLING PERSON TO TESTIFY AGAINST HIMSELF—UNREASONABLE SEIZURE AND SEARCH.

Code Civ. Proc. §§ 1459, 1460, provide that if an administrator complains that any person is suspected to have concealed, embezzled, etc., any moneys or goods of decedent, or has in his possession any writings tending to disclose the right of decedent to property, or any claim, demand, or lost will, the court may cite such person to appear; that, if he refuses to submit to an examination, the court may commit him to the county jail until he submits, or is discharged; that if, on such examination, it appear he has concealed, embezzled, etc., any moneys or goods, or has any such writings, the court may order him to disclose his knowledge, and may commit him to the county jail until the order is complied with, or he is discharged. *Held*, that such statute is remedial, and not criminal, and is not in conflict with Const. art. 1, § 13, providing that no person shall "be compelled in any criminal case to be a witness against himself," or with article 1, § 19, providing that "the right of the people to be secure in their persons, houses, papers and effects against unreasonable seizures and searches, shall not be violated." McFarland and De Haven, JJ., dissenting.

In bank.

Petition by H. M. Levy for a writ of prohibition to the superior court of the city and county of San Francisco, department No. 9, and J. V. Coffey, judge of such court, commanding them to refrain and desist from further proceeding with a certain proceeding for the examination of petitioner on oath concerning property belonging to the estate of Morris Hoeflich, deceased, which it is alleged petitioner concealed and disposed of. Writ denied.

Byron Waters, J. B. Brandt, and Reddy, Campbell & Metson, for petitioner. Henry E. Highton, for respondents.

VAN FLEET, J. Morris Hoeflich died at the city and county of San Francisco in May, 1891, and Solomon Hoeflich was by the superior court of said city and county appointed administrator of his estate. Thereafter, on the —— day of June, 1893, the administrator filed in said superior court a petition in the matter of said estate, averring, in substance, that it had come to his knowledge that said deceased was at and prior to his death either a full partner with one H. M. Levy, or engaged with said Levy jointly in a large number of transactions in stocks and mines in California and Nevada, and in other property, "the exact nature and extent of which transactions, and of the real and personal estate resulting therefrom, can be ascertained by an examination of the said H. M. Levy and other witnesses under oath, and by the production and examination of books of account, correspondence, checks, deeds, conveyances, bonds, contracts, and other writings and documents now in the exclusive possession of said H. M. Levy"; and also by the examination of other named persons, and documents, etc., in their possession. The petition further averred that said Levy has concealed, conveyed away, and disposed of moneys and property of said deceased, and has in his possession and within his knowledge deeds and other documents and writings "which contain evidences of and tend to disclose the right, title, interest, and claim of said deceased to real and personal property," portions of such property being particularly described. The prayer was that said Levy be cited to appear before said court and undergo an examination under oath, together with such witnesses as might be then produced, touching all the matters set forth in the petition, "and especially touching his possession and knowledge of any and all deeds, conveyances, bonds, contracts, or other writings, which contain evidences of or tend to disclose the right, title, and interest or claim of the decedent, Morris Hoeflich, to any real or personal estate, or any claim or demand whatsoever"; and that said Levy be required to produce all said deeds, conveyances, and other writings, books of account, etc., for inspection and examination. In response to a citation issued upon said petition, said Levy appeared and demurred, which demurrer being overruled, he filed a verified answer specifically denying all the material averments of the petition; denied that he had any property in which the deceased was interested, as a partner or otherwise, or that he had any documents or writings relating to any such property. He also filed written objections to any further proceedings in the matter of said examination; but the demurrer and the objections were overruled, and a day was set by the court for the examination. Thereupon said Levy filed his petition here, setting up these facts, upon which he makes this application for a writ of prohibition directed to said court, and the Honorable J. V. Coffey, judge thereof, commanding said respondents to refrain and desist from further proceeding with said contemplated examination. An alternative writ was issued, in response to which respondents have demurred and answered, and the matter has since been argued and submitted.

The proceedings in the superior court which are called into question by this application for prohibition were admittedly taken under and in pursuance of sections 1459 and 1460 of the Code of Civil Procedure, and these sections are as follows:

"Section 1459. If any executor, administrator or other person interested in the estate of a decedent complains to the superior court, or a judge thereof, on oath, that any person is suspected to have concealed, embezzled, smuggled, conveyed away, or disposed of any moneys, goods or chattels of the decedent, or has in his possession or knowledge any deeds, conveyances, bonds, contracts or other writings, which contain evidences of or tend to disclose the right, title, interest or claim of the decedent to any real or personal estate, or any claim or demand, or any lost will, the said court or judge may cite such person to appear before such court, and may examine him on oath upon the matter of such complaint. If such person is not in the county where the decedent dies, or where letters have been granted, he may be cited and examined either before the superior court of the county where he is found, or before the superior court of the county where the decedent dies, or where letters have been granted. But if, in the latter case, he appears and is found innocent, his necessary expenses must be allowed him out of the estate.

"Section 1460. If the person so cited refuses to appear and submit to an examination, or to answer such interrogatories as may be put to him touching the matters of the complaint, the court may, by warrant for that purpose, commit him to the county jail, there to remain in close custody until he submits to the order of the court, or is discharged according to law. If, upon such examination, it appears that he has concealed, embezzled, smuggled, conveyed away, or disposed of any moneys, goods or chattels of the decedent, or that he has in his possession or knowledge any deeds, conveyances, bonds, contracts or other writings containing evidences of or tending to disclose the right, title, interest, or claim of the decedent to any real or personal estate, claim or demand, or any lost will of the decedent, the court may make an order requiring such person to disclose his knowledge thereof to the executor or administrator, and may commit him to the county jail, there to remain until the order is complied with, or he is discharged according to law; and all such interrogatories and answers must be in writing, signed by the party examined, and filed in the court. The order for such disclosure made upon such examination shall be prima facie evidence of the right of the executor or administrator to such property in any action brought for the recovery thereof; and any judgment recovered therein must be for double the value of the property as assessed by the court or jury, or for return of the property and damages in addition thereto, equal to the value of such property. In addition to the examination of the party, witnesses may be produced and examined on either side."

Petitioner contends that these provisions of the Code are unconstitutional and void, and that the proceeding in the superior court is, therefore, without warrant of law. His position is that they are obnoxious to several features of the constitution of the state, and more particularly to section 13 of article 1, which provides that: "No person shall * * * be compelled in any criminal case to be a witness against himself"; and to section 19 of the same article, which provides that: "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable seizures and searches, shall not be violated." These two provisions of the constitution are of well-understood significance; they involve like principles, and, in considering the objection made, may be regarded as one. The argument of petitioner is that these sections of the Code are distinctly penal in character, and contemplate a proceeding which is in its essential nature criminal, within the meaning of the above provisions of the constitution; that, being a criminal proceeding, petitioner is protected by the constitution from being compelled to testify against himself, or submit his books and papers in evidence.

There is no question that, if petitioner's premises are correct, his conclusion follows necessarily. But his construction of the provisions in question cannot be sustained. These provisions have received a construction at the hands of this court directly at variance with that put upon them by petitioner. Sections 1458–1461 of the Code of Civil Procedure were, prior to the adoption of the Codes, a part of the old probate act, as sections 116–119; they are a part of the same article, and relate to the same subject, which is expressed in the title as "Embezzlement and surrender of property of the estate." In the case of Jahns v. Nolting, 29 Cal. 507, this court had occasion to construe section 116 of the probate act (now section 1458, Code Civ. Proc.) upon the very feature now involved. That was an action by an administrator to recover property belonging to the estate of his decedent, which he alleged had been embezzled by defendant and converted to his own use. The lower court held that the action was brought under section 116 of the probate act, which alone gave plaintiff a remedy for the wrong; that the statute was penal in its nature, and that the plaintiff was bound to prove the embezzlement as alleged, or fail in his action. Judgment having gone against him, the plaintiff appealed, and in disposing of that question the court said: "The position that section one hundred and sixteen affords the exclusive remedy for embezzling and alienating the effects of the deceased, intermediate the death of the deceased and the grant of administration, cannot be maintained, unless that section can be held to be a penal statute. * * * The distinctions between penal and remedial statutes are not always clearly marked, nor are the authorities quite harmonious where statutes very similar in their purpose and general terms have been under review. A penal statute is one that imposes a penalty or creates a forfeiture as the punishment for the neglect of some duty, or the commission of some wrong, that concerns the good of the public, and is commanded or prohibited by law. The law generally first prescribes what shall or shall not be done, and then declares the penalty. Its primary object is punishment, and to deter others from offending in like manner, though it may give the penalty, or some portion of it, to the person who may prosecute the action. Reed v. Northfield, 13 Pick. 94; Suffolk Bank v. Worcester Bank, 5 Pick. 106; Frohock v. Pattee, 38 Me. 103; Bayard v. Smith, 17 Wend. 88; Sedg. St. Const. Law, 390." And it was held that the section was not penal, but purely remedial. Sections 1459, 1460, are strictly within the principles of construction announced in that case. They are no more penal in their essential features than is section 1458. It is true that, as urged by petitioner, they provide for pains and penalties, in the way of imprisonment and damages, under certain contingencies; but the essential distinction between these provisions and a penal statute is that the penalty is not imposed as a punishment for a public wrong, but as redress for a private grievance. And it is not unusual to find provisions of a similar character in statutes purely remedial. Both before and since Jahns v. Nolting these sections have several times been under consideration by the court. In Beckman v. McKay, 14 Cal. 250, the court considered the action, which was brought under section 116 of the probate act, as in the nature of an action of trover and conversion; and in Mesmer v. Jenkins, 61 Cal. 151, it is said "that under a statute very similar, if not precisely like sections 1458–1461, Code Civ. Proc., the power of a judge of probate, in respect of matters of this kind, is analogous in its extent and object to the power exercised by courts of chancery upon bills of discovery."

Petitioner relies largely in support of his position upon Boyd v. U. S., 116 U. S. 616, 6 Sup. Ct. 524, and Counselman v. Hitchcock, 142 U. S. 547, 12 Sup. Ct. 195. But we think those cases entirely distinguishable in principle from, and not at all in conflict with, the views expressed in Jahns v. Nolting. There are, it is true, some general expressions and language in those cases which, read without reference to the particular facts of those cases, might be construed as supporting the petitioner's position. But when considered in the light of what was before the court, and the premises from which they were reasoning, any seeming conflict fades away. In the case of Boyd v. U. S., a statute declared that any person who, with intent to defraud the revenue of the United States, should commit or omit certain acts, should for such offense be fined in any sum not exceeding $5,000 nor less than $50, or be imprisoned for any time not exceeding two years, or both; and, in addition, should forfeit the merchandise in respect to which the wrongful acts were performed. Under this statute, an information was filed against certain goods, charging an offense under the act, and asking the forfeiture of the goods. In the course of the proceeding, Boyd having appeared as a claimant of the property, and denied any act of forfeiture, and it being important to the government to show the quantity and value of the goods, a motion was made by the United States district attorney for an order directing the claimant to bring into court a certain invoice alleged by him to be in their possession and to contain proof of the truth of the allegations of fraud made by the United States. Such order was made, and, in obedience to it, the claimants produced the invoice, which was used as evidence against them on the trial. Speaking of the character of the proceeding, it was said by the court (page 634, 116 U. S., and page 534, 6 Sup. Ct.): "In this very case the ground of forfeiture, as declared in the twelfth section of the act of 1874, on which the information is based, consists of certain acts of fraud committed against the public revenue in relation to imported merchandise, which are made criminal by the statute, and it is declared that the offender shall be fined not exceeding $5,000 nor less than $50, or be imprisoned not exceeding two years, or both; and, in addition to such fine, such merchandise shall be forfeited. These are the penalties affixed to the criminal acts, the forfeiture sought by this suit being one of them. If an indictment had been presented against the claimants, upon conviction the forfeiture of the goods could have been included in the judgment. If the government prosecutor elects to waive an indictment, and to file a civil information against the claimants,—that is, civil in form,—can he by this decree take from the proceeding its criminal aspect, and deprive the claimants of their immunities as citizens, and extort from them a production of their private papers, or, as an alternative, a confession of guilt? This cannot be. The information, though technically a civil proceeding, is in substance and effect a criminal one. * * * As, therefore, suits for penalties and forfeitures incurred by the commission of offenses against the law are of this quasi criminal nature, we think they are within the reason of criminal proceedings for all the purposes of the fourth amendment of the constitution and of that portion of the fifth amendment which declares that no person shall be compelled in any criminal case to be a witness against himself. * * *"

The difference between the proceeding under discussion there and the proceeding complained of here by petitioner was recognized in the same opinion in the following language (page 624, 116 U. S., and 524, 6 Sup. Ct.): "The entry upon premises made by a sheriff or other officer of the law for the purpose of seizing goods and chattels by virtue of a judicial writ, such as an attachment, a sequestration, or an execution, is not within the prohibition of the fourth or fifth amendment, or any other clause of the constitution; nor is the examination of a defendant under oath, after an ineffectual execution, for the purpose of discovering secreted property or credits, to be applied to the payment of a judgment against him, obnoxious to those amendments. But when examined with care it is manifest that there is a total unlikeness of these official acts and proceedings to that which is now under consideration. In the case of stolen goods, the owner from whom they were stolen is entitled to their possession, and, in the case of excisable or dutiable articles, the government has an interest in them for the payment of the duties thereon, and, until such duties are paid, has a right to keep them under observation, or to pursue and drag them from concealment; and, in the case of goods seized on attachment or execution, the creditor is entitled to their seizure in satisfaction of his debt; and the examination of a defendant under oath to obtain a discovery of concealed property or credits is a proceeding merely civil to effect the ends of justice, and is no more than what the court of chancery would direct on a bill for discovery." In the Counselman Case, which was a case growing out of the refusal of Counselman to testify before a grand jury upon an investigation of alleged violations of "An act to regulate commerce," on the ground that his answers might tend to criminate him, the court held it was within the principles announced in the Boyd Case, and reaffirmed those principles. The case of Lees v. U. S., 14 Sup. Ct. 163, is another case falling strictly within the principles of Boyd v. U. S.

These considerations dispose of the main objection of petitioner. The other objections to the constitutionality of the statute are, in our judgment, without merit. Nor is the objection tenable that the proceeding in the probate court involves passing upon title to property, and is, on that ground, without its jurisdiction. Ex parte Casey, 71 Cal. 269, 12 Pac. 118; In re Curry, 25 Hun, 321. Writ denied.

We concur: FITZGERALD, J.; HARRISON, J.; GAROUTTE, J.; BEATTY, C. J.

McFARLAND, J. I dissent. This is an original petition here by H. M. Levy for a writ of prohibition to be directed to the superior court of the city and county of San Francisco, department No. 9, and Hon. J. V. Coffey, judge thereof, commanding said court and said Coffey to refrain from further prosecuting a certain proceeding instituted in said court against said petitioner. An alternative writ was issued, and on the return day the respondent demurred and answered, and the matter was then submitted.

It appears that the administration of the estate of one Morris Hoeflich, deceased, is pending in the court of respondent, sitting as a probate court, and that one Solomon Hoeflich is administrator of said estate. On the —— day of June, 1893, the said Solomon Hoeflich, as such administrator, filed in said court, in the matter of said estate, a certain writing, or petition, the contents of which are substantially these: It is therein averred that, from information derived from persons whose names said administrator is unwilling to disclose, he has ascertained that the said deceased, Morris Hoeflich, prior to and down to the time of his death, "was either a full partner with the said H. M. Levy, or engaged with him jointly in a large number of transactions" in stocks and mines in California and Nevada, and in other property, "the exact nature and extent of which transactions, and of the real and personal estate resulting therefrom, can be ascertained by an examination of the said H. M. Levy and other witnesses under oath, and by the production and examination of books of account, correspondence, checks, deeds, conveyances, bonds, contracts, and other writings and documents now in the exclusive possession of said H. M. Levy"; and also by examination of other named persons and documents, etc., in their possession. It is also averred that said Hoeflich, deceased, before his death represented to a number of persons, whose names the administrator is unwilling to disclose, "that he was in partnership and had large joint interests with said H. M. Levy"; and that the fact that he made such representation "confirms and strengthens the information otherwise received by your petitioner, and the conviction produced thereby." It is also averred in general terms that said Levy has concealed, conveyed away, and disposed of moneys, etc., of the said deceased, and has in his possession and within his knowledge deeds and other documents and writings "which contain evidences of and tend to disclose the right, title, interest, and claim of the said decedent to real and personal property," portions of said property being particularly described. The foregoing are, in brief, the material averments of said petition; and it was prayed therein that said Levy be cited to appear before said probate court and undergo an examination under oath as to all the matters set forth in said petition, and subject all his documents, writings, and papers to inspection and examination. A citation was issued according to the prayer of the petition to said Levy, who appeared and demurred to the petition; and, the demurrer having been overruled, he filed a lengthy written verified answer, in which he specifically denied all the material averments of said petition, and denied that he had any property in which the said decedent was interested, either as a partner or otherwise, or that he had any documents or writings of the character alleged in said petition. He also filed written objections to any further proceeding in the matter of said petition and citation; but the court overruled the objections, and set a day for the examination. Whereupon the said Levy filed here the present petition for a writ of prohibition, setting up all the foregoing facts, and praying that the respondents be restrained from proceeding with said examination; and he contends that said proposed examination is beyond the jurisdiction of said court, and that certain provisions of the Code of Civil Procedure, upon which he contends the proceeding is based, are unconstitutional and void.

The proceeding sought to be prohibited, if valid at all, must rest for its validity upon sections 1459 and 1460 of the Code of Civil Procedure. Our general law of procedure is averse to proceedings which are in their character inquisitorial. The only provision in the Code of Civil Procedure in the nature of a bill of discovery, other than said sections 1459 and 1460, is contained in section 1000, which provides that "any court in which an action is pending, or a judge thereof, may, upon notice, order either party to give to the other, within a specified time, an inspection and copy or permission to take a copy of entries of accounts in any book, or of any document or paper in his possession, or under his control, containing evidence relating to the merits of the action or the defense thereto"; and the proceeding here in question is certainly not under that section. Of course, the probate court would have no jurisdiction over any action to determine conflicting rights of property between the estate of Hoeflich and the petitioner herein, H. M. Levy. Moreover, no such an action is pending.

Sections 1459 and 1460, above referred to, are as follows:

"Section 1459. If any executor, administrator, or other person interested in the estate of a decedent, complains to the superior court or a judge thereof, on oath, that any person is suspected to have concealed, embezzled, smuggled, conveyed away, or disposed of any moneys, goods or chattels of the decedent, or has in his possession or knowledge any deeds, conveyances, bonds, contracts or other writings, which contain evidences of or tend to disclose the right, title, interest or claim of the decedent to any real or personal estate, or any claim or demand, or any lost will, the said court or judge may cite such person to appear before such court, and may examine him on oath upon the matter of such complaint. If such person is not in the county where the decedent dies, or where letters have been granted, he may be cited and examined either before the superior court of the county where he is found, or before the superior court of the county where the decedent dies, or where letters have been granted. But if, in the latter case, he appears and is found innocent, his necessary expenses must be allowed him out of the estate.

"Section 1460. If the person so cited refuses to appear and submit to an examination, or to answer such interrogatories as may be put to him touching the matters of the complaint, the court may, by warrant for that purpose, commit him to the county jail, there to remain in close custody until he submits to the order of the court, or is discharged according to law. If, upon such examination, it appears that he has concealed, embezzled, smuggled, conveyed away, or disposed of any moneys, goods or chattels of the decedent, or that he has in his possession or knowledge any deeds, conveyances, bonds, contracts or other writings containing evidences of or tending to disclose the right, title, interest or claim of the decedent to any real or personal estate, claim or demand, or any lost will of the decedent, the court may make an order requiring such person to disclose his knowledge thereof to the executor or administrator, and may commit him to the county jail, there to remain until the order is complied with or he is discharged according to law; and all such interrogatories and answers must be in writing, signed by the party examined, and filed in the court. The order of such disclosure made upon such examination shall be prima facie evidence of the right of the executor or administrator to such property in any action brought for the recovery thereof; and any judgment recovered therein must be for double the value of the property as assessed by the court, or jury, or for return of the property and damages in addition thereto, equal to the value of such property. In addition to the examination of the party, witnesses may be produced and examined on either side."

It is contended by petitioner herein that these provisions are in contravention of section 13 of article 1 of the state constitution, which provides that: "No person shall * * * be compelled in any criminal case to be a witness against himself"; and of section 19 of the same article, which provides that "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable seizures and searches, shall not be violated." He also contends that they contravene section 11 of said article, which provides that: "All laws of a general nature shall have a uniform operation," and section 25 of article 4, which provides that no special law shall be passed "regulating the practice of courts of justice," for the reason that they give special privileges to administrators over other litigants. It is also contended that the probate court could not make the orders sought here to be restrained without passing upon rights of property between the estate of Hoeflich and said Levy, which it has no jurisdiction to do.

I shall not discuss any of the above positions taken by petitioner, except the first two. The two provisions that a person shall not be compelled to be a witness against himself in a criminal case, and shall be secure against unreasonable seizures and searches, are so akin to each other that they are both covered by those judicial decisions and constitutional inhibitions which have established the personal rights and liberties of Englishmen and Americans. A compulsory production of a man's private papers is, in effect, compelling him to be a witness against himself. It will be sufficient, however, in this case, to particularly consider only the first of these two provisions, although the second is necessarily involved. And, basing our decision on that provision, I am of the opinion that upon the principles announced, and the decisions made by the supreme court of the United States in the cases of Boyd v. U. S., 116 U. S. 616, 6 Sup. Ct. 524; Counselman v. Hitchcock, 142 U. S. 547, 12 Sup. Ct. 195; and Lees v. U. S., 14 Sup. Ct. 163,—the contention of petitioner must be sustained, and that the writ of prohibition should issue as prayed for. If the proceeding in the probate court sought here to be restrained were, in form, a "criminal case," there could be no plausible contention that, in view of section 13 of article 1 of the state constitution, the petitioner could be compelled to be a witness against himself. But in the Boyd Case it was held that the fourth and fifth amendments to the federal constitution—which are similar to said sections 13 and 19 of our state constitution—applied to a proceeding to recover a penalty or forfeiture, although the proceeding was not criminal in form. That was a suit to forfeit Boyd's property for an alleged violation of a revenue law, and the court held that to compel him to produce books and papers as evidence against him was a violation of said amendments. The court say that suits for penalties and forfeitures "are within the reason of criminal proceedings for all the purposes of the fourth amendment to the constitution, and of that provision of the fifth amendment which declares that no person shall be compelled in any criminal case to be a witness against himself." The court further say that "illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure," and that "this can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual deprivation of the right, as if it consisted more in sound than substance." Afterwards the same court, in Counselman v. Hitchcock, 142 U. S. 547, 12 Sup. Ct. 195, expressly approved the decision in the Boyd Case, and declared that in the Boyd Case it was held that a statute which authorized a court to require a party to produce his private papers in court was "unconstitutional and void, as applied to a suit for a penalty or to establish a forfeiture of the goods of the party, because it was repugnant to the fourth and fifth amendments of the constitution"; and, furthermore, that "it is an ancient principle of the law of evidence that a witness shall not be compelled, in any proceeding, to make disclosures or to give testimony which will tend to criminate him, or to subject him to fines, penalties, or forfeitures." But the principle was still more directly decided in the late case of Lees v. U. S., 14 Sup. Ct. 163. That was a civil action brought by the United States to recover a penalty of $1,000 for the violation of an act of congress prohibiting the importation of aliens under contracts for labor. The circuit court compelled Lees, one of the defendants, to become a witness for the government, against his objection that the suit was in the nature of a criminal proceeding, and that he could not be compelled to testify; and on a writ of error to the United States supreme court the judgment was reversed. The supreme court, by Mr. Justice Brewer, said: "This, though an action in civil form, is unquestionably criminal in its nature; and in such a case a defendant cannot be compelled to be a witness against himself. It is unnecessary to do more than to refer to the case of Boyd v. U. S., 116 U. S. 616, 6 Sup. Ct. 524. The question was fully and elaborately considered in that case; and within the rule there laid down it was error to compel this defendant to give testimony in behalf of the government."

It is quite clear that said sections 1459 and 1460 include a "penalty" within the meaning of the authorities above noticed. Indeed, the whole scope of the proceeding which it is their purpose to authorize is, in its nature, quasi criminal. It is founded upon the fact that the party to be examined "is suspected" of being guilty either of the embezzlement or smuggling, or of the fraudulent concealment and secret and unlawful disposition of property of another. Certain things are to be done if he "is found innocent." But, if the contrary is found, then an order for disclosure is to be made, which he must obey or be sent to jail. And then it is provided that such order for disclosure shall be prima facie evidence of the right of the administrator to the property involved in any action brought for the recovery of such property; and that "any judgment recovered therein must be for double the value of the property as assessed by the court or jury, or for return of the property, and damages in addition thereto equal to the value of such property." It is thus sought to compel the party examined to testify, and to produce his private papers for the purpose of furnishing evidence upon which may be based an order that will make a prima facie case against him in an action for a penalty which may be of the most grave character. If he be defeated in such action, although he may have defended it with the utmost good faith, and under an honest claim of right, the judgment against him will not be, as in ordinary civil actions, for the value of the property or its return with the usual incidental damages, but, in addition to that, the judgment "must be" for a second full value of the property as a penalty, and cases might easily arise where the amount of such penalty would greatly exceed the highest fine provided as punishment for a crime by any section of the Penal Code. I am satisfied, therefore, that the said sections of the Code are within the inhibition of the constitutional provision of said section 13 of the constitution and the state. And, under the rule and the authorities above cited, a person in the position of the petitioner cannot be compelled to give testimony or produce papers which would tend to make a case against him, or furnish data or links of evidence favorable to such case. I have just noticed the recent case of U. S. v. James, reported in 60 Fed. 257, in which Judge Grosscup of the United States district court, N. D. Illinois, in a very interesting opinion, discusses the subject here under review at great length. In that case the learned judge holds that a person cannot be compelled to testify or produce documents that may tend to criminate him, although there be a statute providing that he shall not be prosecuted or punished for the matter about which his testimony is sought. He holds that the purpose of the fourth and fifth amendments was not confined to the protection of a witness against "law-inflicted pains and penalties only," but that the purpose was "to make the secrets of memory, so far as they brought one's former acts within the definitions of crime, inviolate as against judicial probe or disclosure"; and that "the privilege of silence, against a criminal accusation, guarantied by the fifth amendment, was meant to extend to all the consequences of disclosure." This doctrine is, perhaps, extreme. It may be that a statute exempting a witness from prosecution and from any exposure to penalties or forfeitures for the acts or things about which he is called upon to testify might remove him from behind the constitutional shield. I have noticed the James Case, however, because it is the latest judicial expression upon the general subject, and because the opinion discusses very fully the personal rights of individuals under English and American institutions. Of course, if our views hereinbefore expressed, and the authorities therein cited, are correct, the petitioner herein can invoke these constitutional principles equally with one who is a party to an action which is strictly in form criminal.

If the administrator of the estate of Hoeflich, deceased, believes, from information which he has, that said estate has a just cause of action against the petitioner herein, he has the privilege of bringing an action against said petitioner in the proper court; and when said action is pending he may avail himself, like other litigants, of the provisions of section 1000 of the Code of Civil Procedure to have an inspection of such books, documents, and papers in the possession of said petitioner as the court may deem proper, and may also examine said petitioner as a witness in the case. I think that a peremptory writ of prohibition should issue as prayed for in the petition.

I concur: DE HAVEN, J.

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(4 Cal. Unrep. 936)

## BURRIS v. KENNEDY et al.[1] (No. 15,634.)

(Supreme Court of California. Jan. 3, 1895.)

PROBATE SALES OF LAND—COLLATERAL ATTACK—PRESUMPTIONS.

1. A probate sale of realty, when collaterally attacked by the grantee of a distributee under the final decree, who raised no objection to the validity of the sale, will not be set aside for mere irregularities.

2. Where an order of probate sale of realty recites that at the hearing thereon the court "heard, understood, and fully considered the law and the premises," it will be assumed that it heard evidence as to the value of the property sold, and the sale will not, on collateral attack, be set aside because of the absence in the petition for sale of an allegation of the value of said property.

3. Where a petition in the probate court for the sale of realty recited that the petitioner "duly made and returned to said court * * * a true inventory and appraisement of all the estate" of deceased, as "will more fully appear by reference to the papers on file in the clerk's office," it will be assumed, on a collateral attack on the sale, that the realty was inventoried and appraised as required by statute, and its actual cash value there stated, so as to supply an omission in the petition to state the value of the property.

Department 1. Appeal from superior court, Alameda county; John Ellsworth, Judge.

Action by Jesse Burris against Catherine Kennedy and others to quiet title. From a judgment for plaintiff, and an order denying a new trial, defendants appeal. Reversed.

Hutchinson & Campbell and Donald Y. Campbell, for appellants. Sharp & Bolton, for respondent.

GAROUTTE, J. This is an action to quiet title, and grows out of the claim of respondent that a probate sale of real estate, made in the estate of James Kennedy, deceased, was void. The respondent is a grantee of Annie Church, an heir of Kennedy, and it is conceded occupies no more advantageous position in this litigation than would Annie herself, if the party plaintiff. Judgment went for the respondent, and this appeal is from that judgment and from the order denying a motion for a new trial. Respondent at the trial made numerous objections to the validity of the sale, but many of them are directed to mere irregularities, and are highly technical—entirely too technical to be considered when a collateral attack is made upon the judgment and decree confirming the sale. It was well said in Burris v. Adams, 96 Cal. 664, 31 Pac. 565: "In a doubtful case a court will not lean towards the attacking party, when he is, as in the case at bar, a mere volunteer, and when his grantor was a distributee in the final decree based upon the validity of the sale, and made no objection to it, and received without question the benefit of the money paid into the estate by the purchaser at the sale." And we reiterate that such a grantee must come before the court with something more substantial than irregularities in the proceeding, before probate sales of realty will be set aside in actions of the present character. Courts now hold much more liberal views upon these matters than are indicated in the early judicial history of the state; and, since the enactment by the legislature of section 1537 of the Code of Civil Procedure as it now reads,—which legislation in part was placed upon the statute books by reason of the prior rigorous holding of the court against the validity of probate sales,—the cases have been very exceptional in which by collateral attack sales have been annulled and set aside; and the advance upon liberal lines which the court has made in this class of litigation is largely attributable to the broader jurisdiction with which the court is now possessed under the present constitution, as compared to that which rested upon it in earlier times. The petition for sale of real estate involved in the present action asked that six certain tracts of land be sold. Five of these tracts were fully described, and their valuation and condition stated. The remaining tract, and the one in which we are now interested, is described in said petition as follows: "A piece of property bounded westerly by Bihler property, east by property line, southerly by the Central Pacific Railroad, northerly by East Fourteenth street, being an undivided one-fourth interest, valued at one thousand dollars per acre." No complaint is now made as to the sufficiency of the description, but it is claimed that, as to this particular tract of land, the petition is jurisdictionally defective, in this: that no valuation is placed upon it, and thus a positive demand of the statute omitted. The acreage of the tract not being stated, it is claimed that the valuation of $1,000 per acre gives the court no light as to its value, for it is impossible from the face of the description to even estimate the acreage. The trial court held that the objection to the admission of the petition in evidence upon this ground was well taken, that the petition was fatally defective, and the sale thereunder void for this reason. We see no other matter disclosed by the record pertaining to the validity of the probate proceedings leading up to the sale, the confirmation thereof, and the delivery of the deed, of sufficient importance to demand extended consideration. This is rather a small matter upon which to set aside a sale of real estate in an action to quiet title. The description of the land is sufficient, its condition is shown, and a valuation placed upon it by the acre. In addition, the order of sale recites that at the hearing of the application the court "heard, understood, and fully considered the law and the premises"; and, upon such a recital in the decree, we must assume that the court heard evidence upon the question of value. Under the foregoing state of facts, we are not now prepared to say that the sale was invalid by reason of the absence in the petition of an allegation of the total value of the tract.

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[1] Reversed in banc. 41 Pac. 458, 108 Cal. 331.

But there are other reasons for sustaining the sale more weighty than these. The petition recites "that your petitioner duly made and returned to said court * * * a true inventory and appraisement of all the estate of said deceased, * * * all of which will more fully appear by reference to the papers on file in the clerk's office * * * in the matter of said estate, which is hereby made." By reason of this reference, the inventory and the appraisement are to be considered a part of the petition, and omissions of material statements from the petition may be supplied by statements from the inventory and appraisement. It was said in Stuart v. Allen, 16 Cal. 501: "Nor is it essential that there should be in the petition itself, and without reference to any other paper or thing, a statement of these facts. The main fact required is the averment of the insufficiency of personal assets, and mere formal defects in the mode of statement would not affect the jurisdiction. The reference to the inventory makes, for all purposes of the reference, the inventory a part of the petition." This principle is also recognized in Estate of Boland, 55 Cal. 310. The inventory and appraisement in the estate of Kennedy, deceased, is not in the record, but we must assume in this character of action that the particular tract of land involved was not only inventoried, but that it was appraised, as required by the statute, and its actual cash value there stated, and, if the value of the land sought to be sold is such a material and jurisdictional fact that its recital in the petition is absolutely necessary, then a reference to the appraisement upon file among the records of the estate for such information satisfies the statute. The fact that this reference is general for all purposes, rather than special for one purpose, in no way weakens its effect; and upon principle, and also upon the reasoning of Stuart v. Allen, supra, we think the defective statement of facts found in the petition proper is cured by the reference. In the case of Dennis v. Winter, 63 Cal. 16, the validity of a probate sale was upheld, although the record disclosed that the petition for sale placed no valuation whatever upon the land sought to be sold, and the order of sale found as a fact the appraised value alone. The court held that, in view of the last clause of section 1537, Code Civ. Proc., the petition, aided by the order, was sufficient to give the court jurisdiction of the proceeding. For the foregoing reasons, the judgment and order are reversed, and the cause remanded.

We concur: HARRISON, J.; VAN FLEET, J.

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4 Cal. Unrep. 964

## PEOPLE v. SWEARINGER. (No. 21,148.)

(Supreme Court of California. Jan. 14, 1895.)

APPEAL—NOTICE—RECORD.

An appeal will be dismissed where the record does not show service of the notice of appeal, required by Pen. Code, § 1240, and no certificate of the clerk that there was service has been filed, though permission to file such certificate, on the ground that the failure of the record to show such service was due to an error of the printer, was asked several months before the dismissal.

Commissioners' decision. In bank. Appeal from superior court, Mendocino county; R. McGarvey, Judge.

A demurrer to the information against W. H. Swearinger was sustained, and the people appeal. Dismissed.

J. E. Pemberton, for the People. J. A. Cooper, for respondent.

BELCHER, C. The information in this case charges that on the 15th day of August, 1893, in the county of Mendocino, the defendant, W. H. Swearinger, "did willfully, unlawfully, and feloniously alter and deface the earmarks and brand of one certain roan spotted yearling steer, the property of and belonging to one P. M. Bucknell, with the intent to thereby steal the same, and to prevent identification thereof by the said P. M. Bucknell, the true owner." The defendant demurred to the information upon the ground that it did not state facts sufficient to constitute a public offense. The demurrer was sustained, and from the order or judgment thereupon entered the people appeal.

The record does not show that the notice of appeal was served upon the attorney of the adverse party, or upon any one, as required by section 1240 of the Penal Code, and on that ground the respondent moves to dismiss the appeal. The appellant, in the reply brief, admits that the record is defective in not showing that the notice of appeal was served, but says that it was in fact properly served, and that the omission was an error of the printer. A diminution of the record is then suggested, and leave is asked "to file a certificate of the clerk of the court below showing that there was due service." The reply brief was filed August 2, 1894, but no certificate of the clerk of the court below, or other paper, showing that there was due service, has been filed in this court. It follows that the appeal cannot be considered, and that it should be dismissed. People v. Phillips, 45 Cal. 44; People v. Clark, 49 Cal. 455; People v. Bell, 70 Cal. 33, 11 Pac. 327.

We concur: VANCLIEF, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the appeal is dismissed.

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105 Cal. 572

## McLAUGHLIN v. MENOTTI. (No. 15,299.)

(Supreme Court of California. Jan. 6, 1895.)

ACT OF CONGRESS—VARIANCE BETWEEN PRINTED STATUTE AND ENROLLED BILL.

If there is any variance between an act of congress as found in the printed volume of statutes and the original, as enrolled and deposited with the secretary of state, the latter will prevail. Beatty, C. J., and De Haven, J., dissenting.

In bank. Appeal from superior court, city and county of San Francisco; John F. Finn, Judge.

Action of ejectment by Charles McLaughlin against Peter Menotti. McLaughlin having deceased, Kate M. Dillon and Mary A. Crocker were substituted as parties plaintiff, and claim title under the land grant to the Central Pacific Railroad Company, and conveyances therefrom. Defendant claims under a selection by and a listing to the state of the lands as lieu school lands. On a former appeal from judgment for defendant (26 Pac. 880, 89 Cal. 354), the cause was remanded because of the failure by the trial court to find whether defendant's grantor was a bona fide settler upon the premises in question. From a second judgment for defendant, plaintiffs appeal. Reversed.

A. L. Rhodes, for appellants. Jackson Hatch, for appellee.

PER CURIAM. Upon the former appeal in this case (89 Cal. 354, 26 Pac. 880) the case was remanded for a new trial, for failure of the trial court to find whether Hirleman, the predecessor of the defendant, was a bona fide settler upon the lands involved in the action, within the meaning of section 4 of the act of congress of July 2, 1864 (13 Stat. 358), amending the act of July 1, 1862. That section, so far as applicable to the present case, as found in the printed volume of the statutes, reads as follows: "And any lands granted by this act, or the act to which this is an amendment, shall not defeat or impair any pre-emption, homestead, swamp-land, or other lawful claim, nor include any government reservation, or mineral lands, or the improvements of any bona fide settler, *or* any lands returned and denominated as mineral lands, and the timber necessary to support his said improvements as a miner, or agriculturist," etc.; and this court, in its opinion upon the former appeal, assumed this reading to be correct. Upon the subsequent trial of the cause, the superior court found that Hirleman was a bona fide settler, within the meaning of the act of congress, and rendered judgment in favor of the defendant. The plaintiffs have appealed from this judgment upon the findings alone. Counsel for appellants has now produced a copy of the enrolled act on file in the department of state at Washington, under the seal of the department, and certified by the secretary of state, from which it appears that the true reading of the foregoing portion of the statute is as follows: "And any lands granted by this act, or the act to which this is an amendment, shall not defeat or impair any pre-emption, homestead, swamp-land, or other lawful claim, nor include any government reservation or mineral lands, or the improvements of any bona fide settler *on* any lands returned and denominated as mineral lands, and the timber necessary to support his said improvements as a miner, or agriculturist," etc.

We must accept this certified copy of the act as the authentic statute and expression of the legislative will. What are the provisions of a statute is a question of law to be determined by the court upon an examination of the statute itself, and the enrolled copy of the act is the statute or legislative will, by which courts are to be governed. If there is any variance between an act as found in the printed volume of statutes, and the original, as enrolled and deposited with the secretary of state, the latter must prevail. Section 1875 (3), Code Civ. Proc., provides that the courts of this state shall take judicial knowledge of public acts of the legislative department of the United States, and declares that "the court may resort for its aid to appropriate books or documents of reference." In the absence of the original act, a copy, certified by its legal custodian to be correct, must be accepted as the highest proof of its terms. It is worthy of note that in two cases in which the statute under consideration has been before the supreme court of the United States it is quoted in their opinion in the terms found in the foregoing copy, as certified by the secretary of state (Broder v. Water Co., 101 U. S. 276; Railroad Co. v. Dunmeyer, 113 U. S. 635, 5 Sup. Ct. 566); thus furnishing persuasive evidence that the error in the printed volume had been previously called to the attention of that court. As the court has found "that no part of said lands are or were mineral lands, or were returned or denominated as mineral lands," its finding that Hirleman was a bona fide settler is immaterial, since it is only the improvements of a bona fide settler on such lands that are referred to in the act; and, as the other questions presented in the action were determined upon the former appeal in favor of the present appellants, we are required to reverse the judgment, and direct that a judgment be entered upon the findings in favor of the appellants. The judgment is reversed, and the superior court is directed to enter a judgment in favor of the appellants for the recovery of the lands described in the findings, and for the amount of rents and profits therein found.

We dissent: BEATTY, C. J.; DE HAVEN, J.

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105 Cal. 389

## PEPPER v. SOUTHERN PAC. CO. (No. 15,420.)

(Supreme Court of California. Jan. 3, 1895.)

RAILROAD CROSSING ACCIDENT — CONTRIBUTORY NEGLIGENCE—DAMAGES FOR DEATH OF ADULT SON.

1. A person killed at a railroad crossing, by a train running 30 or 35 miles per hour, had just driven rapidly to the crossing from a point 400 feet therefrom, where there was a view of the track in the direction from which the train was coming for four-fifths of a mile from the crossing, with the exception of the 1,500 feet next to the crossing, which were obscured by an orchard extending along the side of the highway to the railroad right of way, which was 100 feet wide. Deceased did not attempt to check his horses till coming into the right of way, when, they being frightened, he was unable to stop them. *Held*, that he was negligent, as he, when 400 feet distant, either could have seen the train, or thereafter drove at a reckless speed.

2. An engineer who sees that the driver of a team rapidly approaching a crossing does not observe the approaching train, and that there will be a collision unless the team stops, is not negligent in giving signals when both are near the crossing, though the horses are frightened thereby.

3. A person's negligence in attempting to cross ahead of a train which he saw or heard approaching is not affected by the fact that it was running unusually fast.

4. Where a person knew that a train was due at a crossing 8 minutes before it struck him, there was no excuse for his negligent approach to the crossing, he having for 15 minutes previously been in sight and hearing of the crossing.

5. In an action for the death of a relative, it is error to charge that the measure of damages is "not alone the pecuniary loss and injury" of plaintiff, but that, "in addition," plaintiff's loss by being deprived of the comfort, society, and protection of deceased may be considered.

Department 1. Appeal from superior court, Santa Clara county; W. G. Lorigan, Judge.

Action by William Pepper against the Southern Pacific Company for death of a son. Judgment for plaintiff. Defendant appeals. Reversed.

H. V. Morehouse, Hiram D. Tuttle, H. L. Gear, S. Frohman, and J. E. Foulds, for appellant. D. M. Delmas, W. L. Gill, and Bull & Cleary, for respondent.

PER CURIAM. Miles Pepper, a young man of 25 years, in driving across the track of the defendant's railroad in or near the town of Los Gatos, was killed by a passing train. Miles was never married, and the plaintiff, his father and heir at law, brought this action, alleging that his son's death was caused by the carelessness and negligence of the defendant. The answer denied all negligence on the part of the defendant, and alleged that the death of the deceased was caused by his own negligence. The jury found for the plaintiff, and assessed his damages at $8,000. This appeal is from the judgment, and from an order denying defendant's motion for a new trial. Several exceptions were taken to evidence, and to instructions given and refused, and it is further specified that the verdict is not justified by the evidence in many particulars. The more important specifications of insufficiency of the evidence are, in substance (1) that the evidence was insufficient to show negligence on the part of the defendant; and (2) that it does show negligence on the part of the deceased contributing proximately to the accident.

The complaint alleged the negligence of the defendant to consist in not giving any warning, either by ringing a bell or sounding a whistle, of the approach of the train, and in causing the train to approach the crossing at a reckless and negligent rate of speed, and in its negligence in obstructing the view of its track at said crossing. Some of plaintiff's witnesses testified that no bell was rung or whistle blown as a warning of the approach of the train to the crossing, nor until the danger signal was blown, when the engine was so near the crossing that it was too late to prevent the accident; others said they did not hear any whistle or bell until the danger signal was given; while about an equal number of defendant's witnesses testified that the bell was rung continuously from the time the train left the station at Los Gatos, a little more than three-fourths of a mile from the place of the accident, until the train stopped after the accident. It is not necessary to discuss the question whether this evidence was sufficient to support a finding by the jury that the bell was not rung, inasmuch as the negligence of the defendant in not giving warning of the approach of the train to the crossing—if it did not give such warning—is not conclusive of its liability.

As to the rate of speed of the train, the evidence was without conflict that it was going at the rate of 30 or 35 miles per hour. It cannot be said, as matter of law, that it is negligent or dangerous to run at that speed; and there is nothing in the record to show, as matter of fact, that it was negligent, unless it can be said to be negligence to cross any public road at a speed of 35 miles an hour, and that is not claimed by respondent. Nor is there anything in the record tending to show that the defendant obstructed the view of its track at said crossing, whether negligently or otherwise. Conceding, for the purposes of the case, that the defendant did not give the required warning of the approach of its train to the crossing, and that the omission was negligent, we think that the verdict was not justified by the evidence, for the reason that the defendant's negligence proximately contributed to cause the accident resulting in his death. The deceased was engaged in driving a butcher's wagon, delivering meat to customers. The accident occurred where a public road, known as "Showers' Lane," crosses the track of defendant's railroad. Showers' lane runs east and west, and the railroad north and south; and this crossing is 4,444 feet north of defendant's station at Los Gatos. Deceased had served one or more customers on the west side of the crossing the morning of the accident; then went over the crossing to the east side of the railroad; and, at the time of the accident, was again crossing the track at the same place, going west, and the train was going north. On the east side of the railroad, and south side of Showers' lane, there is a small orchard extending southerly from the lane 280 feet, which obstructs the view of the railroad track and of trains south of the crossing as the crossing is approached from the east, until the railroad right of way is reached, which is there 80 feet wide, or 40 feet on each side of the center of the track. A fence on the easterly line of the right of way separated it from the orchard. On the easterly side of the orchard, and crossing Showers' lane, is University avenue, which deceased crossed in going to the railroad crossing; and at that point a train can be seen on any part of the railroad between the Los Gatos depot and the place where the accident occurred, except for the space of 1,000 to 1,500 feet next to the crossing, which was obscured by the orchard and a house and barn in the orchard. The distance between University avenue and the railroad right of way is not stated in the record, except by reference to a map which is not before us; but Mr. Wheeler, who lives on the easterly side of the avenue, testified that the distance from his house to the crossing was 20 or 25 rods, and the avenue is stated to be 60 feet wide. Assuming the distance from the easterly line of the avenue to the easterly line of the right of way to be 25 rods, the distance in feet would be 412; or, if 20 rods, 330 feet. Taking the longer of the distances from the crossing that a train would be hidden by the orchard from a person on Showers' lane opposite the avenue, viz. 1,500 feet, the distance from the center of the avenue to the railroad was at least one-third of the distance that the train would have to pass after it disappeared behind the orchard; so that, if the train were running at a speed of 30 miles an hour, the deceased must have driven at the rate of 10 miles an hour to be upon the crossing in time to be struck by the train. But, if the train was not behind the orchard when he crossed the avenue, it must have been, according to the undisputed testimony, where he could not fail to see it if he had looked. If he approached the crossing at the rate of speed above stated, and did not stop before attempting to cross the track, it was not simply negligence, but recklessness. Mr. Wheeler testified that, when deceased left him, he drove directly towards the crossing, and that he was driving at the "usual gait." What that gait was he did not otherwise state. Jennie Joachim, a girl then 13 years of age, called by the defendant, appears to have been in Showers' lane at some place west of the crossing, and was returning, and at the time of the accident was standing on the west side of the railroad about the edge of the right of way, and at the north side of the lane, and saw the deceased, as well as the train, approach the crossing. She testified that the deceased was driving "very rapidly"; that "he come into the railroad right of way, and tried to check his horses, and the train was about

100 feet from the crossing when it whistled and scared the horses, and they started across. He couldn't hold them. I saw him try to check them, but he couldn't do it. He just hollered 'Whoa' at them. Before that he was driving very rapidly. He had a butcher wagon, with a covered top." Upon cross-examination her testimony given before the coroner was read, and disclosed very clearly that her estimate of the distance of 100 feet was not reliable. The engineer testified that he got a glimpse of the top of the wagon through the trees before he could see the horses, and sounded the whistle; that he saw the wagon still coming pretty rapidly towards the track, and gave several short blasts of the whistle; the horses were in full gallop; that he applied the brake, reversed the engine, and used sand; that he "judged" he was 250 to 300 feet from the crossing when he whistled. Mr. Crabtree, an assistant agent of the defendant, was in the fourth or fifth coach from the engine, next an open window. When he heard the danger signal, he looked out, "and saw he was coming towards the track at a pretty high rate of speed. * * * When I first looked out, the horses' heads were just inside the railway inclosure." There is not only no evidence that the deceased used any care or made any effort to ascertain whether a train was approaching, but the evidence excludes the possibility of his having used any reasonable care or caution in approaching the crossing. The fact that his view was obstructed after he crossed University avenue made it negligence on his part to drive at a rate of speed which not only interfered with his hearing an approaching train, but made it difficult or impossible to stop. If he could not see an approaching train because his vision was obstructed, ordinary care for his own safety required him to stop in order that his hearing should not also be obstructed, and, in any event, to make his approach so slowly as to give him complete control of his team, and enable him to stop instantly if occasion required.

So far as the negligence of the deceased is concerned, we see no conflict in the evidence; and it is well settled in this state and elsewhere that, if his negligence contributed proximately to the accident resulting in his death, the plaintiff cannot recover, even though the defendant negligently omitted to give the warning of the approach of the train which the law and its duty required. Hagar v. Southern Pac. Co., 98 Cal. 309, 33 Pac. 119; Fleming v. Railroad Co., 49 Cal. 253; Glascock v. Railroad Co., 73 Cal. 137, 14 Pac. 518. It is said, however, that the train was running at a rate of speed faster than usual. This could not affect the question, since the deceased could not have been misled by the unusual speed of the train, unless he saw or heard the train, and undertook to cross ahead of it; and to make such attempt and fail is conclusive evidence of negligence. Nor is the fact that the train was 8 minutes late any excuse for the neglect of the deceased to take proper precautions in approaching the track. If he knew the precise time the train passed this crossing when on time, he must have known that it had not passed. He crossed the track going east about 15 minutes before the accident, which was before the train was due, and, while he was on the east side, he was at no time beyond sight and hearing of the train if it had passed. On the other hand, if he did not know when the train was due, it was clearly his duty, in the exercise of reasonable care and prudence for his own safety, to use all reasonable means to ascertain whether he might then cross without danger from a passing train.

It is argued by respondent that "if his horses were frightened by the negligent blowing of the whistle, and ran before they reached the right of way," it would not show that he did not intend to stop, look, and listen when he reached a point where he could view the track. This argument assumes that the blowing of the whistle was negligence. We think it was not. The engineer, when he saw the wagon approaching behind the trees at a rapid gate, could not assume that the driver heard the train; and, under such circumstances, his duty was to attract the driver's attention by blowing the whistle. If the deceased had stopped his team, and thus indicated that he was aware of the approaching train, and was waiting for it to pass before attempting to cross, a different question might have been presented if the horses became frightened and unmanageable because of the sounding of the whistle. In a similar case the supreme court of Iowa, said: "When the engineer saw the team, the whistle sounded twice: This, as we suppose, was the call for brakes; but counsel for the plaintiff insist that, if it had not been done, the collision would not have occurred. Possibly this is so, but the question is, was the engineer negligent in thus sounding the whistle? We think not. In the first place, the engineer saw the horses close to the track, and that a collision would certainly occur unless something was done immediately to prevent it. To sound the whistle under the circumstances in the pending emergency was, we think, prudent and proper. There was no time for reflection. It was the usual thing to do, and, if the engineer had failed to do so, we think he possibly would have been negligent if a collision had occurred because of such failure." Schaefert v. Railway Co., 62 Iowa, 624, 17 N. W. 893.

No exceptions were taken to the instructions given at plaintiff's request, but, as the judgment and order must be reversed upon the ground hereinbefore considered, it is proper to notice instructions not excepted to, in view of further proceedings.

The fifth instruction given to the jury upon the point last above discussed was misleading and erroneous in two particulars:

First. That it assumes that if the deceased could not see the train, and was not aware of its approach, he was not negligent. We have already held that, if he could not see the train because of obstructions, he was negligent in not resorting to other means reasonably within his power to ascertain whether a train was near. And, second, it assumes that in blowing the whistle the engineer was negligent.

The court instructed the jury, at defendant's request, that the damages must be confined to the pecuniary loss suffered by the plaintiff; but afterwards, upon its own motion, the court further instructed the jury "that the measure of damages is not alone the pecuniary loss and injury sustained by the plaintiff in the loss of his son, as just explained; but in assessing the damages you may, in addition, take into consideration the loss, if any, sustained by plaintiff in being deprived of the comfort, society, and protection of the deceased by reason of his death. * * * You are not to take into consideration sorrow, grief, or mental suffering, if any, occasioned by the death of decedent." This instruction is erroneous. In Morgan v. Southern Pac. Co., 95 Cal. 510, 30 Pac. 603, the court below, in an action brought by the mother for the death of her infant daughter, charged the jury that "the jury is not limited by the actual pecuniary injury sustained by her by reason of the death of her child"; and it was held that the instruction was erroneous. This question was fully discussed in that case, and it was clearly held that, in an action for damages for the death of a relative, the relations existing between the plaintiff and the deceased could only be considered in estimating the pecuniary loss. Here the jury were instructed that they were "not limited by the actual pecuniary injury sustained by the plaintiff." The instruction, therefore, permitted the jury to give the plaintiff more than his "actual" pecuniary loss. What meaning the court intended to convey by the word "actual" is not clear, but it is comprehensive enough to include all pecuniary loss, and that in actions of this character is the limit of compensatory damages. Besides, the jury were instructed that they might, "in addition,"—that is, in addition to the actual pecuniary injury,—"take into consideration the loss, if any, in being deprived of the comfort, society, and protection of the deceased." Here "the loss" is not restricted to pecuniary loss, but as was said in Morgan v. Southern Pac. Co., supra, the jury "were given wide range to run into any wild and excessive verdict which their caprice might suggest." It may well be doubted whether the facts of this case justified any, even the most guarded, instruction in relation to compensation for the deprivation of the comfort, society, and protection of the deceased. The son was 25 years of age, and had the legal right to change his residence to a remote part of the state or of the world at any time he chose. He was not living with the plaintiff, though in the same town. The case was not like that of husband and wife,—a relation which the law presumes would have continued until the death of the plaintiff; nor like that of parent and minor child, where the right to select the residence of the child and to retain his society, during minority, is given by the law.

Some other instructions are criticised by appellant, but the general discussion we have given will sufficiently cover all other questions arising upon the instructions.

The only serious error in ruling upon the admission of evidence was corrected by the court.

The judgment and order appealed from are reversed, and the cause remanded.

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105 Cal. 413

## BOOB et al. v. HALL et al. (No. 19,550.)

(Supreme Court of California. Jan. 3, 1895.)

SUIT FOR LAND — FORECLOSURE OF MORTGAGE — BOND ON APPEAL—DEFICIENCY JUDGMENT.

Under Code Civ. Proc. § 945, providing that, on appeal from a judgment for the sale of real property, a stay bond to secure appellee against waste, and to secure payment for the use and occupation of the property in case of affirmance, shall be given for "a sum to be fixed by the court by which the judgment was rendered or order made," and that, "when the judgment is for the sale of mortgaged premises and the payment of a deficiency arising upon the sale, the undertaking must also provide for the payment of such deficiency," the trial court has power to fix the amount of the bond in respect to waste, use and occupation, and deficiency. Harrison, J., dissenting.

In bank. Appeal from superior court, San Bernardino county; John L. Campbell, Judge.

Action by Paul Boob and others against Lavinia Hall and others to foreclose a mortgage. There was a decree for plaintiffs, and defendants appealed. The cause appeared on a motion by defendants for an order restraining the sheriff from executing his deed to the purchaser at the sale held under such order of foreclosure. Granted.

Goodcell & Leonard, for appellants. Geo. B. Cole, for respondents.

McFARLAND, J. This is an action to foreclose a mortgage in which a decree of foreclosure was rendered for plaintiffs, from which defendants have appealed. The sheriff sold the property, and is about to give a deed to the purchaser; and this case is now before us on a motion of defendants to set aside the sale, and restrain the sheriff from executing a deed, upon the ground that defendants have given an undertaking on appeal which stays execution. The undertaking is in the penal sum of $1,000, and provides that, in case the judgment is affirmed, the appellants will not suffer waste, and will pay the value of the use, etc., of the premises, and also any deficiency that may arise upon the sale; and the undertaking recites that the said $1,000 is the amount fixed by the judge of the court to include the said deficiency. There is certainly no provision of the Code applicable to the matter of a bond for a deficiency judgment upon appeal from a decree foreclosing a mortgage other than section 945, Code Civ. Proc. Section 942, which requires a bond in double the amount of the judgment, is clearly not applicable. It refers solely to a judgment in personam for a certain sum of money, and provides that, upon affirmance on appeal, the sureties must pay the whole amount, or have personal judgment entered against them therefor. It is obvious that such a provision could not apply to sureties on a bond for an unascertained deficiency. Nor is there any other section of the Code which throws any light on the question here involved. Section 945 is as follows: "If the judgment or order appealed from direct the sale or delivery of possession of real property, the execution of the same cannot be stayed unless a written undertaking be executed on the part of the appellant, with two or more sureties, to the effect that during the possession of such property by the appellant he will not commit, or suffer to be committed, any waste thereon, and that if the judgment be affirmed or the appeal dismissed he will pay the value of the use and occupation of the property from the time of the appeal until the delivery of possession thereof, pursuant to the judgment or order, not exceeding a sum to be fixed by the judge of the court by which the judgment was rendered or order made, and which must be specified in the undertaking. When the judgment is for the sale of mortgaged premises and the payment of a deficiency arising upon the sale, the undertaking must also provide for the payment of such deficiency." This is the section—and the only section—which provides for a stay bond on appeal from a judgment which directs "the sale * * * of real property," and particularly "the sale of mortgaged premises and the payment of a deficiency arising upon the sale." The only question is as to how the amount of the bond for deficiency is to be fixed, if it is to be fixed at all; and the answer to the question is not entirely free from difficulty. After mature consideration, however, our conclusion is that the legislature, when framing section 945, intended to give to the judge the power to fix the amount of the bond in all the three matters mentioned in the section; namely, waste, use and occupation, and deficiency. They are all in the same section, and are being dealt with as one group. If the last sentence, referring to deficiency, had been put into the section at a place preceding the words "to be fixed by the judge," or if it had not followed a period and commenced with a capital, there would have been no doubt on that subject. But its mere position in the section does not make it independent of the preceding clause, which is naturally as applicable to it as to any other clause therein. Moreover, as the Code nowhere else provides a way for fixing the amount of a deficiency bond, and as the universal rule of the Code is to fix the amounts of statutory bonds, or to provide how they shall be fixed, we are not to suppose that the legislature intended to leave a hiatus in this instance, unless we are necessarily driven to that conclusion. We find no decisions directly in point.

When the case of Englund v. Lewis was decided (25 Cal. 337), although the law of procedure differed in many respects from our present Code, section 352 of the practice act was in the exact language of section 945 of the Code; and in that case, although the point was not raised or discussed, counsel and court seemed to assume that the amount of a deficiency bond should be fixed by the judge. The court, in its opinion, says: "They also, in proper time, executed and filed their undertaking on appeal, having first applied to the judge of the court for and obtained an order, under section 352 of the practice act, fixing the amount of the undertaking at two thousand dollars to stay waste, and secure the value of the use and occupation of the premises ordered to be sold, and to pay any deficiency unpaid upon said judgment, etc. The appeal thus perfected was passed upon by the supreme court," etc. Under the Code, the amount of the bond must be fixed by the judge, or it must be in general terms, without stating any amount at all, which would be out of harmony with all the other provisions of the Code. Moreover, in such case, in what amount would the sureties be called upon to justify? In that event the judge would have to fix the amount of the justification, which would be doing in substance the very thing denied him in the first instance. In Englund v. Lewis, supra, it was held that the judgment there under review was a dual judgment,—one at law in personam for a sum of money, and one in equity decreeing the enforcement of a vendor's lien. It was first adjudged that "plaintiff do have and recover from said defendants the sum of" $3,205, with costs, etc.; and then followed a decree in equity declaring and providing for the enforcement of the lien. It was held that, under the law then obtaining, such a judgment might be entered even in case of a mortgage, and that the personal judgment was entirely distinct from the decree, and might be enforced immediately by a fi. fa., without regard to the sale of the mortgaged premises. Therefore, it was held that a bond on appeal against waste, deficiency, etc., while it stayed the decree of sale, did not stay the personal judgment, and that the latter could be stayed only by giving a bond in double the amount of the judgment. Whether such a judgment could be properly rendered in an action to foreclose a mortgage under section 726 of the Code of Civil

Procedure, and the construction put upon it by decisions of this court, is a question which does not here arise; for the judgment in the case at bar is not of that character, either in form or substance. It merely follows the form now in common use, and, after reciting that a certain sum is due upon the debt and mortgage, immediately proceeds to order, adjudge, and decree that the mortgaged premises be sold, the proceeds applied to costs, counsel fees, etc., and the sum due, with interest; and that, if there be any deficiency after the sale, "a judgment of this court be docketed," etc. There was no judgment which could be enforced by common execution. The defendants were therefore required to give no stay bond other than one for waste, occupation, and deficiency; and the amount of the deficiency could not be ascertained until after the application of the proceeds of the sale. It would be great injustice to require an appellant in such a case to give a bond in double the amount of the sum for which the premises are to be sold, for they might be ample security for twice that sum. It appears, for instance, that in the case at bar the premises sold for the full amount found due. It is ordered that all proceedings in this case be stayed until the determination of the appeal herein, and that the sheriff of San Benito county be, and he hereby is, enjoined and restrained from executing a deed of conveyance to the purchaser or purchasers of the mortgaged premises under the sale thereof heretofore made.

We concur: GAROUTTE, J.; VAN FLEET, J.; FITZGERALD, J.

HARRISON, J. I dissent. To hold that under section 945 the judge may fix the amount of the undertaking for the deficiency required, in order to stay proceedings upon an appeal from a judgment for the sale of mortgaged premises, is to make a law, rather than to give construction to a law that has been enacted by the legislature. The legislature has given the judge authority to fix the amount of such undertaking for only two purposes, viz. to secure the respondent against waste, and for the recovery of the value of the use and occupation in case the judgment is affirmed. Where the judgment is for the sale of mortgaged premises, an undertaking for the value of the use and occupation is not required (Englund v. Lewis, 25 Cal. 354); and consequently no order fixing the amount is proper. The legislature has said, in clear and unambiguous language, that "when the judgment is for the sale of mortgaged premises, and the payment of a deficiency arising upon the sale, the undertaking must also provide for the payment of such deficiency." This is an absolute requirement, and cannot be limited by any order of the judge. To give to this clause the construction that, instead of providing for the payment of the deficiency,—that is, the whole deficiency,—the undertaking need provide for the payment of only such sum as the judge may determine will be the deficiency, is to interpolate into the clause a provision that the legislature has not made, and to give to the appellant a stay of proceedings without securing to the respondent the means of satisfying his judgment. In the present case the judge did not make any order fixing an amount for which an undertaking should be given to secure payment of the deficiency, but made an order fixing "the amount of the undertaking upon such appeal to stay the execution of said judgment under and for the purposes of section 945, Code Civ. Proc.," in the sum of $1,000.

Whether it is a hardship upon an appellant to require an undertaking for the deficiency, in addition to holding the mortgaged premises as security for the judgment, is for the legislature to determine. Whether the execution of such judgment shall be stayed pending an appeal, without any security, or whether the appellant shall be compelled to give security, and, if so, the amount thereof, in order to entitle him to such stay, are matters purely of legislative control. It may be added, however, that the liability upon an undertaking for the deficiency will be no greater than the disparity between the value of the mortgaged premises and the amount of the judgment, and that, if they are of greater value than the amount of the judgment, there would be no liability upon such undertaking. If their value is insignificant, or if they are not of as great a value as the amount of the judgment, the respondent is entitled to an undertaking which will fully guaranty to him the collection of his judgment, as much as in the case of an appeal from an ordinary money judgment. If, upon the appeal, the money portion of the judgment should be affirmed, but it should be held that it is not secured by the mortgage, the respondent would not be fully secured by the undertaking. The rule laid down in Englund v. Lewis, 25 Cal. 337, has been followed for upward of 30 years; and, if it is to be changed, it should be done by legislative act, rather than by judicial decision.

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105 Cal. 420

## JOHNSTON v. FISH et al. (No. 15,503.)

(Supreme Court of California. Jan. 4, 1895.)

RECOVERY IN EJECTMENT—EFFECT—RIGHT TO CROPS.

Where plaintiff in ejectment establishes his title, he cannot maintain claim and delivery for a crop raised and harvested on the land by defendant's tenant before judgment in ejectment was rendered, though the tenant knew that plaintiff disputed his landlord's title.

Department 1. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Action by Johnston against Fish and others for the conversion of hay. Judgment was rendered for plaintiff, and defendants appeal. Affirmed.

Atty. Gen. Hart, Aylett R. Cotton, and Nowlin & Fassett, for appellants. Estee & Miller and John B. Mhoon, for respondent.

HARRISON, J. Action to recover damages from defendants for the conversion of certain hay. The plaintiff's right of action grows out of the following facts: Prior to March 1, 1881, Henry Benson had been for many years the owner of a tract of land in Contra Costa county, which on that day he conveyed to one Jones. In May of the same year Jones conveyed it to the defendants herein. The conveyance from Benson to Jones was procured by the fraud of the latter, and on the 1st of September of that year Benson took possession of the land, claiming it as his own, upon the ground that by reason of the fraud he was entitled to disregard his conveyance, and remained in possession until evicted under a judgment in ejectment by the defendants herein in March, 1883. Shortly after Benson went into possession of the land the defendants herein brought an action of forcible entry against him, which was tried before a jury, and a verdict and judgment rendered in his favor November 12, 1881. In April, 1883, this verdict was set aside, and a new trial ordered, but no further step was taken in the action until 1887, when the action was dismissed. November 21, 1881, the defendants commenced an action in ejectment against Benson and others for the recovery of the land, and damages for the withholding thereof. The plaintiff herein was made a defendant in this action, but upon his disclaimer he was dismissed from the action November 29, 1881. A cross complaint was filed in the action in behalf of Benson to avoid his conveyance to Jones on the ground of fraud, and upon the trial of this issue a decision was rendered February 19, 1883, in favor of the plaintiffs therein, upon the ground that they were bona fide purchasers from Jones for value; and after this decision the trial of the issues in the ejectment was had, in which the plaintiffs withdrew their claim for damages, and judgment was rendered in their favor March 22, 1883. On the 1st of December, 1881, the plaintiff herein made a cropping contract with Benson for the cultivation of the land, under which he sowed a portion thereof to hay, which he harvested in the following summer. By the terms of this agreement the plaintiff was to have two-thirds of the crop, and Benson the remaining third; and, after the hay had been cut and stacked, the plaintiff bought from Benson his third of the crop. Subsequently thereto, and while the hay was still on the ground, the defendants herein brought an action of claim and delivery against Benson for the hay, in which, under their direction, the sheriff took possession thereof, and subsequently delivered it to them. This action was brought before the trial was had in the ejectment suit, and issue was joined therein by Benson, but no further proceedings were had therein until 1887, when, upon the stipulation of Benson, judgment for the possession of the hay was entered against him. The present action was commenced in January, 1883, and judgment was rendered in favor of the plaintiff for the value of the hay, assessed at the sum of $4,000.

There is no substantial difference between the facts in this case and those presented in Page v. Fowler, 39 Cal. 412, and under the principles laid down in that case the plaintiff's right of recovery must be sustained. See, also, Martin v. Thompson, 62 Cal. 618; Emerson v. Whitaker, 83 Cal. 147, 23 Pac. 285; Groome v. Almstead, 101 Cal. 425, 35 Pac. 1021; Stockwell v. Phelps, 34 N. Y. 366. Benson's entry upon the land in September, 1881, was made under his claim that by reason of the fraud perpetrated on him by Jones his conveyance to Jones was avoided, and that he still remained the owner of the land. Such an entry was not a mere trespass, but it was made under a claim of right adverse to the whole world, and constituted a disseisin of the real owners. The subsequent determination in the ejectment suit that the real owners of the land at that time (the defendants herein) were not affected by the fraud of Jones, for the reason that they were bona fide purchasers for value, does not change the character of Benson's entry, or the fact that it was an actual disseisin. The findings of fraud made by the court in the ejectment suit fully show that, as between Benson and Jones, he could successfully defend his possession of the land. While he thus held possession of the land, he had the right to dispose of its fruits, and any one dealing with him therefor became the owner of what he might purchase from him. He could either cultivate the land himself, or employ others to do it for him; and he could recompense those whom he employed either by giving them a definite quantity of the product of the land, or by an aliquot part of the whole. A person entering into a cropping contract with him would have the same right to the share agreed upon as his proportion as if he had purchased and paid for the same. The real owner of the land could not deprive him of this share, any more than he could take from him such portion of the crop as he had purchased from the occupant. The law gives to the plaintiff in ejectment the right to recover from the defendant, either in the same action or in another, the value of the use and occupation of the land, which is termed "damages for the withholding thereof"; but while the title to the land is undetermined the owner out of possession is not entitled to the fruits of the land, nor can he, after he has established his right to the possession, recover the fruits of the land from one who has purchased them from an occupant while such occupant was in the adverse possession. Such a rule would give to the real owner the gross product of the land, irrespective of the labor and expense required in its production. As was said in Page v. Fowler: "The very fact that he may recover the rents and profits of the land shows that he cannot recover the crops, for, as was well said in the case of Stockwell v. Phelps, 34 N. Y. 363, the owner of the land in such cases does not recover the value of the crops raised and harvested, but the value of the use and occupation of the land; and the annual crops of grain and grass, which contain both the value of the use of the land and the labor of the farmer, do not, under such circumstances, belong to the owner of the land. It would be an oppressive rule to require every one who, after years of litigation, perhaps, may be found to have a bad title, to pay the gross value of all the crops he has raised; and it would be an inconvenience to the public if the bad title of the farmer to his land attached to the crops he offered for sale, and rendered it necessary to have an abstract of his title to make it safe to purchase his produce." In Brothers v. Hurdle, 10 Ired. 490, the court said: "But when one who is in the adverse possession gathers a crop in the course of husbandry, or severs a tree or other thing from the land, the thing severed becomes a chattel, but it does not become the property of the owner of the land, for his title is divested. He is out of possession, and has no right to the immediate possession of the thing, nor can he bring any action until he regains possession. The owner of the land cannot sue for the thing severed in trover or detinue as a chattel, for it is not his chattel. It did not become so at the time it was severed, and the title to it as a chattel cannot pass to him afterwards, when he regains the possession, by force of the jus post liminii."

The fact that the plaintiff herein knew that the defendants claimed to be the owners of the land, as against Benson, does not impair his right of recovery. If, as against Benson, they had no right to the fruits of the land which he gathered while it was held adversely to them, they would have no right against his vendee, since Benson could give to his vendee as good a title as he himself possessed. And it is equally immaterial whether the hay cut from the land was a volunteer crop, or had been sown by the plaintiff. The right to the fruits of the land does not depend upon the amount of labor expended by the occupant in their production. The apples or strawberries picked by him belong to him as fully as the potatoes or corn which he may have planted; and the hay which he cuts is his whether it is an annual crop or whether the land was sown to hay for the first time while in his occupancy. The judgment against Benson for the possession of the hay in the action of claim and delivery against him does not aid the defendants herein. At the time that action was begun, Benson had no interest in the hay, the plaintiff herein being the owner of two-thirds thereof under the original contract, and having acquired the other third by purchase from Benson.

The evidence fully sustains the finding of the court that the value of the hay at the time it was taken by the defendants was $4,000. The defendants themselves alleged in the affidavit for its seizure in the claim and delivery action against Benson that it was of the value of $5,000, and its value is stated at that amount in the judgment recovered in that action in their favor. The judgment and order are affirmed.

We concur: GAROUTTE, J.; VAN FLEET, J.

105 Cal. 558

## In re FLAHERTY. (No. 21,069.)

(Supreme Court of California. Jan. 6, 1895.)

ORDINANCE—DELEGATION OF AUTHORITY—BEATING DRUMS ON STREET—REGULATIONS.

An ordinance forbidding the beating of drums on the street, except on permit of the president of the board of trustees, which he may grant when, in his judgment, it will not conflict with the purposes of the ordinance,—the promotion of the safety and security of public travel,—is not void by reason of the authority given such officer to decide when permits shall be given. Harrison, De Haven, and Fitzgerald, JJ., dissenting.

In bank.

Application of John H. Flaherty for writ of habeas corpus. Writ denied.

H. V. Morehouse, Hiram D. Tuttle, and J. E. Richards, for petitioner. C. C. Bennett, for respondent.

McFARLAND, J. The petitioner is under sentence of imprisonment for a violation of an ordinance of the city of Redlands, and seeks to be discharged on habeas corpus upon the ground that said ordinance is wholly invalid and void. The ordinance is entitled, "An ordinance to promote safety and security to public travel by prohibiting the beating of drums and certain other noises on the traveled streets or avenues of the city of Redlands without special permission therefor, and authorizing such permission in certain cases"; and in the body of the ordinance it is made an offense, punishable by fine or imprisonment, for any person to, among other things, "beat a drum" upon any traveled street of the city "without special permit in writing so to do first had and obtained from the president of the board of trustees of said city, which permit the president of said board may grant whenever, in his judgment, the issuance of the same shall not conflict with the aforesaid purposes of this ordinance, and not otherwise, provided that such permit shall specify the time when and the street or avenue where any of said instruments shall be so used as aforesaid." Petitioner was convicted of beating a drum on the traveled streets of said city without a permit, contrary to the said provisions of said ordinance. It appears from the petition that petitioner had been in the habit of beating a drum on the streets daily, and that, upon his application to the president of the board for a permit "to engage in beating a drum as he had been heretofore doing," the permit was refused; although, as appears from the petition, he was given a permit to beat his drum upon a certain occasion. He claims the right to beat his drum,—not on special occasions only, as other people, but every day, without a permit, and despite the ordinance.

There is no need of discussing the general power and right of a city to prohibit such noises on the streets as those made by the beating of drums. We do not understand counsel for petitioner as contesting such power. At all events, it certainly exists. But the point urged by petitioner is that the ordinance is void because it gives a certain officer authority to give permits to beat drums on special occasions; and this position is the only one which needs examination. It is contended that the clause authorizing a permit is partial and oppressive, because it gives too much power to the president of the board, and is violative of general constitutional principles against abridging the privileges of citizens, depriving a person of his rights without due process of law, denying him the equal protection of the law, etc. The continuous or daily beating of drums on the streets of a city would be an intolerable nuisance,—endangering the safety of teams and the occupants of vehicles drawn by animals, as well as of pedestrians liable to be injured by runaways, and stunning the ears with din so constant as to be almost insufferable. On the other hand, there is usually no objection to such noises on a few special occasions,—either when there are patriotic celebrations, generally participated in by all the people, or processions of a part of the people united in civic societies, political parties, etc. These occasions are comparatively few, and usually well known, so that people are prepared for them; and the processions and drums are generally preceded by policemen, who give notice of the approaching uproar. But how can these occasions be provided for? By an ordinance which shall anticipate and state in detail beforehand every occasion on which the noises may be made? Such a thing is practically impossible. No human foresight could conjure up all the circumstances under which the people might want a band (with a drum) on the streets. It would not do to name legal holidays alone; that, for obvious reasons, would be too narrow a provision. Neither would it do to single out, in addition to legal holidays, certain other enumerated days, as, for instance, the first Monday of every month; the president of the United States, or some other distinguished man whose advent should be celebrated with drums, might come on Tuesday. Neither would it be possible to schedule the kinds or characters of occasions of which drum-beats would be a necessary part. And so the practical result of petitioner's contention is that all persons must be allowed to beat drums on all occasions as they may choose, or no person must be allowed to beat a drum on any occasion whatever.

In dealing with this and similar questions, —such as repairs of wooden buildings within fire limits, carrying concealed weapons, using public buildings and grounds, ringing bells on buildings where many operatives are employed, haranguing on the streets by lecturers, preachers, etc., singing or playing on musical instruments on the streets, and the like,—our federal, state, and municipal governments have always recognized the practical impossibility of providing in advance for proper exceptional cases, and the necessity of giving to a public officer some discretion in the premises; and laws and ordinances based on that principle have nearly always been upheld when subjected to judicial test. Laws are not made upon the theory of the total depravity of those who are elected to administer them; and the presumption is that municipal officers will not use these small powers villainously and for purposes of oppression and mischief. Of course, it is impossible to state in terms the extent or the limitation of what is known as the "police power"; and courts have not attempted to do it. Whether or not that power has been exceeded in particular cases must be determined as the cases arise; and to find the law applicable to a particular case we must look to see what courts have held in similar cases. And we find that statutes and ordinances similar in character to the one in question in the case at bar have been sustained in most of the cases to which our attention has been called. We will notice a few of them. Statutes and ordinances have been sustained prohibiting awnings without the consent of the mayor and alderman (Pedrick v. Bailey, 12 Gray, 161); forbidding orations, harangues, etc., in a park, without the prior consent of the park commissioners (Com. v. Abrahams [Mass.] 30 N. E. 79), or upon the common or other grounds, except by the permission of the city government committee (Com. v. Davis [Mass.] 4 N. E. 577); "beating any drum or tambourine, or making any noise with any instrument for any purpose whatever, without written permission of the president of the village" on any street or sidewalk (Vance v. Hadfield [Sup.] 4 N. Y. Supp. 112); giving the right to manufacturers and others to ring bells and blow whistles in such manner and at such hours as the board of aldermen or selectmen may in writing designate (Sawyer v. Davis, 136 Mass. 239); prohibiting the erecting or repairing of a wooden building without the permission of the board of aldermen (Hine v. City of New Haven, 40 Conn. 478); authorizing harbor masters to station vessels, and to assign to each its place (Vanderbilt v. Adams, 7 Cow. 349); forbidding the occupancy of a place on the street for a stand without the permission of the clerk of Faneuil Hall Market (In re Nightingale, 11 Pick. 168); forbidding the keeping of swine without a permit in writing from the board of health (Inhabitants of Quincy v. Kennard [Mass.] 24 N. E. 860); forbidding the erection of any kind of a building without a permit from the commissioners of the town through their clerk (Commissioners v. Covey [Md.] 22 Atl. 266); forbidding any person from remaining within the limits of the market more than 20 minutes unless permitted so to do by the superintendent or his deputy (Com. v. Brooks, 109 Mass. 355). In Barbier v. Connolly, 113 U. S. 27, 5 Sup. Ct. 357, the supreme court of the United States had under consideration an ordinance which, among other things, prohibited the carrying on of the business of a laundry without certificates from the health officer and the board of fire wardens; and, while that part of the ordinance was not directly involved, the court say as follows: "In the case before us, the provisions requiring certificates from the health officer and the board of fire wardens may, in some instances, be unnecessary, and the changes to be made to meet the conditions prescribed may be burdensome; but, as we have seen, this is a matter for the determination of the municipality in the execution of its police powers, and not the violation of any substantial right of the individual." Many other authorities to the same point as those above noticed might be collected outside of the decisions in our own state. In this state it was held in Ex parte Casinello, 62 Cal. 538, that an ordinance giving to the superintendent of public streets the power to determine where, either on a public street or on private premises, any person could deposit "any glass, broken ware, dirt, rubbish, garbage or filth," was a salutary and valid "police regulation." In the Case of Guerrero, 69 Cal. 88, 10 Pac. 261, it was held that the city council had authority to make the issuance of a license for the sale of liquors conditional upon the appellant's obtaining a permit from the board of police commissioners. In Ex parte Tuttle, 91 Cal. 589, 27 Pac. 933, an ordinance prohibiting the selling of pools on horse races, except within the inclosure of a race track where the race is to be run, was upheld, and it was declared not to be void because its effect might be "to confer a special privilege or benefit upon those who own or control the race courses." In Ex parte Fiske, 72 Cal. 125, 13 Pac. 310, an ordinance was upheld which prohibited the repair of a wooden building within certain fire limits without permission in writing signed by a majority of the fire wardens and approved by a majority of the committee on fire department and the mayor. In that case we said as follows: "It is clear, however, that a literal compliance with the regulation prohibiting the repairing of a wooden building might work, in some instances, useless hardships. The repair of a leaking roof or a broken window would be necessary to the comfort and health of a family, without enhancing the danger which the framers of the ordinance sought to provide against; and repairs of a more extensive character might be made to particular houses, standing in particular localities, without increasing the fire risks. And it is equally clear that no general rule could be established beforehand that would meet the emergencies of individual cases. Therefore the power to give relief in particular instances is conferred on certain officers; and it is not to be presumed that they will exercise it wantonly, or for purposes of profit or oppression." In Ex parte Christensen, 85 Cal. 208, 24 Pac. 747, this court upheld an ordinance prohibiting the business of a retail liquor dealer unless he procured the permission of a majority of the board of police commissioners, or, upon their refusal, the permission of 12 property owners in the block. The foregoing authorities, in our opinion, clearly establish the validity of the ordinance here in question.

Counsel for petitioner rely on some cases —particularly State v. Dering, 84 Wis. 585, 54 N. W. 1104, and Frazee's Case (Mich.) 30 N. W. 72—which, at first blush, seem to conflict with the general current of authorities as above presented. But upon closer examination they will be found to go upon a distinction or principle—whether sound or not —that is not applicable to the case at bar. They are based upon the theory that the lawful inherent rights of men cannot be entirely suppressed or destroyed by statute or ordinance, but can only be regulated; and that all regulations of such rights must be uniform, etc. The cases cited all deal with ordinances regulating the right of the people to have processions or parades in the streets; and it is this right that is discussed, although the accompaniment of music is mentioned in some of the ordinances. In the Wisconsin case, supra, the petitioner "was convicted of parading the streets." Now, the public have an undoubted right to travel on the street; that is what a street is for. And to march along a street in a procession is merely to exercise the right to travel on it. Therefore, if the cases under review be sound, this right can only be regulated, and cannot entirely be suppressed; and the regulation must be uniform,—although it is difficult to understand how the crowded streets of a city could be practically regulated in this respect without vesting some discretion in the police authorities. At all events, the cases referred to deal with a right. But the proposition that a man has a natural, ingrained, inviolate, common-law, or constitutional right to beat a drum on the traveled streets of a city has no foundation in reason or authority. As, therefore, it is not a right that may not be entirely suppressed, it may be regulated as the lawmaking power may determine. In Ex parte Tuttle, supra, it was held that, as betting on horse races was demoralizing in its tendencies, and an evil, it could be suppressed by ordinance; and that, as it could be suppressed, no one could be heard to complain of an ordinance regulating it because thereby special privileges accrued to particular persons. And in Ex parte Christensen this court distinctly declared that such is the rule. The court said: "The objection is that this makes the license depend upon the arbitrary will and pleasure of the board of fire commissioners. * * * But, whatever force this objection might have in reference to licenses to carry on the ordinary vocations of life, which are not supposed to have any injurious tendencies, it has no force in the present case. It is well settled that the governing power may prohibit the manufacture and traffic in liquor altogether, provided only it does not interfere with interstate commerce. And, if the governing power can prohibit a thing altogether, it can impose such conditions upon its existence as it pleases. * * * Even if it be conceded that the conditions were arbitrary, they were within the power of the board." In the ordinance involved in the case at bar, there is no attempt to suppress processions or parades. It does not interfere with travel, but seeks to promote the comfort, convenience, and safety of travelers by preventing that which makes traveling uncomfortable and dangerous. Its provisions do not affect private premises, but refer solely to public traveled streets. It prohibits no business which every one has a right to pursue. As the wants and comfort and pleasure of the public require that the thing prohibited, although in the abstract injuriously annoying, should on special occasions be allowed, the ordinance provides for permitting the thing to be done on such occasions; and the granting of such privileges is not taking away the right to do the thing from others, because they have no such right. When the public welfare requires it, a nuisance may, for special purposes, be permitted. Railroad Co. v. Brown, 67 Ind. 45; Sawyer v. Davis, 136 Mass. 239. As all such occasions cannot be foreseen and provided for by special enactment, some small discretion in the premises is granted to a certain officer; and that discretion to grant a permit is limited to instances where "the issuance of the same shall not conflict with the aforesaid purposes of this ordinance," viz. "to promote safety and security to public travel." The validity of such an ordinance is clearly established by the current of authorities, some of which are hereinbefore cited. It is entirely within the reasoning of the supreme court of the United States in Crowley v. Christensen, 137 U. S. 86, 11 Sup. Ct. 13, which case also furnishes an answer to petitioner's claim of support from Yick Wo v. Hopkins, 118 U. S. 373, 6 Sup. Ct. 1064.

In our opinion, the ordinance here involved is valid, and the petitioner should be remanded. The writ is dismissed, and the petitioner remanded to the custody of the marshal.

We concur: GAROUTTE, J.; VAN FLEET, J.; BEATTY, C. J.

HARRISON, J. (dissenting). The authority of the city to make police regulations is given by the constitution, and, although it is derived directly from the people, instead of mediately through the legislature, through the municipal government act, yet it is a legislative power, and, like any other legislative power, is to be exercised by the body to which the power has been intrusted. The power to make laws is a sovereign power, and its exercise by the legislative body of a municipality, being a delegated power, cannot be delegated to any other body or individual. Mr. Dillon says (Mun. Corp. 96): "The principle is a plain one that the public powers or trusts devolved by law or charter upon the council or governing body, to be exercised by it when and in such manner as it shall judge best, cannot be delegated to others." Mr. Cooley says (Const. Lim. p. 248): "So far as its functions are legislative, they rest in the discretion and judgment of the municipal body intrusted with them, and that body cannot refer the exercise of the power to the discretion and judgment of its subordinates, or of any other authority." This inhibition includes, not only the ordinance itself which is to be adopted, but also the individuals upon whom it is to operate, as well as the times and places in which it is to be in operation. The legislative body of the municipality cannot delegate to one of its members, or to any executive officer of the city, the power to determine whether an ordinance shall be operative upon certain individuals, or at certain times, any more than it can delegate to him the power to determine whether the ordinance shall be adopted, or shall have any operation; nor can it confer upon such officer the power to exempt any individual that he may choose from the operation of the ordinance. "No man's rights can be submitted, under a constitutional government, to the discretion of anybody." Robison v. Miner, 68 Mich. 556, 37 N. W. 21. Whenever the question has been presented for determination, it has been uniformly held that an ordinance which confers upon an executive officer of the city the right to determine by his own will whether it shall be in operation or not in the particular cases to which it is directed is invalid. If the act covered by the ordinance is one which the individual has no inherent right to perform, or which the municipality may prohibit altogether, a privilege to perform the act may be made to depend upon the compliance with certain conditions, or the previous approval of another officer. If, however, the act is lawful or proper in itself, and improper only as it may affect the public, the power of the municipality is limited to a regulation of its exercise, and such regulation must be indicated by fixed and definite rules, and cannot be left to the arbitrament of any officer. This rule is not to be confounded with the execution of the ordinance by the officers intrusted therewith. The enforcement of the ordinance by the executive officer of the city is entirely distinct from determining whether the ordinance, when adopted, shall be in force. The policeman may have a discretion to determine whether an obstruction of the streets by an individual is such a violation of an ordinance forbidding the obstruction as will warrant his arrest, but neither he nor any other officer can have the power to determine whether the ordinance itself shall be suspended for the benefit of that individual, or can give to such individual the right to disregard the ordinance. The right of the harbor master to station vessels at different points in the harbor, or of the policeman to prescribe the order of carriages at a theater, or of the superintendent of streets to designate a place for dumping garbage, is not the exercise of a legislative power, but rather the act of an executive officer to enforce the ordinance. Accordingly, it has been held that an ordinance conferring upon the mayor the right to determine whether a stationary steam engine should be removed was void, as conferring upon him a power which could only be exercised by the city council (Mayor, etc., of Baltimore v. Radecke, 49 Md. 217); that an ordinance providing that no person should erect any building within the city limits without having obtained permission from the board of aldermen is void, since it does not prescribe a uniform rule of action for governing the exercise of their discretion (State v. Tenant, 110 N. C. 609, 14 S. E. 387); that an ordinance forbidding the erection of livery stables in any block without the consent of the owners of land in the block is invalid (City of St. Louis v. Russell, 116 Mo. 248, 22 S. W. 470); that an ordinance making it unlawful for persons to parade a public street, singing or beating drums, or playing upon musical instruments, without having obtained the consent of the mayor, is void upon the ground that it does not fix the conditions uniformly and impartially, and is unreasonable (Anderson v. City of Wellington, 40 Kan. 173, 19 Pac. 719; In re Frazee, 63 Mich. 396, 30 N. W. 72; Rich v. City of Naperville, 42 Ill. App. 222; State v. Dering, 84 Wis. 585, 54 N. W. 1104); that an ordinance that no parades or processions shall be allowed upon the streets without a permit from the police department is invalid, because it leaves the power of restraining processions to an unregulated official discretion, when the whole matter, if regulated at all, must be by permanent legal provisions operating generally and impartially (City of Chicago v. Trotter, 136 Ill. 430, 26 N. E. 359).

There are many cases in which ordinances containing such a provision have been upheld, but in these cases the effect of such a provision upon the ordinance was not considered by the court; the only question presented to it for its consideration being the validity or invalidity of the ordinance upon other grounds. In these cases the act of the court in sustaining the ordinance cannot be regarded as an affirmance of the power to include this provision. Ordinances relating to health and security from fire, which prohibit certain acts without a permit from officers in charge of those departments, have been sustained upon the ground that the safety of the citizen from disease and fire were of a peculiar character, demanding the supervision of officers particularly skilled in reference thereto, and to whose judgment the matter could be more appropriately referred. The principles applicable to these ordinances, and under which they may be upheld, have, however, no application to the ordinance under discussion. There is another line of cases in which ordinances have been upheld which reserved to the city council or to the legislative body itself the power to exempt individuals from their operation. This is, however, entirely consistent with the principle above laid down. It is not a delegation of legislative authority, but is an exercise of that authority by the legislative body itself. In the absence of any restrictions upon its exercise of the legislative power intrusted to it, the city council has the same power to enact ordinances applicable only to special portions of the city, or to designated classes or individuals, as would the legislature of the state in the absence of constitutional restrictions; and it may equally enact an ordinance exempting individuals or classes from the operation of an ordinance, or suspending the operation of the ordinance entirely. This rule also includes another class of cases in which an exemption from the ordinance is made by some particular branch of the city government. The entire legislative power which is delegated to a municipality is not always conferred upon the city council. It may be portioned out to the different departments of the city, and authority conferred upon those departments to legislate upon the matters peculiarly intrusted to their care. The park commissioners may have exclusive authority to determine the manner and times in which the parks shall be used. The health department may have the authority to enact sanitary regulations for the entire city. Similar powers may be intrusted to the school department, the harbor commissioners, the police commissioners, for the enactment of ordinances relating to certain subjects. The ordinance under consideration falls within the rule hereinbefore referred to, and should be declared invalid. It confers upon the president of the board of trustees the power to suspend its operation in favor of any individual, whenever he may elect, and to deny the same favor to another who may be equally entitled to its suspension. It, in fact, confers upon him the power to determine the extent to which the ordinance shall be operative, which is in reality the power to determine whether there shall be such an ordinance. The only limitation upon the exercise of this power is his own judgment that the permit will not conflict with the purposes of the ordinance. This is a pure and simple delegation to him of the legislative power which has been conferred upon the trustees themselves. It is not enough to say that it must be presumed that this officer will act properly. The question is not whether a power that has been conferred will be properly exercised, but whether there has been any authority given to confer the power. If there has not, it is no answer to say that it will not be abused. In a country under the government of laws, the conduct of its citizens cannot be subjected to the arbitrary will of any individual. The mildest despotism has no place in a constitutional government. Beating a drum is not a nuisance per se, or in violation of the rights of others, and it does not of necessity interfere with the usual and proper use of the public streets. The authority of the trustees of the city to regulate the use of the streets, or the beating of drums thereon, is not denied, but the "regulation" must be made by the city, and cannot be delegated by it to the president of the board of trustees.

In my opinion, the ordinance is invalid, and the prisoner should be discharged.

We concur: DE HAVEN, J.; FITZGERALD, J.

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4 Cal. Unrep. 950

### SANTA ROSA CITY R. CO. v. CENTRAL ST. RY. CO. (No. 15,202.)

(Supreme Court of California. Jan. 6, 1895.)

STREET-RAILROAD FRANCHISE — VALIDITY OF GRANT—FORFEITURE—ESTOPPEL OF CITY —INJUNCTION—EVIDENCE.

1. Where for 14 years after the passage of an ordinance the city recognized its existence and validity, and treated it as duly adopted and published, it will be presumed to have been approved by the mayor and published as required by the city's charter.

2. Where a city charter requires that ordinances shall be published only by order of the council, and that the city clerk shall keep a book into which he shall copy each ordinance, with a certificate annexed to the copy stating, among other things, that it was published according to law, the certificate of the clerk that the ordinance was published is sufficient evidence that the order for publication was made.

3. The right to avoid a public grant for failure to perform a condition subsequent is confined to the government.

4. A public grant cannot be avoided for failure to perform a condition subsequent, except through a court's judgment, or a legislative declaration of forfeiture, unless the statute creating the condition expressly declares that a failure to perform it will, ipso facto, avoid the grant.

5. Under the Civil Code (section 502), providing that, where a franchise has been granted to a street railroad, work on the road must be commenced within one year from the date of the grant of right of way, and finished within three years thereafter, and that a failure to comply with such provision "works a forfeiture" of the right of way as well as of the franchise, when a street railroad fails to comply with that provision, its right of way and franchise continue to exist until declared forfeited by a court or by legislative authority, said section not being self-executing.

6. When a city railroad's franchise is liable to forfeiture for breach of condition subsequent, forfeiture thereof is not effected by the city's granting the same rights to another company.

7. Where a city granted a street-railroad franchise to two persons, who organized a corporation to operate a railroad thereunder, and thereafter the franchise became liable to forfeiture because the road was not constructed on certain streets within the specified time, but for 11 years after the breach, with full knowledge thereof, the city, in dealing with the company, by resolutions, orders, and ordinances, recognized the franchise as valid and in force, and took legal steps to enforce the obligations assumed by the company thereunder, and the company in consequence incurred expense in paving the streets on which its tracks were laid, and in paying taxes, the city and the public are estopped to claim a forfeiture of the franchise or deny the company's ownership thereof.

8. Where a street-railroad franchise was granted to two persons, and they thereupon organized a corporation for the express purpose of constructing and operating a railroad under the franchise, and so declared in the articles of incorporation, an assignment of the franchise by said persons to the corporation was not necessary to vest the latter with any right relating thereto.

9. In an action by a street-railroad company, operating its road under a franchise, to enjoin another railroad company, claiming the right to construct a road on the same street under a subsequent franchise, from tearing up plaintiff's tracks, plaintiff need not show ownership of the franchise under which it operates, its actual possession of the street being sufficient as against defendant.

10. Where a street-railroad company, claiming the right to construct its road over a street under a franchise, tears up the tracks and interferes with the operation of the road of another company already operating on said street under a prior franchise, the latter may bring an action to enjoin said acts, and recover its actual damages on account of them.

11. In an action by the company to enjoin the tearing up of its tracks, an ordinance passed after its franchise became liable to forfeiture, granting plaintiff the right to construct a switch, which right should "extend until the expiration of the term of the franchise" first granted, was admissible, as tending to show both the original existence of the franchise and a waiver of the forfeiture.

12. Testimony of a city clerk that after search he was unable to find among the city records any orders for the publication of certain ordinances is admissible to show the nonexistence of those orders.

De Haven and Harrison, JJ., dissenting.

In bank. Appeal from superior court, Sonoma county; S. K. Dougherty, Judge.

Action by the Santa Rosa City Railroad Company against the Central Street-Railway Company for an injunction and damages. From a judgment for defendant, and an order denying a new trial, plaintiff appeals. Reversed.

Barham & Bolton and Van R. Paterson, for appellant. W. F. Russell and Rutledge & Pressley, for respondent.

VAN FLEET, J. This is an action for an injunction to restrain defendant from tearing up the track of plaintiff's railroad, and from interfering with the running of plaintiff's cars, and for damages for acts of interference already committed. A preliminary injunction was granted; but, on the hearing, the injunction was dissolved, and judgment rendered for defendant. Plaintiff appeals from the judgment and an order denying its motion for a new trial.

On the trial the following facts were proved without any substantial conflict: On October 3, 1876, Mark L. McDonald and Jackson R. Meyers petitioned the common council of the city of Santa Rosa to grant to them and their assigns the privilege of constructing and operating a street railroad on certain streets of said city. On the same day the common council passed a resolution granting to the petitioners and their associates the privilege requested. On May 11, 1877, the petitioners and certain other persons incorporated the corporation plaintiff, for the express purpose of constructing and operating said street railroad, and it was so stated in the articles of incorporation. On June 5, 1877, the city council passed an ordinance, numbered 16, granting to said McDonald and Meyers, "their associates, successors, or assigns," authority to construct said railroad, and to maintain the same and propel cars thereon for the term of 50 years. This ordinance, among other things, provided that the tracks should be kept "flush and even with the street," and that the holders of the franchise should "plank, pave, or macadamize the entire length of the street used by the track, between the rails and for two feet on each side thereof." This ordinance is found, in regular order, in the official Book of Ordinances of the city, with the signatures of the mayor and clerk, but without the certificate required by section 19 of the act incorporating the city (St. 1875–76, p. 251); and there was no direct evidence of the publication or posting of said ordinance, as required by section 22 of that act. Plaintiff immediately commenced the construction of said road, and during the year 1877 completed the portion in controversy in this action, and has ever since continued to operate that portion; but on certain portions of the route named in the application and ordinance no railroad has ever been constructed or operated. In 1884 the city council undertook a revision of all the ordinances of the city then in force, and for that purpose, on July 15, 1884, passed an ordinance, numbered 59, which, among other things, contains the whole of said Ordinance 16. Ordinance 59 is found duly recorded in the Book of Ordinances, with the certificate of the clerk required by the charter. On January 6, 1886, the council adopted a resolution directing the street commissioner to notify McDonald "to place the street railroad on the proper grade, and have the same macadamized in accordance with the ordinance." On January 19, 1886, the council adopted a resolution authorizing the city engineer to furnish plaintiff with the grade "of the railroad track on Fourth street," which is the street now in controversy. On September 14, 1886, the council adopted a resolution requiring the plaintiff "to pave the space between the rails of its road, and for two feet on each side, with bituminous blocks" of a certain kind, and to substitute flat rails for "the rails now used," and to put and keep the track flush with the street; and directing the city attorney, in case of a failure of the plaintiff to comply with said requirements, to commence an action "to have said track declared a nuisance and removed, and the right to maintain a street railroad annulled and revoked." On September 21, 1886, the council directed the city attorney at once to commence the action provided for in the previous resolution. On December 27, 1886, the city attorney commenced said action in the name of the city, and filed a complaint in which, among other things, it was alleged that the plaintiff here (defendant in that action) was organized for the purpose of building, equipping, and operating said railroad, and had built and equipped the same about June 7, 1877, and had ever since operated the same; and that, before commencing said road, it had applied for and obtained from the city permission to lay down and operate said railroad for 50 years. A demurrer was interposed to that complaint, and sustained; and on November 16, 1888, the city attorney reported that fact to the council, and also reported that plaintiff had commenced the work of paving as required by the resolution, and was putting the road into excellent condition, and recommended the dismissal of the action. Pending that action, on May 4, 1888, the council passed a resolution granting to plaintiff the right to establish a certain switch. On March 3, 1891, the council passed a resolution declaring plaintiff's railway on Fourth street to be a nuisance, "except that portion of said railway already in repair, flush and even with the street, and with good crossings." Thereupon plaintiff proceeded to and did put said track in good repair, and so as to cover the objections made. From 1877 down to the commission, in 1891, of the acts complained of in this action, the plaintiff has been in the actual, continuous, and notorious occupation of this railroad, has operated the same, and collected fares thereon, and regularly paid taxes thereon, and neither its possession nor its right to operate its road was ever disputed by any one. On September 2, 1891, the city council passed an ordinance, numbered 132, granting to defendant the right to construct and operate a street railroad on certain streets in said city, including a portion of Fourth street, on which plaintiff's track was laid. Under authority of this ordinance defendant commenced the construction of its road, and, as a part of that work, commenced to tear up and remove plaintiff's track; whereupon this action was commenced. Defendant undertakes to justify its acts on the grounds that plaintiff never obtained any franchise whatever, or, if it did, that that franchise was forfeited by the failure of plaintiff to complete the whole of its road within the time prescribed by section 502 of the Civil Code; and that its track was therefore a public nuisance, which defendant could lawfully abate in the exercise of its own franchise. We think that under the evidence in the case plaintiff did obtain a valid franchise to construct and operate its road on Fourth street; that that franchise was never forfeited; and that plaintiff is therefore entitled to an injunction, and such damages as it has suffered by reason of the acts complained of.

1. Defendant contends that Ordinance 16, the original ordinance under which plaintiff claims, was never approved by the mayor, nor published or posted as required by law, and that it therefore never took effect. Section 22 of the city charter provides that "all ordinances shall be signed as nearly as may be in the following form: Approved this —— day of ——, ——, Mayor of the City of Santa Rosa." The ordinance in question is signed by the mayor, but without any words of approval. Section 46 requires the mayor to sign such ordinances as he approves, and there was some parol evidence tending to show that the mayor did approve this ordinance, and signed his name with that intention. We are inclined to hold that that provision of section 22 is merely directory, and that the signature of the mayor, under the circumstances of the case, is sufficient evidence of his approval; but it is not necessary to decide that question. Section 22 also provides that every ordinance "shall be published in some newspaper in Santa Rosa at least one time, or posted in three public places in said city, and shall be in force ten days after such publication or posting." Section 19 provides that the city clerk "shall keep a book marked 'City Ordinances,' into which he shall copy all city ordinances, with his certificate annexed to said copy, stating the foregoing ordinance is a true and correct copy of an ordinance of the city of Santa Rosa, and giving the number and title of said ordinance, and stating that the same has been posted or published according to law. Said record copy shall be prima facie evidence of the contents of the ordinance and of the passage and publication of the same, and shall be admissible as evidence in any court or proceeding. Nothing herein contained shall be construed to prevent the proof of the passage and publication of ordinances in the usual way." Ordinance 16 was copied by the clerk into that book, but without any certificate, nor was there any direct evidence of its publication or posting. There can be no doubt that publication in a newspaper or by posting is made by that statute a condition precedent to the taking effect of any ordinance; but it does not follow that direct proof of that fact is essential in any case. The statute expressly allows the passage and publication of ordinances to be proved "in the usual way"; that is, by such proof as would be sufficient to prove such facts in any other case. In this case the proof is overwhelming that the city, from the time of the passage of this ordinance, has always recognized its existence and validity, has acted upon it, and, both by its action and its nonaction, has treated it as duly adopted and published. As we shall show hereafter, the defendant has no rights in this action which the city would not have, and the case is to be treated precisely as if the city, instead of the present defendant, were the party to the record. The circumstances in proof raise, after the lapse of 14 years, a sufficient presumption of the existence of every fact necessary to the validity of the ordinance, including approval by the mayor and publication; certainly sufficient against the city and the defendant here. As was said in City of Atchison v. King, 9 Kan. 550, 556: "The city having passed the ordinance four or five years before it was offered in evidence, and having acted upon it as valid, will not now be allowed in such an action to deny its publication. Such a rule would be a great inducement to cities to disobey the law. They get the benefits and escape the inconveniences of the law by such a course, as it would in most cases be impossible for a stranger to prove a publication four or five years after the passage of the ordinance, when the publication is by posted notices. Nor would the difficulty be much less where it was published in a newspaper, in a country where newspaper changes are as frequent as they are in this state. It was the duty of the city authorities to publish the ordinance. As they acted on it, the presumption is that it was duly published; and at least this presumption is sufficient till the contrary appears." See, also, City of Quincy v. Chicago, B. & Q. R. Co., 92 Ill. 21. But, aside from this, Ordinance 16 was re-enacted in Ordinance 59, and the publication of that ordinance was proved by the statutory certificate of the clerk. The statute does not limit the time within which ordinances may be published; and the publication of the latter ordinance was a publication of the former, and therefore rendered it effective in 10 days from the time of such publication. For all the purposes of this action that is sufficient. It is contended by defendant that ordinances

can be validly published only by order of the city council; and that, as no such order of publication can now be found in the minutes of the council, the publication of Ordinance 59 was ineffectual. But the charter does not, either in terms or by implication, require such an order, and the authorities relied on by defendant are inapplicable (County of San Luis Obispo v. Hendricks, 71 Cal. 242, 246, 11 Pac. 682); and, if such an order were necessary, the certificate of the clerk is sufficient evidence that it was made. These considerations render it unnecessary to decide whether, under section 497 of the Civil Code, this privilege might not have been granted by simple resolution without any publication. Neither the city charter, nor the section of the Code referred to, nor any general rule of law, requires an ordinance in such a case. Atchison Board of Ed. v. De Kay, 148 U. S. 591, 13 Sup. Ct. 591. Defendant relies on the use of the word "ordinance" in sections 498 and 502 of the Civil Code. The use of that word in those sections would hardly seem to be a sufficient reason for interpolating it into section 497; but, for the reason above stated, that question need not now be determined.

2. Defendant next contends that plaintiff, by its failure to construct its road on certain of the streets named in Ordinance 16, ipso facto forfeited its entire right of way and franchise, as well for those portions constructed as for those not constructed, and that all its rights thereby ceased and determined at the expiration of three years from the date of that ordinance. This contention is based on section 502 of the Civil Code, which reads as follows: "Work to construct the railroad must be commenced within one year from the date of the ordinance granting the right of way and the filing of articles of incorporation, and the same must be completed within three years thereafter. A failure to comply with these provisions works a forfeiture of the right of way as well as of the franchise, unless the uncompleted portion is abandoned by the corporation with the consent of the authorities granting the right of way, such abandonment and consent to be in writing." It is conceded that plaintiff did not complete the work of constructing its railroad within the period prescribed, and has never completed it; but it cannot be denied that it commenced that work within one year. Under the rule laid down in Railroad Co. v. Baldwin, 57 Cal. 160, it would seem that no forfeiture can occur unless the holder of the franchise is in default in both particulars,—in failing to commence the work within one year, and in failing to complete it within three years. But, as that question has not been argued by counsel, we do not pass upon it. Assuming, then, that a failure to complete the road within three years, though commenced in time, "works a forfeiture" within the meaning of section 502, the question to be determined is whether that statute is self-executing; that is, whether the right of way and franchise absolutely cease to exist at the end of that period, or whether a judicial or legislative declaration of forfeiture is necessary to produce that result. It is obvious that the requirement as to the completion of the work within a given time is a condition subsequent. It is a general rule that none but the grantor or his heirs can avoid a grant for failure to perform a condition subsequent; and in case of a public grant the right to avoid it on that ground is confined to the government, and can be exercised only through the judgment of a court, or by a legislative declaration of forfeiture. It follows that, where such condition is imposed by statute, a failure to perform it will not ipso facto avoid the grant, unless so declared by the statute creating the condition. Unless the statute, by express terms or by plain implication, so declares, no forfeiture will take place without a judicial, or at least a legislative, determination to that effect. Schulenberg v. Harriman, 21 Wall. 44. The statute in question provides that a failure to comply with its provisions "works a forfeiture" of the right of way and franchise. This section, as shown by the note of the Code commissioners, was taken from section 8 of the street-railroad act of March 29, 1870 (St. 1869–70, p. 483), which provided that, upon such failure, "all rights of the grantee under the order or ordinance shall be forfeited and shall thenceforth cease and determine." The latter portion of the provision, according to some of the decisions in this state, evinced an intention on the part of the legislature to dispense with any further proceeding to declare a forfeiture, for the rights of the party were upon the default to "cease and determine." The omission of those words in the Code, an omission which we must presume to have been deliberate and intentional, indicates an intention to mitigate the former rule. The words "work a forfeiture," which are the only words used in the Code, are usually understood to mean merely that the default mentioned is a ground for forfeiture,—a ground for a judicial declaration of forfeiture (People v. Hillsdale, etc., Turnpike, 23 Wend. 256); and they do not appear to mean more in this case. The great weight of authority without this state establishes the rule that a statutory provision that in case of default a party shall forfeit his rights, or that a thing granted shall be forfeited or shall revert to the government, or the like, merely exposes the party to proceedings for forfeiture on behalf of the state, and does not of itself divest those rights. Such a provision will not be held self-executing, unless further words are used plainly implying such a legislative intent. The cases are too numerous to be reviewed, but a few of them may be noted. In re Brooklyn El. R. Co., 125 N. Y. 434, 26 N. E. 474; Schulenberg v. Harriman, 21 Wall. 44; In re Kings County

El. Ry. Co., 105 N. Y. 97, 119, 13 N. E. 18; Chesapeake & O. Canal Co. v. Ohio R. Co., 4 Gill & J. 1, 121; Briggs v. Cape Cod Co., 137 Mass. 71; Lock Co. v. Kittridge, 5 Sawy. 44; Frost v. Coal Co., 24 How. 283; Railroad Co. v. Johnson, 49 Mich. 148.[1] In this state the cases are not altogether consistent with each other, nor in harmony with the decisions elsewhere. In Borland v. Lewis, 43 Cal. 569, the words construed were: "Such neglect or failure shall work a forfeiture of such lands, and the same shall be resold as if no purchase had been made." This statute was held self-executing, on the ground that the last clause would be useless if the resale could not be made until the forfeiture had been pronounced by a court. In Oakland R. Co. v. Oakland, B. & F. V. R. Co., 45 Cal. 365, the words, "the franchises and privileges herein granted shall utterly cease and be forfeited," were held to accomplish the forfeiture without the necessity of judicial proceedings. In Upham v. Hosking, 62 Cal. 250, the same ruling was made as to the words, "the rights granted by this act shall become forfeited to the state." This was decided upon the supposed authority of the two preceding cases, and without any further reason stated. Those cases were clearly not authority for that ruling, for in each of them the decision was rested on language beyond the words of forfeiture,—"shall be resold as if no purchase had been made"; "shall utterly cease." In People v. Railway Co., 91 Cal. 338, 27 Pac. 673, it was remarked that acts sufficient to cause a forfeiture do not per se produce a forfeiture, without proper proceedings in a proper court. In Town of Arcata v. Arcata & M. R. R. Co., 92 Cal. 639, 28 Pac. 678, it was said: "Where the statute provides that a failure to complete the contemplated work within a certain time shall work a forfeiture, no action is necessary to enforce the forfeiture. In such a case, upon the happening of the event of the commission of the offense which is the statutory basis of forfeiture, the title to the thing forfeited immediately vests in the state." It was, however, expressly held that that question did not arise in the case, and the language quoted must therefore be considered obiter dictum.

We think that the true rule on this subject is that laid down in the cases cited above from other courts, and that the case of Upham v. Hosking and the dictum in the Town of Arcata Case cannot be supported upon principle. If this statute ex proprio vigore produces a forfeiture without further legislative or judicial action, it does so absolutely and unconditionally. If the grantee of the franchise should commence the work within the year, and thereafter diligently prosecute it, and should, within the three years, complete it with the exception of a single block, its entire road would be forfeited, even though its failure to complete that block should be caused by the occupation of the city by hostile troops, or by a destructive pestilence, or any other cause entirely beyond its control. If, on the very next day after the expiration of the three years, it should complete its road, and thereafter operate it for 10 years, it might then be ousted without redress. It might happen that such a road, in a small place, could be operated for many years only at a loss; yet the moment it became profitable a rival might step in and avail itself of a forfeiture occurring many years before, and never thought of by any one. The injustice that might be done in such cases would be avoided, and private as well as public rights protected, if resort must be had to legal proceedings. It is therefore reasonable to suppose that the legislature in general intends that a forfeiture shall be enforced only by judicial action, or, in a proper case, by express legislative declaration; and that, when it intends otherwise, it will use apt and plain language to that effect. The language used in the section under consideration evinces no such intention; and, until a judgment of forfeiture is obtained or the forfeiture is declared by legislative authority, the franchise and right of way continue to exist. It is not necessary, for the purposes of this case, to decide whether, in a case like the present, a mere legislative declaration of forfeiture would be sufficient. The authorities do not agree as to when, if ever, a forfeiture can be enforced in that way. It is sufficient to say that, in this case, no such legislative declaration was ever made by the city council or any other body. It is well settled that a mere grant to a third party will not, of itself, effect the forfeiture; and the ordinance granting the franchise to defendant expresses no such intention, and is not in any way inconsistent with the continuance of plaintiff's franchise.

From the principles above laid down, it follows that no one but the government can avail itself of a ground of forfeiture of a public grant; and that the government, being the sole judge of the propriety of such action, may waive the right to enforce or declare a forfeiture. Such waiver may be by express legislative action, or may be inferred from other acts of the governmental authority. Accordingly, when the state, or any subordinate governmental body to whose charge the matter has been committed, after knowledge of the act or omission constituting a ground of forfeiture, does any act which unequivocally recognizes the franchise as still existing and in force, a waiver of the forfeiture will be inferred. And if such act of recognition has the effect of causing the holder of the franchise to incur expense which he would not have incurred had the forfeiture been insisted on, or otherwise to change his position, the inference of a waiver becomes conclusive, on the ground of estoppel. These propositions are supported by an overwhelming weight of authority; indeed, no case to the contrary has been brought to our attention. New Orleans, C. & L. R. Co. v. City of New Orleans, 44 La. Ann. 748, 11 South. 77; Chicago, R. I. & P. R. Co. v. City of Joliet, 79 Ill. 25, 37; City of Atlanta v. Gate City Gaslight Co., 71 Ga. 106, 125; State v. Fourth N. H. Turnpike, 15 N. H. 162; Martel v. East St. Louis, 94 Ill. 67; Trustees of McIntire Poor School v. Zanesville C. & M. Co., 9 Ohio, 203, 290; State v. Mississippi, O. & R. R. Co., 20 Ark. 495; In re New York El. R. Co., 70 N. Y. 338; State v. Taylor, 28 La. Ann. 460. In the present case the acts of recognition by the city council of the continued existence of plaintiff's franchise have been numerous and unequivocal. For 14 years, of which at least 11 years were after the alleged ground of forfeiture had occurred, the city in every possible way, by direct dealing with plaintiff, by its public resolutions, orders, and ordinances, and by its pleadings in a judicial proceeding, recognized plaintiff's franchise as valid and in force, and insisted upon and took steps to enforce the obligations assumed by plaintiff by its acceptance of that franchise. In consequence of those official acts, plaintiff incurred expense in paving the public street, in paying taxes, and in other ways, which it would certainly not have incurred had the alleged forfeiture been insisted upon. As the fact that plaintiff had not constructed its railway on certain streets was necessarily one of public notoriety, it must be presumed that the city council had knowledge of it; and its acts, in view of that knowledge, conclusively import a waiver of the right to insist upon a forfeiture, and estop the city from ever claiming that a forfeiture has occurred. As the city is by law the agent of the public for this purpose, this estoppel extends to the whole public, and binds the defendant and all other persons. People v. Holladay, 93 Cal. 241, 29 Pac. 54. It is therefore clear that the failure of plaintiff to complete its road afforded no justification to defendant for any interference with plaintiff's track. Whether, in any case, a private individual or corporation has the right to remove from a public highway a railroad track in actual use therein, though laid without authority, where such track does not amount to a complete obstruction of the highway, we need not decide; but see Market St. Ry. Co. v. Central Ry. Co., 51 Cal. 583.

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[1] 13 N. W. 492.

3. Defendant contends that, no assignment having been proved from McDonald and Meyers to plaintiff, plaintiff cannot maintain this action. But as McDonald and Meyers were two of the original incorporators of plaintiff, and as plaintiff was incorporated for the express purpose of building and operating this railroad, no assignment was necessary. Besides, the acts of the city council referred to recognize plaintiff as the owner of the franchise, and estop the city and the defendant from claiming the contrary. Moreover, as against defendant, which is a mere trespasser, plaintiff's actual possession is sufficient.

4. The acts of defendant, complained of in this action, would amount to a complete destruction of plaintiff's property, and a permanent obstruction to its right of way. As they were committed under a claim of right, injunction is the proper remedy (Moore v. Waterworks, 68 Cal. 146, 8 Pac. 816); and plaintiff may also, in this action, recover its actual damages.

5. On the trial plaintiff offered in evidence an ordinance of the city, duly passed July 10, 1889, and numbered 110, granting to plaintiff the right to construct on Fourth street a switch, to be "connected with the main track of the Santa Rosa Street Railroad, now laid and constructed on said Fourth street." In that ordinance it was provided that the term of the franchise thereby granted should "extend until the expiration of the term of the franchise for laying, etc., the main track of the Santa Rosa Street Railroad." This ordinance was excluded by the court on defendant's objection that it was "irrelevant, immaterial, and incompetent." From what has been said above, it follows that this ruling of the court was error. The ordinance contained an unequivocal recognition of plaintiff's franchise, and therefore tended to show both the original existence of the franchise and a waiver of the alleged forfeiture.

6. The court did not err in admitting the testimony of the city clerk, Jordan, to the effect that, after search, he had been unable to find among the city records any order for the publication of Ordinances 16 and 59. That is a well-recognized method, and often the only available method, of proving the loss or nonexistence of a record. This testimony was, however, unimportant for the reasons before stated. The findings and conclusions of the court below are in conflict with the views herein expressed; and the judgment and order appealed from are therefore reversed, and the cause remanded for a new trial.

We concur: McFARLAND, J.; FITZGERALD, J.

GAROUTTE, J. I concur in the judgment, and also concur in the conclusions arrived at by Mr. Justice VAN FLEET upon the first and second propositions discussed by him. But, by reason of the conclusions there reached, I think the matter of an estoppel as against the city becomes immaterial, and therefore the city should not be foreclosed from litigating that question in the future by some proper action, if it deem such course advisable.

DE HAVEN and HARRISON, JJ. We dissent from the judgment. The failure of the plaintiff to complete the whole of its road, for the construction of which its franchise was granted, within the time prescribed by section 502 of the Civil Code, worked a forfeiture of the franchise; and the subsequent action of the city of Santa Rosa in granting to defendant the right to construct and operate its road over a portion of the same streets named in plaintiff's forfeited franchise gave to defendant the right to enforce and insist upon such forfeiture in this action.

105 Cal. 648

## PEOPLE v. COLBURN. (No. 21,178.)

(Supreme Court of California. Jan. 19, 1895.)

CRIMINAL PROSECUTION — HEARSAY EVIDENCE — LETTER FOUND ON DEFENDANT.

A letter found on the person of defendant when arrested for robbery, containing damaging statements and warnings to keep out of reach of the officers, and identified by a witness as having been written by him to defendant, is inadmissible in the absence of evidence that defendant answered it or acted on the information contained therein.

Commissioners' decision. In bank. Appeal from superior court, Amador county; John F. Davis, Judge.

John Hervey Colburn was convicted of robbery, and appeals. Reversed.

Wm. J. McGee, for appellant. Atty. Gen. Hart, for the People.

SEARLS, C. Defendant was convicted of the crime of robbery, perpetrated in the county of Amador on the 17th day of March. 1893. He appeals from the judgment and from an order denying a new trial. The information is in conformity with the provisions of the Penal Code, is direct and certain as to the offense charged, and states the facts in ordinary and concise language; so that a person of common understanding cannot but know from its perusal what is intended and charged therein. It was not therefore subject to the demurrer interposed against it, and such demurrer was properly overruled.

At the trial the prosecution introduced evidence tending to show that in the evening of the 17th day of March, 1893, at the store of the Clinton Consolidated Gold-Mining Company, a robbery was committed by two masked men. One of them, a man named Robert Masterson, was recognized by W. H. Dunn, the man in charge of the store when robbed; and, upon being arrested, said Masterson pleaded guilty, and implicated the defendant, John Hervey Colburn, and Alic Knox as having been assistants in the robbery; Knox, as he stated, having acted as watchman on the outside, while he and defendant perpetrated the robbery. Defendant and Knox disappeared after the arrest of Masterson. Defendant was arrested in Arizona some months later, and in his possession a letter was found, which letter, upon proof by one Moore that it was written by him, that he did not know where defendant and Knox were, but was desirous of ascertaining that fact, and wrote the letter, and gave it to the sister of Knox, who he supposed would manage to have it conveyed to defendant and Knox, the prosecution offered in evidence, to the introduction of which counsel for defendant objected. The objection was overruled, and the letter admitted and read to the jury. Defendant assigns the ruling of the court admitting such letter as error.

The following is a copy of the letter, omitting such portions only as relate to personal matters not pertinent to the case. The witness explained that the letters H. C. in the address, stood for Herb Colburn, the defendant. "Modesto, Cala., June 9, 1893. H. C.—Dear Friend: It has been a long time I heard anything from you boys. I began to think you had forgotten me. We had the officers hunting in the bottom for a month after you left. They know how you boys got away, as they everything guarded. The horse is gone. They come after her in a few days after you left. Bill is watched. I don't think it would do to write to him, as he is watched. I have heard it whispered around that, if they caught you boys, it would go hard with Bill. They are still hot after you, and Sam Embra come down from San Diego. He has told everybody that he seen Alic. Boys, if you are there, be on your guard. I am afraid they will git you boys before you get this. I will send your trunk as soon as I can, but Purvis has it in charge now. They hunting just as hard as the day you left. Purvis has sent word to the San Diego officers that A. was seen there, and Sam Embra came back from down there with his moustache shaved off. * * * I will give you some of the news. Was down to see your brother. Was favorably impressed with. I think he would be a good one in your business. Boys, look for me after harvest if I don't git a good crop, and I don't think I will. Boys, you can write to with danger as stand in with the officers, but write. Don't write to Bill, as they have got an eye on him. Be on your guard, boys, and don't get caught. Tell A. to write me and his mother. A Friend." That the letter contained damaging evidence against the defendant is quite apparent. It does not in direct terms state his guilt, but the fact that the writer regarded defendant and A. (Alic Knox) as being guilty is plainly inferable from his solicitude and caution to them to avoid discovery of their whereabouts. All this was well calculated to impress a jury with the belief that defendant was guilty. This letter was clearly hearsay. Were such evidence admissible against a defendant charged with crime, there would be no limit to the power of designing persons to manufacture testimony against their neighbors. It will not do to say that Moore was a friend of the defendant, and hence that the evidence was admissible. It would be quite easy for an enemy, under the guise of friendship, to indict the most damaging epistles to a victim whose destruction he was seeking to encompass. The question of friendship or enmity does not properly constitute a factor in the problem. The letter was a statement of a third party, in no wise connected with defendant; was not made under the sanction of an oath; and not admissible. The possession of unanswered letters is not such evidence of acquiescence in their contents as to make them admissible in a civil case, and a letter found upon a prisoner when arrested has been held to be no evidence of the facts stated in it. Rap. Cr. Law, § 283; Whart. Cr. Ev. § 682; People v. Green, 1 Parker, Cr. R. 11; Com. v. Edgerly, 10 Allen, 184; Smith v. Shoemaker, 17 Wall. 630. There are exceptions to the rule,—as, for instance, where it is shown that the defendant has acted upon the information contained in the letter; or where he has answered it, in which case so much of the letter as is explanatory of his answer is admissible; or where the party receiving the letter has by his acts or conduct invited the sending of it to him. There was no sufficient showing to render the letter admissible under any of these exceptions. The most that can be said is that Moore received more than one letter which he believed came from defendant; that he did not know defendant's handwriting, and the letters were not signed. He did not know from whom they came, and had lost or destroyed them. This was not sufficient evidence of their authenticity to warrant proof of their contents. Deeming, as we do, the evidence of the letter from the witness to defendant detrimental to the rights of the latter, the judgment and order appealed from should be reversed, and a new trial ordered.

We concur: VANCLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, and a new trial ordered.

105 Cal. 431

## MASTERSON v. MUNRO et al. (No. 15,533.)

(Supreme Court of California. Jan. 5, 1895.)

DESCRIPTION OF LAND IN DEED—CONFLICT—OFFICIAL MAP—METES AND BOUNDS.

Where one buys land at public auction, having before him an official map showing the size of each parcel sold, and the deed to him describes the land as a certain numbered lot, shown on the map, and also by metes and bounds, and the two descriptions do not agree as to the size of the lot, the dimensions shown in the map control.

Department 1. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Action of ejectment by William Masterson against Margaret Munro and others. Judgment was rendered for plaintiff, and defendants appeal from an order denying a motion for a new trial. Affirmed.

W. C. Burnett, L. G. Burnett, and R. H. Taylor, for appellants. Naphtaly, Friedenrich & Ackerman, for respondent.

PER CURIAM. This is an action in ejectment, the land in controversy consisting of a strip 10 feet by 25 feet. Both parties claim through deeds from Ottinger and Brooks. The deed to respondent and the deed to the predecessor of appellant Margaret were each dated and acknowledged September 30, 1862. Respondent and appellants bought their respective lots at an auction sale, and the particular tract in dispute is included in both deeds. Ottinger and Brooks were the owners of 100-vara lot No. 149, situated at the corner of Second and Townsend streets in San Francisco, and for the purpose of selling the same to advantage made a plan or map of the lot, subdividing the same into smaller lots, numbered consecutively from 1 upwards, and caused this map to be filed in the office of the county recorder. After the map had been filed, the property was offered for sale at public auction at the auction rooms of John Middleton & Son, where there was an enlarged copy of the map, and the lots were sold by reference to said map. Upon this map a street called "Stanford Street" was laid out parallel with Second street, and 160 feet distant therefrom. At this auction sale the plaintiff purchased lot No. 25, and the defendants' grantor purchased lot 22; and, as is stated in appellants' brief, "lots 22 and 25 comprised an area of 25 feet by 160 feet, running through from the east line of Stanford street to the west line of Second street, the south line of each lot being 125 feet north of Townsend street." The conveyance to the defendants' grantor describes the land by metes and bounds, with a depth of 80 feet, and also describes it as "being subdivision No. 22 of the 100-vara lot known upon the official map of said city as 'No. 149,'" and the conveyance to the plaintiff describes the land purchased by him as subdivisions 24 and 25, as represented upon the same map, with a depth of 90 feet. Under the foregoing circumstances, the contradiction of the descriptions in appellants' deed must be resolved in favor of the description which refers to the official plat or map. Appellants' predecessor purchased subdivision 22 of a certain tract of land, as shown by the official map. He bought at public auction, with the map before him, and it is clearly evident that the description by courses and distances was intended to describe subdivision 22. If a party purchases a certain numbered block of land according to the official map of the city, and his purchase is so described in the deed, a further description of the block by metes and bounds or courses and distances would be subordinate to the description of the block by its number, and would have to give way in case of conflict. The present case involves the same principle. We might further suggest, if other grounds were necessary to sustain the judgment, that the acts of the respondent in and about the premises in the exercise of his possession are strongly indicative of the creation of a title by prescription; but we do not find it necessary to enter into a discussion of that question in detail. The order denying the motion for a new trial is affirmed.

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4 Cal. Unrep. 949

## DAVIS v. WALLACE, Judge. (No. 15,888.)

(Supreme Court of California. Jan. 5, 1895.)

MANDAMUS—REFUSAL TO HEAR CASE.

Mandamus will not lie to compel a judge to hear a matter notwithstanding an appeal, on the ground that the appeal is invalid, where the order appealed from is an appealable one.

Department 2.

Mandamus by Davis to compel William T. Wallace, judge of the superior court, to hear a matter notwithstanding an appeal. Petition denied.

PER CURIAM. Petition for mandate to compel judge to hear a certain matter notwithstanding the pendency of an appeal, upon the ground that the appeal is invalid. The order appealed from is an appealable order. Livermore v. Campbell, 52 Cal. 75. Whether the appellant was really a "party aggrieved" is a question which we cannot determine on this proceeding. The petition is denied, and the proceedings dismissed.

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105 Cal. 465

## CHINETTE v. CONKLIN, Judge. (No. 19,-473.)

(Supreme Court of California. Jan. 5, 1895.)

INSOLVENCY—APPOINTMENT OF ASSIGNEE.

Where an insolvent files a petition in insolvency, it is no objection to the appointment of an assignee that the only testimony as to the insolvency was that of a creditor, who was the insolvent's son-in-law.

In bank.

Application of J. P. Chinette for a writ of prohibition against J. R. Conklin, judge of the superior court of Kern county. Denied.

Wells & Jamison, for applicant.

HARRISON, J. On the 19th of December, 1893, a petition in insolvency was filed in the superior court of Kern county by the firm of Pourry, Freres & Co., and on the same day the respondent made an order adjudging the said firm insolvent, and appointed a day on which to choose an assignee of their estate. In the schedules annexed to the petition the firm of Ardizzi & Olcese were named as creditors of the insolvent firm; and, on the day fixed for choosing an assignee, Olcese appeared, and made proof of the claim of said firm, and by his evidence alone an assignee of the insolvent estate was chosen. Olcese is the son-in-law of the respondent; and, after the assignee had been chosen, the petitioner herein, who is also a creditor of the insolvent firm, moved the court to vacate the orders of December 19th, on the ground that, by reason of the relationship of Olcese to the respondent, he was disqualified to act in the proceedings in insolvency, and that the orders are void. This motion was denied, and thereafter the respondent made an order directing the sheriff to sell the property of the insolvent firm, which was accordingly done. Subsequently the present application was made for a writ of prohibition to restrain the respondent from acting or making any order in the insolvency proceedings.

The insolvent act (section 2) declares that the filing of the petition by the insolvent firm is itself an act of insolvency, "and thereupon the petitioner shall be adjudged an insolvent debtor." There are no "parties" to proceedings in insolvency other than the insolvent himself, at the time of the adjudication, or until after one or more creditors shall have made and filed proofs of their claims against the insolvent; and the order of the judge fixing the time for choosing an assignee is but a regulation of the order of business. At the time fixed for choosing the assignee there is no judicial function to be performed by the judge of the court, since the election of the assignee is made by a vote of the creditors, of which the clerk keeps a minute, and enters the result upon the records of the court. As the assignee has sold the property of the insolvent, there is no office for the writ of prohibition to perform in reference thereto.

We are of the opinion that the respondent, in making the order of adjudication, and in fixing the day for choosing the assignee, did not act in contravention of section 170, Code Civ. Proc. If, in the course of the proceedings, any matter requiring judicial action shall arise, it is not to be assumed that the respondent will violate his judicial obligations. The application is denied.

We concur: BEATTY, C. J.; DE HAVEN, J.; GAROUTTE, J.; FITZGERALD, J.; McFARLAND, J.

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In re BLYTHE'S ESTATE. (No. 15,788.)

(Supreme Court of California. Jan. 5, 1895.)

In bank.

In the matter of the estate of Thomas H. Blythe, deceased.

PER CURIAM. Motion suggesting diminution of record denied.

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105 Cal. 403

MERRIMAN v. WALTON et al. (No. 15,519.)

(Supreme Court of California. Jan. 3, 1895.)

FRAUDULENT JUDGMENT—RELIEF IN EQUITY—PARTIES.

1. Where a justice of the peace refuses to vacate a judgment obtained in his court through fraud, and no right of appeal lies, the judgment debtor is entitled to relief in equity.

2. Where one of several joint judgment debtors sues to restrain the enforcement of the judgment against himself alone, he need not join the others as parties plaintiff.

Department 1. Appeal from superior court, Napa county; E. D. Ham, Judge.

Action by one Merriman against one Walton and others to enjoin the enforcement of a judgment. Judgment for plaintiff, and defendants appeal. Affirmed.

Gesford & Thompson, for appellants. Coghlan & Hutchinson, for respondent.

HARRISON, J. The defendant Walton commenced an action against the plaintiff and another in a justice's court, and, after the defendants therein had answered the complaint, the justice set the case for trial on the 28th of February; but on the morning of that day it was agreed between the attorneys for the respective parties that the trial should be postponed and that the cause should be transferred to another township. On the next day the attorneys for the plaintiff herein received a letter from the justice, purporting to have been written the previous day, in which he stated that the case was to be transferred to another township, and thereupon the attorneys for Walton agreed to take such steps as would be necessary to effect the transfer. Instead of so doing, however, they had on the previous day, without any knowledge on the part of the plaintiff herein or of his attorneys, appeared before the justice, and caused judgment by default to be entered by the justice against the defendants therein for the full amount asked for in the complaint. At the time that the justice wrote the above letter, and at the time of the agreement on the part of Walton's attorneys to effect the transfer to another township, it was known to them that such judgment had been entered. Other interviews were subsequently had between the attorneys for the respective parties regarding the transfer of the cause, in which Walton's attorneys, for the purpose of misleading and deceiving the attorneys of the plaintiff herein, represented that they were seeking to effect the transfer of the cause, and in which they concealed the fact that the judgment had been entered; and by reason of their statements and deceptions the plaintiff herein did not learn that the judgment had been entered until more than 30 days after its entry, and when the time for an appeal therefrom had expired. Upon learning this fact, the plaintiff herein moved the justice to set aside the judgment, and recall an execution that had been issued thereon; and on the 18th of April this motion was granted, but on the next day the justice, without any notice to the plaintiff herein or his attorneys, vacated this order. Thereupon the plaintiff brought this action to perpetually enjoin Walton from enforcing the said judgment against him or his property. A demurrer to the complaint was overruled, and, the defendants declining to answer, judgment was rendered in favor of the plaintiff, from which this appeal has been taken.

The complaint shows that the judgment in the justice's court was obtained by a fraud practiced upon the plaintiff herein by the attorneys of Walton, with the assistance of the justice, in a manner which entitles the plaintiff to the equitable relief sought; and the appellant does not attempt to controvert the power of a court of equity to afford the relief sought by the plaintiff, but rests his defense upon the proposition that the plaintiff is not entitled to equitable relief if he could obtain the same relief at law. It is a familiar rule that a separate action to restrain the enforcement of a judgment will not be sustained when the same relief can be obtained through a motion or other proceeding in the action in which the judgment was obtained; and, in a jurisdiction in which legal and equitable relief is dispensed in different tribunals, a court of equity will not grant relief against a judgment when the same relief can be obtained by the aid of the court that rendered the judgment. But under the system of procedure which obtains in this state, where the various kinds of relief are administered by the same tribunal, and where there is but one form of civil action for the enforcemen or protection of civil rights (Code Civ. Proc. § 307), a party who presents a complaint showing his right to the relief asked is not to be denied that relief because he might have sought it under a different form of action. See Thompson v. Laughlin, 91 Cal. 313, 27 Pac. 752.

When the plaintiff learned that the judgment had been entered against him, the time for an appeal had expired; and, even if the justice had the power to grant his motion to open the judgment, his subsequent action vacating this order was equivalent to a denial of the motion, and from this order there was no appeal to the superior court. The rule under which a court of equity declines to interfere until after the application for relief has been made to the court in which the judgment was rendered has no application when relief has been sought and denied in that court. The denial of that court to grant relief gives to the court of equity the same authority to interfere as if the other court was powerless to render aid. Even if the plaintiff could have had the judgment annulled upon certiorari, he was not compelled to resort to that remedy; especially where he would not thereby obtain as effective relief as by the course herein pursued.

The objection that the codefendant of the plaintiff is not a party to this action is without merit. The judgment in the justice's court is restrained only so far as it affects the plaintiff herein and his property, leaving the judgment against his codefendant in full effect, to be enforced at any time. The judgment is affirmed.

We concur: GAROUTTE, J.; VAN FLEET, J.

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105 Cal. 467

## WORKS et al. v. MERITT. (No. 19,385.)

(Supreme Court of California. Jan. 5, 1895.)

MORTGAGE OF OPEN ACCOUNT—RIGHTS OF MORTGAGEE—SUBSEQUENT ASSIGNMENT.

1. Where an open account is assigned in writing to secure a debt, the assignor cannot, by collecting the account, or assigning it to another, who has notice of the previous assignment, defeat the legal right of the assignee to collect it.

2. Civ. Code, § 2924, providing that "every transfer of an interest in property other than in trust, made only as a security for the performance of another act, is to be deemed a mortgage," does not limit an owner's right to mortgage his personal property to the articles enumerated in section 2955.

In bank. Appeal from superior court, San Diego county; W. H. Clark, Judge.

Action by one Works and others against one Meritt on an account. Judgment for plaintiffs, and defendant appeals. Reversed.

Luce & McDonald, for appellant. M. S. Babcock and Works & Works, for respondents.

HARRISON, J. On the 5th of February, 1891, the defendant was indebted to the Story & Isham Commercial Company, a corporation, in the sum of $525, for merchandise sold and delivered to him by it, and on that day the corporation, by an instrument of writing, assigned the indebtedness to Mrs. Adella B. Story as security for money paid and by said instrument agreed to be paid by her for the benefit and account of the corporation. This instrument is set out at length in the case of Commercial Co. v. Story, 100 Cal. 30, 34 Pac. 671. After this assignment the defendant gave to Mrs. Story his promissory note for the amount, which she accepted in full payment for the account, and gave to the defendant a receipt acknowledging its payment. Prior to giving this note the corporation executed an assignment of the claim to one Miller, who afterwards assigned it to the plaintiffs, which assignment was for a valuable consideration, and the defendant had notice thereof at the time that he executed the note to Mrs. Story. The plaintiffs and their assignor had notice also of the assignment in February to Mrs. Story. This action was brought to recover from the defendant the amount of said indebtedness. The court below held that there had been no assignment to Mrs. Story, and gave judgment in favor of the plaintiffs, and the defendant has appealed from an order denying his motion for a new trial. The respondents seek to sustain the decision upon the ground that as the account was assigned to Mrs. Story only as a security, the title still remained in the corporation (Civ. Code, § 2888), and that the corporation still had the power of disposing of the account. It is also claimed by the respondents that the account was not "pledged" to Mrs. Story, for the reason that she did not take possession of it, and that, as the assignment was not executed with the formalities required for a chattel mortgage, no lien was created in her favor. There can be no physical possession of an open account, but its assignment by an instrument of writing will vest the assignee with the legal right to collect the same, whether such assignment be in absolute ownership or for the mere purpose of collection, either as agent of the assignor, or as security for the performance of an obligation from the assignor to the assignee; and in the latter case the power of collection will be so coupled with an interest in the account as to prevent the assignor from doing any act to impair the rights of the assignee to collect the account. At the time that the account of the defendant was assigned to Mrs. Story the corporation was indebted to her, and as a further consideration for the assignment she obligated herself to pay the indebtedness of the corporation, and thereby acquired the right to collect the accounts assigned to her as security therefor. After thus conferring upon her an interest in these accounts, and the right to collect them for her own reimbursement, it was not competent for the corporation to deprive her of this right, either by collecting the account itself, or by an assignment to another, who had knowledge of the previous assignment to her. The provision in section 2924, Civ. Code, that "every transfer of an interest in property other than in trust, made only as a security for the performance of another act, is to be deemed a mortgage," does not limit the right of the owner of personal property to transfer the same by way of mortgage to the articles enumerated in section 2955, Id. The right to deal with property, and to make a qualified or absolute transfer of it, is an essential element of ownership, and may be exercised to the fullest extent, unless there is some statutory restriction of such right. Id. § 679. There is no express restriction in the statutes of this state against making a mortgage upon any kind of personal property, and the comprehensive provision in section 2924 indicates that the term "mortgage" embraces "every transfer made only as a security for the performance of another act," whether the transfers are those for which specific provision is made in other parts of the Code, or such as rest upon the natural right of individuals to deal with their property as they choose. Section 2955, in which provision is made for mortgages upon personal property, does not, in terms, restrict the right to make such mortgage upon the property therein enumerated; and the general provision in section 2957 that "a mortgage of personal property [that is, any mortgage of personal property] is void as against creditors of the mortgagor and subsequent purchasers and incumbrancers in good faith," unless certain formalities are complied with, is of universal application, and is not limited to mortgages upon property, enumerated in section 2955. See, also, Gilman v. Curtis, 66 Cal. 116, 4 Pac. 1094; Tregear v. Water Co., 76 Cal. 537. 18 Pac. 658; Chittenden v. Pratt, 89 Cal. 178, 26 Pac. 626.

It was incumbent upon the plaintiffs, and not the defendant, to show that the corporation had not collected the $2,000 which it had reserved the right to use in its business. The assignment to Mrs. Story included all the accounts, and it was for the plaintiffs to show that this was within the exception. The reservation of $2,000 was, moreover, limited to moneys that might be collected by it, and did not confer the right to make an assignment of the accounts. The order is reversed.

We concur: GAROUTTE, J.; DE HAVEN, J.; FITZGERALD, J.; McFARLAND, J.

105 Cal. 636

## PEOPLE v. BORDA. (No. 21,134.)

(Supreme Court of California. Jan. 17, 1895.)

POLLUTION OF CITY WATER SUPPLY—PROSECUTION—CONSTRUCTION OF STATUTE—PENNING AND CORRALLING SHEEP.

1. Error in the admission of testimony is cured by an order striking it out.

2. On a prosecution under Pen. Code, § 374, as amended by Act March 3, 1893, making it a misdemeanor to corral sheep over and on the banks of a stream from which a city's water supply is drawn, thereby causing a pollution of the water, evidence of the meaning of the word "corral," as accepted by usage among stockmen, is admissible.

3. Evidence showing how and to what extent the water was polluted was admissible.

4. The words "penned" and "corralled," as used in Pen. Code, § 374, as amended by Act March 3, 1893, making it a misdemeanor to keep sheep "penned, corralled, or housed on, over, or on the borders" of any stream used for a city water supply, means confined in a small inclosure or narrow place, either by means of an artificial structure, or through the agency of men and dogs, without such structure.

Commissioners' decision. In banc. Appeal from superior court, San Bernardino county; John L. Campbell, Judge.

Domingo Borda was convicted of polluting the waters of a stream used for a city water supply, by corralling sheep over such stream and on its banks, and appeals. Affirmed.

Paris & Allison, for appellant. Atty. Gen. Hart, for the People.

BELCHER, C. The information charges that the defendant "on the 27th day of June, 1893, at the county of San Bernardino, state of California, did willfully and unlawfully keep a large number of sheep, to wit, about two thousand sheep, penned and corralled in, over, and on the banks of that certain stream of water known as the 'East Fork of the Mojave River,' so that, by reason of keeping said sheep so penned and corralled as aforesaid, the waters of said stream then and there became polluted; and from which said stream water was then and there, ever since has been, and now is, drawn for the supply of the inhabitants of the town of Hesperia, said Hesperia being then and there a town in the state of California." The charge was made under section 374 of the Penal Code, as amended March 3, 1893, which makes it a misdemeanor to keep any sheep or other live stock penned, corralled, or housed on, over, or on the borders of any stream, the waters of which are thereby polluted, and are drawn for the supply of the inhabitants of any city or town in this state. The defendant was convicted, and has appealed from the judgment and an order denying his motion for a new trial.

It was proved that the town of Hesperia had a population of three or four hundred people, who were supplied with water taken from the East fork of the Mojave river, and conducted through an open ditch about four miles, and then through a 14-inch pipe about eight miles, and that the water, in its normal condition, was very clear and pure, but that in June, 1893, it was so fouled with sheep manure as to be badly discolored, and made entirely unfit for use. It was also proved that in May and June, 1893, the defendant had a band of 2,000 or more sheep, which he daily drove to the banks of the said stream, a little above the head of the Hesperia ditch, and there, by the aid of men and dogs, herded them together in, along, and upon the stream for a considerable part of each day, and that the bed and banks of the stream were covered with manure dropped by the sheep.

J. F. Pike was called as a witness for the prosecution, and testified that he was on the East fork of the Mojave river on the 14th of July, and saw a large band of sheep there, which the defendant claimed. He was then asked, "Did you, when you were there, notice any corrals or structures along the eastern fork of the Mojave river?" The defendant objected to the question on the ground that it was irrelevant, immaterial, and incompetent, because the time was subsequent to any act charged in the information. The objection was overruled, and an exception reserved. The witness then testified that he saw a place which sheepmen call a "corral," and went on to describe it. On cross-examination the witness stated that the corral which he had described was not on the East fork of the river, but on a tributary; and thereupon, on motion of defendant, the testimony as to the corral was stricken out. The order overruling defendant's objection to the question propounded by the plaintiff is assigned as error, but, conceding that the ruling was erroneous, still it was rendered harmless by the subsequent order striking the evidence out.

Perry Blackburn was a witness for the prosecution, and stated that he was present when the defendant was arrested, that it was on the East fork of the Mojave river, and that defendant was there with a band of about 2,000 sheep. He also stated that he had seen the defendant with the sheep there before in May and the early part of June, The witness was then asked to explain how he saw the sheep in and along and on the stream; and said: "They come in the stream about ten o'clock, and the sheep, as a rule, drink and lay down. They don't have to be herded. If they commence to start away on any point, they send their dogs after them, and the dogs bunch them up. The men hardly ever leave the camps; and the men, as a general rule, sleep in the middle of the day, and in the afternoon, about 4 o'clock, they start the sheep out, and they come back just at night, dark, and their sheep is so trained that they don't have any manufactured corrals. They stand themselves, with herders sleeping around them, and their dogs." The witness was next asked: "Where a band of sheep are kept bunched together that way and watched by men and dogs, isn't that understood among stockmen as 'corralling'?" The defendant objected to the question on the ground that it called for an opinion, and was a question for the jury to determine. The objection was overruled, and this ruling is assigned as error. We see no prejudicial error in the action of the court complained of. The objection was not, as claimed, that the witness was not shown to be an expert, and hence not qualified to answer the question. And the answer sought was simply as to what stockmen understand constitutes the corralling of sheep. The word "corral" comes from the Spanish language, and is to be construed according to its approved usage. Pen. Code, § 7, subd. 16. It was proper, therefore, to show what that usage is among stockmen.

Henry Johnson was a witness for the prosecution, and testified that he had had charge of the Hesperia waterworks for two years. He was asked: "How is the discoloration and impurity in that water compared this season with what it was last season, prior to the 27th day of last June?" This question was objected to by defendant as irrelevant, immaterial, and incompetent, and the objection was overruled. It is urged that this ruling was erroneous, but we thing it clearly correct. It was entirely competent to show how, and to what extent, the water had been polluted. The witness said: "The natural condition of that water is perfectly clear,—clear as crystal. In the last three or four months, May, June, and July, and up to now, it has been pretty bad. It is very bad,—colored brown. The discoloration is caused by sheep manure. We scraped it up by the bushel,—wagon load,—up at he head of the ditch, and two or three miles in the bed of the river and on the sides."

The court instructed the jury "that 'to pen' means to confine in a small inclosure or narrow place, and that 'to corral' means to surround or inclose; to coop up; to put into a close place. This need not necessarily be done by means of an artificial structure, but may also be done by means of, or through the agency of, men and dogs, either alone or in conjunction with natural or artificial barriers of an inanimate nature." The appellant contends that this instruction was erroneous, and it is said, "The vice of this instruction is that the words 'pen' and 'corral' are given a definition that is unusual and figurative, and not according to the context either of the statute or of the information." The language of the statute is, "penned, corralled, or housed on, over, or on the borders of any such stream." This plainly implies that, within the meaning of the statute, the animals may be inclosed by means other than an ordinary pen or corral, as such structures are not usually built on or over a stream. And such use of the words "pen" and corral" is authorized. See Cent. Dict. The instruction was proper, and the appellant has no valid ground of complaint. The judgment and order appealed from should be affirmed.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

# CALIFORNIA REPORTER

39 PACIFIC REPORTER

106 Cal. 83

## PEOPLE v. UN DONG. (No. 21,104.)

(Supreme Court of California. Feb. 7, 1895.)

ASSAULT WITH DEADLY WEAPON — EVIDENCE — IDENTITY OF DEFENDANT—TESTIMONY AS TO CHARACTER—OCCUPATION OF WITNESS.

1. On a trial for assault with a deadly weapon, a number of witnesses testified that defendant and one B. laid in wait at a street corner until the prosecuting witness came along, when defendant pointed him out, and told B. to shoot him, which B. did. Defendant was positively identified by the witnesses. A peace officer testified that he was present just after the shot was fired, and that he recognized the assailants, and that defendant was not one of them. A doorkeeper at a theater testified that defendant was in the theater when the shooting occurred, and several witnesses testified that the prosecuting witness accused another person of doing the shooting. There was evidence that the trouble grew out of rival societies, and that defendant was the head of one of them, and that his prosecution was an afterthought. *Held*, that a conviction would not be disturbed.

2. On a trial for assault with a deadly weapon, where the prosecuting witness, on direct examination, testified that the only reason he could give for the shooting was that he had once notified the authorities that defendant was one of a number who had assaulted a person, it was error to exclude, on cross-examination, a question as to what part defendant took in such assault.

3. On a trial for assault, it is error to allow the prosecuting attorney to question defendant as to whether he lived in a house of prostitution; and the fact that his answers are in the negative, or objections to the questions are sustained, does not cure the error.

4. It is error to allow the prosecution to ask one of defendant's witnesses whether he is connected with a gambling house, when the

question is not called for by anything the witness has testified to.

In bank. Appeal from superior court, Santa Clara county; W. G. Lorigan, Judge.

Un Dong was convicted of assault with a deadly weapon, and appeals. Reversed.

C. D. Wright and D. W. Burchard, for appellant. Atty. Gen. Hart, for the People.

VAN FLEET, J. Defendant, a Chinese, was convicted of an assault with a deadly weapon upon a fellow countryman, and sentenced to the state prison for the term of two years. He appeals from the judgment and an order denying him a new trial.

It is strongly urged that the evidence is insufficient to sustain the verdict, but we do not think this contention can be sustained. The evidence of the prosecution tended to show that the alleged assault was committed between 11 and 12 o'clock at night, upon a public street in a quarter of the city of San José known as "Chinatown"; that defendant and an associate, one Ah Wei, lay in wait at a street corner, outside a restaurant, until the prosecuting witness, one Ah Bong, came out, when defendant pointed out Bong to Ah Wei, and told the latter to shoot; that Ah Wei immediately fired two shots at Ah Bong, one of which hit the latter in the back; that, immediately following the shots by Ah Wei, several other shots were fired by a party or parties from across the street. But by whom the latter shots were fired, or whom they were fired at, was not disclosed. These facts, in substance, were testified to by a number of Chinese witnesses, several of whom positively identified defendant as one of the assailants. On the part of defendant, a large number of Chinese witnesses, and some white witnesses, gave testimony tending strongly to show that defendant was not present at the time of the assault, and did not participate therein. One Wheeler, a peace officer or watchman in Chinatown, testified that he was in a restaurant near the place of the shooting, and ran out on the sidewalk, where he could see the parties before the second shot was fired; that he saw Ah Bong's assailants, and recognized them, and that defendant was not one of them, but that one Toi Soon did the shooting. Another white witness, Jones, who was the doorkeeper at the Chinese theater, testified that he had seen defendant enter the theater earlier in the evening, and that defendant was still in the theater when the shooting occurred. Other witnesses, including some police officers, testified that the prosecuting witness, immediately after the shooting, accused another party than defendant of doing the shooting. There was also evidence tending to show that the trouble grew out of differences between members of rival tongs or societies; that the arrest and prosecution of defendant, who it appeared was the grand master or headman of one of the rival tongs, was an afterthought prompted by a desire on the part of the wounded man and his friends to make defendant suffer vicariously for the wrong of the real assailant, who had escaped and could not be apprehended.

The evidence is exceedingly contradictory and conflicting throughout, and there are many things calculated to cast discredit upon the case of the prosecution. But, while the evidence is not, to our minds, by any means satisfactory, we cannot say that it was not sufficient to sustain the verdict. But we think the court committed error in its ruling on the cross-examination of the prosecuting witness, Ah Bong, which, under the circumstances, was manifestly prejudicial to defendant. The only evidence tending to show motive for the alleged assault was that given by the witness Ah Bong, the party assaulted. He testified in his direct examination by the prosecution that the only cause of the assault upon him, so far as he knew, was that he was present on a previous occasion when the defendant, with several other Chinese, came to the theater, and assaulted the white doorkeeper by beating him with revolvers; that he (Ah Bong) witnessed the affair and subsequently gave the names of those engaged in it to the officers, which resulted in the arrest of the assailants. That previous to this he and the defendant were on friendly terms and had never had any difficulty. Upon cross-examination the witness was asked, "Was this defendant, Un Dong, among the parties who assaulted that doorkeeper?" to which he answered, "Yes, sir; he had something to do with it, too." The defendant's counsel then asked, "What did he do?" to which question the district attorney objected. The objection was sustained, and defendant was not permitted to cross-examine the witness upon the subject. The record does not disclose the ground of the objection, but the question was plainly in the line of proper cross-examination, and upon a point of vital importance to the defendant. The witness having assigned the result of the affair at the theater as the sole ground for the defendant's malice towards himself, and the only motive for the subsequent assault upon him, it was very material for the defendant to rebut the statements of the witness in this regard, and to show, if he could, by the cross-examination of the witness, that the latter was mistaken, and that defendant had in truth no participation in that affair, as defendant himself claimed was the fact. This he might have been able to accomplish, if permitted to properly cross-examine the witness, or at least have so shaken the statements of the latter as to have turned the scales of justice in his favor.

The defendant was examined as a witness in his own behalf. His examination in chief was confined to a denial of any participation in the assault upon the prosecuting witness, Ah Bong, or that he was present on the occasion, and a statement that he was in the theater at the time; and a further denial of having taken part in the assault upon the doorkeeper of the theater. In cross-examination he was asked these questions by the prosecution: "Q. Who lives in that house with you, where you live? Defendant's Attorney: We object to that as irrelevant and immaterial. (Objection overruled. Defendant excepts.) A. I had servants that attend to my household matters. Q. Some women live in that house? (Objected to and sustained.) Prosecuting Attorney: I think the prosecution has a right to show what this man is engaged in, or his occupation or business. The Court: Why don't you? Prosecuting Attorney: Q. Isn't it a fact that you live in a house of prostitution?" To this defendant objected, but the objection was overruled, and defendant answered: "No; it ain't a house of prostitution. It is a house where they rent rooms for boarding purposes." He was also asked: "Are there any Chinese prostitutes in that house?" and "Are there any Chinese women in that house?" to which latter questions objections were sustained. This whole course of examination by the prosecution was improper, in the highest degree. The questions asked were not only in large part violative of the defendant's right to have his cross-examination confined to the subject-matter of his testimony in chief (People v. O'Brien, 66 Cal. 603, 6 Pac. 695; People v. Hamblin, 68 Cal. 101, 8 Pac. 687), but the obvious purpose and undoubted effect of such course of examination were to degrade and injure defendant in the estimation of the jury. Its allowance was therefore erroneous, and clearly prejudicial. People v. Wells, 100 Cal. 459, 34 Pac. 1078. Nor was the error cured or the prejudicial effect removed by the negative answers to the questions allowed, or the sustaining of defendant's objection to others where, as here, the manifest purpose and inevitable tendency of the questions were to injuriously affect the verdict. The error in such case lies in permitting an examination of that character. People v. Wells, supra. It was likewise error to allow the question, "Aren't you connected with a gambling house with Yen Yick?" put by the prosecution, on cross-examination, to Chee Ying, a witness for defendant. It was not in response to anything called out on his direct examination, and could have been intended but for one purpose,—that of discrediting the witness with the jury by a method wholly unsanctioned in law. This character of examination appears to have been several times indulged in by the prosecution. We have had frequent occasions to animadvert upon similar conduct in criminal cases, and it has been uniformly held to be improper. Its repetition is not only wholly inexcusable, but it is not in keeping with a proper appreciation by the prosecuting officer of the functions of his office.

It is contended that the court invaded the province of the jury in charging them that there was an "irreconcilable conflict" in the evidence, as between the prosecution and defense. While it is a dangerous practice to undertake to characterize the effect of the evidence, in the sense in which the language of the court was here used, we are not prepared to say, in view of the evidence in the case, that the charge was prejudicially erroneous. For the errors above pointed out, the judgment and order are reversed.

We concur: BEATTY, C. J.; GAROUTTE, J.; McFARLAND, J.

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(4 Cal. Unrep. 970)

## CHAPMAN v. PENNIE. (No. 15,520.)[1]

(Supreme Court of California. Feb. 5, 1895.)

DEFICIENCY JUDGMENT IN FORECLOSURE—ACTION AGAINST ADMINISTRATOR—DISCHARGE IN BANKRUPTCY.

1. An action cannot be maintained against an administrator for a deficiency judgment on foreclosure, where the decedent, the mortgagor, was a nonresident at the time of commencement of the action to foreclose, remained away from the state until after the sale thereunder, and never appeared in the action.

2. On the same day that a discharge in bankruptcy was granted to B., the maker of a note and mortgage, "from all debts and claims which are made provable against his estate," a stipulation was entered into between B. and C., the owner of the note, whereby it was agreed that the interest should be reduced, that the note should be extended, and that proceedings to enforce its payment should be dismissed. *Held* that, as it did not appear that the agreement to pay the note was made after the discharge, the parties did not intend to make a new contract on which the bankrupt could be held, but only to extend the time and reduce the interest of the note and mortgage.

In bank. Appeal from superior court, city and county of San Francisco; Wm. T. Wallace, Judge.

Action brought by E. W. Chapman against James C. Pennie, administrator of the estate of John Bensley, deceased, to compel him to pay a deficiency judgment on the mortgage note of his decedent. Judgment rendered for defendant. Plaintiff appeals. Affirmed.

T. M. Osmont, for appellant. Naphtaly, Friedenreich & Ackerman, for respondent.

PER CURIAM. The deceased, John Bensley, made his promissory note to the Nevada Bank of San Francisco, November 24, 1875, for the sum of $80,000, payable one year thereafter, at the rate of 1¼ per cent. per month, and to secure the same executed to the Nevada Bank a mortgage upon certain real estate in the city and county of San Francisco. January 19, 1881, the Nevada Bank commenced an action upon the promissory note against Bensley and others for the foreclosure of the mortgage given as security for the payment therefor. Bensley was absent from the state, and service upon him was had by the publication of summons. Judgment was rendered in that action, January 5, 1882, for the foreclosure of the mortgage and the sale of the premises, and providing that in case of a deficiency in the proceeds of the sale the judgment for such deficiency should be docketed against the defendant, Bensley. Under this judgment an order of sale was issued to the sheriff of the city and county of San Francisco; and on the 10th of August, 1882, he returned the order of sale, from which it appeared that, after applying the proceeds of the sale upon the judgment, there was a deficiency of $37,721.51. Judgment for this deficiency was then docketed by the clerk against Bensley. December 10, 1889, the Nevada Bank assigned the said promissory note to T. M. Osmont, and on the 21st of May, 1890, Osmont assigned the same to the plaintiff. The plaintiff has brought this action upon the aforesaid promissory note, setting forth in his complaint that the sum of $37,721.51. with interest, is unpaid thereon, and alleging that on the 26th of May, 1890, he presented his claim for the said deficiency to the defendant, as the administrator of Bensley's estate, for allowance, and that it was by him rejected. Judgment was rendered for the defendant in the court below, and the plaintiff has appealed directly therefrom upon the judgment roll alone, without any statement or bill of exceptions.

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[1] Rehearing denied.

In his brief herein counsel for appellant states: "The sole question involved in the case—assuming that such defense may be made without pleading—is whether an action can be maintained against an administrator for a deficiency arising upon the sale of mortgaged premises pursuant to a decree of foreclosure against the decedent in his lifetime, in a case where the decedent, the mortgagor, was a nonresident of this state at the time of the commencement of the action to foreclose, remained absent from the state until after the foreclosure and sale thereunder, and until his death, and never appeared in the action, no jurisdiction having been acquired except by publication of summons." This precise question was determined in accordance with the contention of appellant in Blumberg v. Birch, 99 Cal. 416, 34 Pac. 102, and in the more recent case of Felton v. West, 102 Cal. 266, 36 Pac. 676, both of which decisions were, however, rendered after the appeal had been taken in the present case. February 27, 1877, Bensley was adjudged a bankrupt by the district court of the United States for the district of California, and on March 20, 1878, that court rendered its judgment granting Bensley a discharge in bankruptcy, by which it ordered that he be "forever discharged from all debts and claims which are made provable against his estate, and which existed on the 5th day of February, 1877, on which day the petition for adjudication was filed against him, excepting such debts, if any, as are by law exempted from the operation of a discharge in bankruptcy." The note in the present action was provable against Bensley's estate, and by the terms of the decree he was discharged therefrom. Counsel for appellant in his brief contends that this decree is not available by reason of the fact that his discharge was based upon an agreement reserving the creditors' rights against him. The decree itself is, however, absolute and without limitation. We cannot in this action look into the agreement for the purpose of determining whether the decree is in accordance with that agreement. If for any reason the decree is other than should have been rendered, the parties affected thereby should have applied for its correction to the court which pronounced it. Upon a collateral attack we can only look at the language in which it is expressed. It is not impossible that the agreement referred to, and which was made in July, 1877, was vacated and annulled by the parties themselves prior to the entry of the decree of discharge. For the purpose of sustaining the action of the court we are to so hold, if necessary.

It is contended, however, that if it must be held that Bensley was released from his liability on this note by the discharge in bankruptcy, yet he is liable for the debt under the agreement made March 20, 1878. The agreement, as averred and found, is as follows: "That on the 20th day of March, 1878, the said John Bensley and the said James Coffin, while the said Coffin was the owner and holder of said promissory note, entered into an agreement in writing by which it is covenanted and agreed that the interest of said promissory note should be reduced to eight (8) per cent. per annum, and that said interest should be punctually paid, and that the time of the payment of said promissory note should be extended to the 1st day of November, 1880, and that said note should be punctually paid; and, furthermore, that said certain proceedings theretofore instituted by the said James Coffin to enforce the payment of said promissory note should be dismissed, which said proceedings were accordingly dismissed." It is plain, we think, that this stipulation was not understood or intended by the parties to have the effect now claimed for it. The note was secured by a mortgage, and no one supposed that as to the security the debt was discharged by the proceedings in bankruptcy. The parties believed the debt preserved by the previous agreement. The motive of Bensley doubtless was to procure time to pay off and discharge the mortgage, and the agreement could have had no other purpose than to afford Bensley this privilege. It does not appear that it was made after the discharge. It bears the same date. As it was shown that the debt had been discharged, it was incumbent upon the plaintiff to show that the bankrupt had agreed, after the discharge, to pay the debt, and the action should have been based on the new agreement. The parties did not intend to make a new contract which should supersede the note and mortgage. It merely extended the time and reduced the interest stipulated in the note and mortgage. The judgment is affirmed.

106 Cal. 62

### ROUNTREE v. I. X. L. LIME CO. (No. 15,745.)

(Supreme Court of California. Feb. 2, 1895.)

APPEAL—TRIFLING ERROR.

An appeal from a judgment, upon a trivial error in the computation of interest, is without merit.

Department 1. Appeal from superior court, Santa Cruz county; J. H. Logan, Judge.

Action by Rountree against I. X. L. Lime Company. There was judgment for plaintiff, and defendant appeals. Judgment affirmed.

Z. N. Goldsby, for appellant. L. F. Smith, for respondent.

PER CURIAM. The appeal in this case is without merit, and was evidently taken for delay. It is brought here upon the judgment roll alone, without any exception to the sufficiency of the evidence to sustain the findings of fact, and the judgment as entered follows the conclusions of law found by the court. In these conclusions of law the court finds that the plaintiff "is entitled to judgment for the sum of $638.55, with interest thereon from the 1st day of September, 1893, to this date (February 17, 1894), and now amounting to $23.70, with costs of suit." Upon a proper computation the interest upon the principal sum of the judgment would amount to $20.70 instead of $23.70, and the latter sum is manifestly a clerical error, which would have been corrected by the court below upon having its attention called to the matter. To appeal from a judgment upon a trivial error in the computation of interest, when the entire relief sought could have been obtained upon a mere application to the trial court, is essentially frivolous, and merits reproof. The superior court is directed to make the proper correction in its computation of interest, and thereupon the judgment will stand affirmed. The costs of this appeal are to be paid by the appellant, and the respondent is allowed the sum of $100 damages as a part of the costs of the appeal.

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4 Cal. Unrep. 909

### Ex parte COOK et al. (No. 21,197.)

(Supreme Court of California. Feb. 4, 1895.)

JURISDICTION OF JUSTICE.

A justice of the peace has no jurisdiction of the crime of embezzlement committed in another county.

Petition by Joseph E. Cook and Thomas E. Langley for habeas corpus and release from commitment by a justice of the peace. Writ granted.

Myrick & Deering and Wm. S. Wells, for petitioners. C. Y. Brown, for respondent.

PER CURIAM. Habeas corpus. Petitioners have been held to answer, after examination before a committing magistrate, for the crime of embezzlement, and ask to be discharged upon the ground that they were committed without reasonable or probable cause. The specific charge is that they embezzled certain fruit which was received by them in the county of Contra Costa under a contract by which they agreed to incur certain expenses for packing, shipping, etc., and to sell the fruit in Eastern markets for account of the growers on commission. The evidence in the deposition shows that they did with the fruit precisely what they contracted to do, but they failed to pay over to the growers the whole amount of their share of the proceeds. It is clear from the evidence that there was no embezzlement of the fruit. If any embezzlement has been committed it was of the proceeds, and was committed in San Francisco, and not in Contra Costa. The magistrate who issued this commitment (a justice of the peace of Contra Costa county) had no jurisdiction of the only offense which the evidence has the slightest tendency to establish. Prisoners discharged.

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105 Cal. 504

### PEOPLE v. COLLINS. (No. 21,129.)

(Supreme Court of California. Jan. 5, 1895.)

INFORMATION—NEGATIVING FEDERAL JURISDICTION—IMPANELING JURY—QUALIFICATION—IMPEACHING WITNESS.

1. Since the jurisdiction of a state over crimes committed within its territory is general, and that of the United States exceptional, depending on the fact of purchase of land with the consent of the state legislature for forts, arsenals, and other needful buildings, it is not necessary to negative, in an indictment or information in the state courts, the jurisdiction of the federal courts.

2. The absence of a venireman, when his name is called in a criminal case, does not necessitate a suspension of proceedings until an attachment can be served, but the court may fill the panel from the veniremen present.

3. An opinion as to the guilt of a defendant in a criminal case, based on newspaper statements, does not disqualify one from acting as a juror, where he testifies that the opinion will not prevent him from acting impartially.

4. A prejudice against the defense of insanity in criminal cases does not disqualify a juror, where no such defense is made or contemplated.

5. The fact that jurors summoned on a special venire fail to answer when called in the morning does not render it erroneous to put their names in the box in the afternoon when they appear, though the names of those put in the box in the morning are not exhausted.

6. Where a juror on a murder trial testifies that he has conscientious scruples against the infliction of the death penalty, and a challenge by the people on this ground is sustained, the court does not abuse its discretion in refusing permission to the defendant's counsel to further examine the juror.

7. In a murder trial, evidence is not admissible to contradict a witness who has testified, on cross-examination, that he executed a bond for certain Chinamen under the internal revenue law, but denied that he had been paid for it.

8. Where the bill of exceptions does not show that defendant was absent when the case was set for trial, it will be presumed that he was present.

Commissioners' decision. In bank. Appeal from superior court, city and county of San Francisco; Edward A. Belcher, Judge.

Patrick J. Collins was convicted of murder in the first degree, and appeals. Affirmed.

G. E. Colwell and P. C. Harlan, for appellant. William S. Barnes, for the People.

HAYNES, C. Appellant was convicted of murder in the first degree. His motions for a new trial and in arrest of judgment, respectively, were denied, and he was duly sentenced to be hanged. He now appeals from the said judgment and the orders denying said motions.

The first question presented goes to the sufficiency of the information. The information charges the defendant with a felony, "to wit, murder, committed as follows: The said Patrick J. Collins on the 9th day of October, A. D. eighteen hundred and ninety-three, at the said city and county of San Francisco, state of California, did then and there willfully," etc., kill and murder one Sarah Collins. It is argued on behalf of appellant that this information does not show that the offense was committed within the jurisdiction of the superior court of said city and county, because that court has not jurisdiction over all the territory embraced therein, but that the federal courts have exclusive jurisdiction of portions thereof, and that, therefore, the general allegation that the offense was committed "at the city and county of San Francisco" is not sufficient. This objection concedes the jurisdiction of the superior court over all places within the limits of the city and county, except as to such parts, if any, over which the United States has exclusive jurisdiction. This exception is created by the constitution of the United States, which provides: "Congress shall have power to exercise exclusive legislation over such district (not exceeding ten miles square) as may, by cession of particular states and the acceptance of congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock yards and other needful buildings." Article 1, § 8. Section 37 of our Political Code provides: "The state has the following rights over persons within its limits, to be exercised in the cases and in the manner provided by law: (1) To punish for crime." Both the general and state governments assume the jurisdiction of the state over all the territory within its borders, the cases provided for in the constitution of the United States being regarded as exceptions merely, the exceptions depending upon the fact of purchase with the consent of the legislature. The jurisdiction of the state being general, and that of the United States exceptional, it is not necessary to negative, in an indictment or information in the state courts, the jurisdiction of the federal courts. It is like an exception in an act creating or defining a public offense, in which case it is held that if the exception is not necessary to the description of the offense it need not be alleged or negatived, but is matter of defense simply. The mere ownership by the United States of land or property within the county does not show any federal jurisdiction over crimes committed upon it, as that fact does not oust the jurisdiction of the state; but the ownership must be acquired by purchase with the consent of the legislature, which is held to include the acquisition of property by eminent domain when that proceeding is authorized by the legislature. U. S. v. Cornell, 2 Mason, 60, Fed. Cas. No. 14,867; U. S. v. Jones, 109 U. S. 513, 3 Sup. Ct. 346. The federal jurisdiction, therefore, involves a question of fact, viz. a purchase by the United States, or the acquisition of property by a proceeding to condemn it, and of such questions courts will not take judicial notice. It is a matter of common knowledge that the United States occupies buildings for customhouse, post office, and other purposes; but whether such buildings have been purchased by the United States, or whether they are occupied under leases from private owners, is a matter to be proved by the record of the conveyances. The information in question conforms to the statutory precedent given in section 951 of the Penal Code, in the particular under discussion, and as this court cannot, as matter of law, say that the federal courts have exclusive jurisdiction over any part of the city and county of San Francisco, the jurisdiction of the court is sufficiently alleged; and the objection here urged is not based on any evidence tending to show that the court did not, in fact, have jurisdiction. The exceptional character of the federal jurisdiction is further shown by the precedents used in the federal courts, which allege, not only that the place where the offense was committed was within the jurisdiction of such court, but that it was not within the jurisdiction of any state. What has been said points out the distinction between this case and the case of People v. Wong Wang, 92 Cal. 281, 28 Pac. 270. There the offense was a misdemeanor, over which, if committed in the city of Los Angeles, the police court had exclusive jurisdiction, and as such jurisdiction was given by law, and therefore must be judicially noticed, it did not appear upon the face of the information that the superior court had jurisdiction, since its jurisdiction depended upon a fact which did not appear, namely, that it was committed in that part of the county outside of the city. The motion in arrest of judgment in the case at bar was properly denied.

During the formation of the jury one of the veniremen failed to respond to his name when called by the clerk, whereupon defendant's attorney moved that an attachment issue for him, and that proceedings be stayed until he could be brought into court and examined touching his qualifications to serve as a juror; but, it appearing to the court that there was then present more than enough veniremen to fill the panel, the motion was denied. Like motions were made as to other jurors who failed to answer. This ruling was not erroneous. If the court were required to suspend proceedings until an attachment could be served and the juror's presence secured, the impanelment of a jury in a murder case would often prove almost interminable. The power of the court to excuse a qualified juror who is present is undoubted, and no reason is perceived why the court may not assume that the failure of the juror to answer is based upon a sufficient reason, and refuse to issue an attachment. Whether an attachment shall issue is within the discretion of the court. Section 238, Code Civ. Proc., provides that "any juror summoned, who willfully and without reasonable excuse fails to attend, may be attached and compelled to attend." In People v. Arceo, 32 Cal. 40, it was said: "But a qualified juror may be rejected, and still a jury of lawful men, against whom there is no objection, may be obtained. A party is entitled to a lawful jury, but no decision has been brought to our notice to the effect that under all circumstances he is, as a matter of absolute right, entitled to have the first juror called who has all the statutory qualifications." Unless the defendant has an "absolute right" under the law to have the first juror called present to be examined before he is required to proceed, it must appear that he has been prejudiced in order to make the error, if it is one, available, and no prejudice appears.

Defendant objected to the panel, "to lay the foundation for another motion," but what motion he intended to make, or what objection he made to the panel, does not appear. It was said by counsel that "in impaneling and drawing of special jurors the Code was not followed"; but in what respect is not stated, and does not appear. We have carefully gone over the proceeding relating to the securing of a jury, and find nothing to which the objection could properly apply.

Several objections were taken by the defendant to the disallowance of challenges for actual bias. The examination of these jurors disclosed the fact that, so far as any of them had formed an opinion as to the guilt of the defendant, such opinion was based upon newspaper statements, and that it would not prevent them from acting fairly and impartially as jurors. The rulings of the court upon these challenges were clearly within the law as stated in People v. Wells, 100 Cal. 227, 34 Pac. 718. See Pen. Code, § 1076.

A juror, under examination touching his qualifications, said, in reply to a question, that he was a juror in the Goldenson Case. He was then asked: "You don't believe in the plea of insanity, do you? A. No, sir. Q. You don't believe in the plea of insanity in any case? A. Ordinarily not. No, sir." Counsel for defendant thereupon challenged the juror, and his challenge was denied. No defense based on insanity was made or contemplated. The challenge was properly denied.

Certain jurors summoned on a special venire failed to answer when called in the morning. At 2 o'clock they were present, and their names were then put in the box, though the names of those put in the box in the morning were not exhausted. Defendant's objection thereto was properly overruled. They did not cease to be of the venire, because they did not appear in time to answer in the morning, nor could their names be properly placed in the box until they did appear.

The special venires ordered on December 27, 1893, and January 3, 1894, respectively, appear to have been in all respects regular. Besides, the challenge did not point out any supposed irregularity, nor is any ground of challenge shown in appellant's brief.

The juror Rudolph Jordan, on examination by the prosecution, testified that he had conscientious scruples against the infliction of the death penalty, and was challenged on behalf of the people upon that ground, and the challenge was allowed under subdivision 8, § 1074, Pen. Code. Counsel for defendant then asked permission to further examine the juror. The court did not abuse its discretion in refusing the request.

Counsel says in his brief that "placing names, once drawn and disposed of, in the box to be drawn again, is irregular and erroneous." We are not referred to any part of the record in which it appears that it was done, and we are unable to find any basis in the record for the point stated.

A witness for the prosecution, called in rebuttal, was asked upon cross-examination whether he executed a bond for certain Chinamen under the internal revenue laws, and whether he had not been paid for doing so. He answered that he had executed the bonds, but denied that he was paid for it. When the prosecution rested, counsel for defendant asked for time to get a witness by whom he stated he could prove that Kelly (the people's witness) was paid for going upon these bonds, and this for the purpose of discrediting Kelly as a witness. The evidence proposed was inadmissible.

It is said by counsel for defendant that the case should not have been set for trial during the absence of defendant. The minutes of the court show that on the day set for the defendant to plead he entered his plea, and the case was set for December 9, 1893, and the minutes of December 9th show that the case was continued until the 27th. The bill of exceptions does not show that the defendant was not present, and it must therefore be presumed that he was.

Certain instructions asked by defendant were refused because already given in the instructions prepared by the court. Such refusal was proper. The instructions given were concise, clear, and in no respect subject to the remark of counsel that in effect the court charged "the jury with respect to matters of fact," in violation of the constitution.

It is not necessary to notice at length the remark of counsel as to the general effect of the rulings of the court being prejudicial to the defendant, while conceding that the several rulings, separately considered, were not prejudicially erroneous. If such rulings become so frequent as to possibly create a prejudice in the minds of the jury, the cause thereof is not chargeable to the court.

The jury were amply justified in finding the defense of an alibi not proven, and in finding the defendant guilty of murder in the first degree.

We find no error of which the appellant can complain. The trial seems to have been conducted with great care and fairness by the court below, and we have given the record such careful examination as the great gravity of the case demands. We advise that the judgment and order appealed from be affirmed.

We concur: TEMPLE, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

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(105 Cal. 459)

## STEWART v. KYSER. (No. 15,521.)[1]

(Supreme Court of California. Jan. 5, 1895.)

### RESIDENCE OF VOTERS—INMATE OF VETERANS' HOME.

1. An inmate of the veterans' home, whose intention is to stay there as long as he lives, is a resident of the precinct in which the home is located, and qualified to vote as such, though he became an inmate of the home solely because of his indigent circumstances.

2. Where a veteran becomes an inmate of the veterans' home with the intention of making it his permanent residence, the fact that he is supported at public expense does not prevent him from voting in the precinct where the home is located, though Const. art. 2, § 4, provides that for the purpose of voting no person shall be deemed to have gained or lost a residence while kept at any almshouse or other asylum at public expense. People v. Holden, 28 Cal. 137, followed.

Department 1. Appeal from superior court, Napa county; A. J. Buckles, Judge.

Election contest by William Stewart against R. M. Kyser to determine the title to the office of public administrator of Napa county. From a judgment for defendant, the contestant appeals. Affirmed.

F. E. Johnston and Henry Hogan (Garrett W. McEnerney, of counsel), for appellant. H. M. Barstow and T. B. Hutchinson, for respondent.

PER CURIAM. This is a proceeding by which the plaintiff contested the election of the defendant to the office of public administrator of the county of Napa, on the ground that a number of votes cast and counted for defendant, more than equal to the majority by which he had been declared elected, were illegal, solely because the persons who cast them were not residents of the precincts in which they voted. The court found that defendant had received 1,671 legal votes, and that the contestant had received only 1,656 votes, and thereupon adjudged that the defendant had been duly elected. The contestant, within 60 days after the entry of the judgment, appealed therefrom on the judgment roll, including a bill of exceptions as to matters of law and fact. The bill of exceptions shows that a number of the inmates of the veterans' home and inmates of the county infirmary and certain students of the Napa College voted at the election in the precincts of said county in which those institutions are respectively situated, and appellant contends that such inmates and students had not been residents of the county and of the precincts in which they respectively voted during the period of 30 days immediately prior to the election, and therefore that they were not qualified electors. Counsel for appellant have taken the testimony of their witness Killalee as a sample of that of some 16 other inmates of the veterans' home who were called and testified at the instance of plaintiff, and correctly represents it as follows: "Killalee came to the county and to the precinct and entered the home as an inmate on November 14, 1891. For some time prior to this date he was living on the charity of relatives and friends in the city and county of San Francisco, where he was an elector. He made and subscribed the usual application, and obtained a permit to enter the home. He says that: 'The reason I went there was because I was in indigent circumstances. Circumstances compelled me to go, and I would not have gone there had it not been for those circumstances. I had no desire to become a resident of the veterans' home or the precinct, other than as induced by my indigent circumstances. Since I have been there, I have been maintained and supported by the home. At the time I went there I did not have any fixed intention with respect to the length of time I should stay there. It was my intention to stop there as long as I lived. I have no other interests in the precinct except my relations with the home. I went there with the expectation of living and dying there,—making it my permanent home the balance of my life. I have no relatives or property interests in the Veterans' Home precinct. I have no other home. At the time I went here, it was my intention to make the home my permanent home. I made it as a home to live and die,—as a refuge.' " And counsel for appellant further say: "There is no claim made that the witness was not a citizen of the United States, of lawful age, and having been in the state, county, and precinct a sufficient length of time to entitle him to vote; but the claim is that he was not a resident of the precinct and county in which he claimed his vote and voted, within the meaning of section 4 of article 2 of the constitution. The question presented is whether or not Killalee was a legal resident of the Veterans' Home precinct, and entitled to vote at the last general election." It being thus properly conceded that the witness had all the requisite qualifications of an elector of the Veterans' Home precinct, except the intention to abandon his former residence, and to adopt and make the veterans' home his place of residence, the controversy is still further reduced to the simple question of fact as to whether or not he went to the veterans' home and remained there with such intention. And upon this issue the uncontradicted testimony of the witness that such was his intention is abundantly sufficient to justify the finding of the court to that effect. The circumstances and motives by which he was induced to change his residence, so far as disclosed, are immaterial. The evidence upon the issue as to the qualifications of Killalee is, substantially, a fair sample of that applicable to each of the other inmates of the veterans' home, the infirmary, and the college, whose votes were adjudged by the court to have been legal. In other words, if Killalee was a qualified elector of the precinct in which he voted, the judgment is right.

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[1] Rehearing denied.

It is contended for appellant, however, that Killalee could not have gained a residence for the purpose of voting at the veterans' home while there as a beneficiary at public expense, for the reason that the gaining of such residence is prohibited by the fourth section of the second article of the constitution of this state, which is as follows: "For the purpose of voting no person shall be deemed to have gained or lost a residence by reason of his presence or absence while employed in the service of the United States, nor while engaged in the navigation of the waters of this state or of the United States, or of the high seas; nor while a student at any seminary of learning; nor while kept at any almshouse or other asylum at public expense; nor while confined in any public prison." As construed by our supreme court in the case of People v. Holden, 28 Cal. 137, this section does not have the effect claimed for it by counsel for appellant. In that case the qualification of soldiers to vote while employed in the service of the United States was questioned, and it was decided that their presence in Mendocino county, while thus employed in the service of the United States, did not "preclude them from acquiring a residence in Mendocino, if disposed to do so." The court further said: "That it was their intention to acquire a domicile in Mendocino county sufficiently appears from the evidence. Such being the case, there is nothing in the constitutional provision in question (which is merely declaratory of the common law) which stands in the way of their doing so." Thus their residence for the purpose of voting in Mendocino county was made to depend upon proof of their intention to make that county their place of residence while they were there present in the service of the United States; there being no question that they had all other requisite qualifications of electors. Whatever may be said of some portions of the language used arguendo in the opinion of Chief Justice Sanderson in that case, the decision is clearly in point for the respondent in this case, and upon the authority of that decision the judgment of the trial court in this case is affirmed.

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105 Cal. 434

## TREWEEK v. HOWARD et al. (No. 15,215.)

(Supreme Court of California. Jan. 5, 1895.)

SURETIES—DEMAND—JOINDER OF CAUSES OF ACTION—DECREE OF DISTRIBUTION—LIABILITY ON EXECUTOR'S BOND.

1. Civ. Code, § 2844, which confers on a surety all the rights of a guarantor, does not render demand or notice necessary to fix the liability of surety, unless expressly required by the contract, since section 2807 provides that a guarantor of payment or performance is liable to the guarantee immediately upon the default of the principal without demand or notice.

2. Where a complaint joins several causes of action, it is not necessary to repeat at length the allegations of the first count in the succeedings counts, but it is necessary to refer to such allegations specifically, and state that they are to be taken as part of the cause of action alleged in such succeeding counts.

3. A decree of distribution, rendered after final accounting by an executor, is, in the absence of fraud, binding on the executor and his sureties, though the latter are not parties to the proceeding.

4. The fact that an executor had, during the lifetime of the testator, and while acting as his agent, embezzled money of the testator, and that the sureties on his bond were ignorant thereof, as well as of his insolvency, does not relieve them from liability under a decree of distribution treating the amount so embezzled as money of the estate in the executor's hands, since Code Civ. Proc. § 1447, expressly renders an executor liable for a debt due to the testator as for so much money in his hands belonging to the estate.

Department 1. Appeal from superior court, city and county of San Francisco; J. P. Hoge, Judge.

Action by George Treweek against William H. Howard, H. J. Brittan, and Arthur W. Bowman on the bond of Howard, as executor of Nicholas Treweek, deceased. From a judgment for plaintiff, defendants appeal. Affirmed.

Henry P. Bowie, for appellant Wm. H. Howard. James L. Crittenden, for appellant H. J. Brittan. C. Bartlett, Stanly & Hayes, and McEnerney & Bradley, for respondent.

PER CURIAM. This is an action to recover from the defendants the sum of $10,000 upon the official bond of defendant Bowman, executed by him as principal, and by the other defendants as sureties, for the faithful discharge of the duties of said Bowman as executor of the last will of Nicholas Treweek, deceased. The cause was tried by the court without the intervention of a jury, and written findings filed, upon which judgment was entered in favor of plaintiff for $10,260.60, interest and costs. The sureties, Howard and Brittan, appeal from the final judgment, and from an order denying their motion for a new trial. Defendant Bowman made default.

There were four counts in the second amended complaint. Defendants Howard and Brittan demurred to each of said several counts separately, upon various grounds, among which were, as to each and every of them, that they failed to state facts sufficient to constitute a cause of action, and, as to the second, third, and fourth counts, that said complaint failed to allege a demand by the plaintiff or his assignor upon the defendant Bowman, and the default of said Bowman prior to a demand upon the defendants Howard and Brittan, the sureties of said Bowman. The following synopsis of the complaint will serve to an understanding of the points made on demurrer. The first count thereof alleges in apt terms the death of the testator, Nicholas Treweek; the admission of his will to probate; the grant of letters testamentary to the defendant Bowman upon his taking the oath required by law and filing a bond with sufficient sureties in the sum of $34,000; the filing of the bond (which is set out in full in the complaint, and is in the ordinary form), with the defendants Howard and Brittan as sureties thereon; the taking of the oath of office by Bowman, as required by law; issue of letters testamentary, etc., to said Bowman, which remain unrevoked, etc. That Bowman, as such executor, immediately after the issuance of such letters, received, and has in his possession as executor, more than $16,000 of money belonging to the estate. That on or about January 3, 1884, the executor presented and filed his final account, with a petition for the distribution of said estate, in which account he charged himself with $18,305.23, less expenses and commissions, leaving a balance of $15,000 subject to distribution. January 15, 1884, by an order and decree of the superior court, the final account was allowed and settled, and the executor adjudged to have in his hands and be chargeable as such for said $15,000, which, by said decree, was distributed, and the executor adjudged to pay to plaintiff $2,500. That thereafter plaintiff demanded payment thereof from the executor, which he has neglected and refused to pay. That thereafter plaintiff informed the other defendants of such demand and refusal, and demanded from them, and each of them, payment, which they have neglected and refused to make, etc. The remaining three counts of the complaint are based on the demands of John Treweek, Jane Pender, and Elizabeth West, respectively, who were legatees and distributees of like amounts under the will and decree of distribution, and who had assigned their claims to plaintiff before suit brought. In said last three counts the pleader, instead of stating at length the several proceedings had up to the decree of distribution, made use of the following language, repeating the same substantially in each count, viz.: "The plaintiff here repeats and alleges all the matters and things set forth and alleged in the subdivisions of this second amended complaint, numbered 1, 2, 3, 4, and prays that the same be taken and deemed a part of this cause of action, the same as though herein set out at length." The several counts then contain averments as to the decree of distribution to the legatees severally of $2,500 each, as in the first count, except as to the names of the several legatees; that defendant Bowman has not, nor have the other defendants, paid the same, or any part thereof; that demand of payment of said sum has been made from the defendants, and each of them, and that they still fail and refuse to pay. The several counts then aver an assignment of the demands by the several legatees and distributees to plaintiff.

The contention of appellants in support of the demurrer to the complaint is twofold: (1) That the complaint failed to allege a demand by plaintiff or his assigns upon Bowman, and the default of said Bowman prior to a demand upon or notice to the defendants, Howard and Brittan, who were merely sureties of said Bowman, and only liable in the event of his default. (2) That the second, third, and fourth counts of the complaint were each defective, in not stating the essential facts constituting the causes of action otherwise than by a mere reference to paragraphs 1, 2, 3, 4 of the first count.

As to the first point, it may be said that much of the difficulty and confusion involved in the proposition arises from grouping together guarantors and sureties, and attempting the difficult task of a general definition applicable to both. Baylies, in his work on Sureties and Guarantors, at section 1, says: "In fact, it is impossible to frame a definition of either term which will clearly distinguish the one contract from the other, and still be in harmony with the dicta in the many cases in which courts have attempted, by the application of some general rule to bring a contract which might equally well be classed with either," etc. The words "surety" and "guarantor" are often used as synonymous terms, but they are not so in fact. Both are bound for another person. A surety is, however, usually bound with his principal by the same instrument, executed at the same time and on the same consideration. Our Civil Code (section 2831) defines a surety as follows: "A surety is one who, at the request of another, and for the purpose of securing to him a benefit, becomes responsible for the performance by the latter of some act in favor of a third person, or hypothecates property as security therefor." The same Code also provides (section 2844) that "a surety has all the rights of a guarantor, whether he becomes personally responsible or not." This cannot include the right to demand or notice, for the reason that under section 2807 "a guarantor of payment or performance is liable to the guarantee immediately upon the default of the principal, and without demand or notice." Cases often occur in which it is difficult to determine whether a given contract is one of surety or of guaranty, and it is believed the object of the Code was to place the contract of guaranty on the same plane with that of surety by dispensing with the necessity of demand and notice in the former, as the courts, in a majority of instances, have in the latter. Coburn v. Brooks, 78 Cal. 443, 21 Pac. 2, and Chafoin v. Rich, 77 Cal. 476, 19 Pac. 882, have settled the doctrine in this state that no demand or notice is necessary to fix the liability of a surety, except in cases where such demand and notice are expressly required by the language of the contract. It follows that, conceding that the complaint failed to properly aver demand and notice, it was immaterial, and hence that the first contention of appellants cannot be maintained.

2. It was unnecessary to repeat at length in each of the succeeding counts of the complaint the facts stated in the first count and leading up to the decree of distribution. By the language used in each count, and the prayer that they be deemed and taken a part of the cause of action, they were made a part thereof (as is often done in the case of exhibits) as effectually as though restated in full. The practice has become quite prevalent, and where the reference to a preceding count is definite and certain, as in this case, there seems no serious objection to it. In the cases cited by appellant there was, with one exception, no reference to or adoption of the previous allegations, and hence the counts were held defective. In one of them (Haskell v. Haskell, 54 Cal. 262) it was said, after referring to the fact that marriage, residence, etc., were not alleged in the second count of the complaint: "Nor is there any reference in it to the allegations in the first count as to such marriage or residence;" and again: "Treating the allegations in the first count as to marriage and residence as mere matters of inducement, they should have been repeated or referred to in the subsequent count, and the omission to either repeat or refer to them is fatal." In Pennie v. Hildreth, 81 Cal. 127, 22 Pac. 398, which is the exception referred to, there is language deprecating this method of pleading, but it was not necessary to the determination of the case, and may be regarded as obiter dicta. We think the rule enunciated by McFarland, J., in his dissenting opinion in the same case, and in the later case of Green v. Clifford, 94 Cal. 49, 29 Pac. 331, to be the correct one.

The other objections to the complaint are unimportant, and the demurrer was properly overruled.

It is further contended by appellants that the court erred in sustaining plaintiff's demurrer to the defendants' cross complaint, and in refusing to allow and in excluding any and all evidence to sustain defendants' fifth defense. These errors are assigned separately, but, as they involve the same question, and as the fifth defense set out in the answer and the cross complaint are substantially the same, we shall consider them together, as appellants have argued them. Briefly stated, the allegations of the fifth answer and cross complaint are: (1) Bowman, as executor, never received any moneys belonging to the estate of Nicholas Treweek. (2) That Bowman, as agent of Treweek during the lifetime of the latter, received, appropriated, and embezzled the moneys which he fraudulently returned in his inventory. (3) Said Bowman was insolvent from the time of such embezzlement up to suit brought. (4) The money pretended to be accounted for by Bowman and included in decree of distribution was embezzled by him in 1878, while agent of testator, and he was insolvent, and by reason thereof never able to repay it. (5) Treweek died more than four years after the embezzlement. (6) Bowman induced the sureties to go upon his bond by false and fraudulent statements, whereby they were induced so to do; and to cover up his embezzlement, and to promote the interest of plaintiff and his assignors at the expense of defendants, and to deceive the court, and to have made and entered a fraudulent decree of distribution, filed a false account, stating he had $15,010 in his hands as executor, which he knew was false, whereby the court was imposed upon, and induced thereby to approve the same, and decree a distribution. (7) Defendants here knew nothing of these facts, or of any fraud of Bowman, or of his objects or purposes. (8) The plaintiff and his assignors knew all of the foregoing facts and of all the fraudulent acts of Bowman in 1885. (9) Plaintiff and his assignors, with intent to defraud the defendants, pretend and claim that said defendants are sureties on the bond, and liable to pay said $15,000, by virtue of the decree of distribution; and that the assignments to plaintiff were with a view to defraud defendants. (10) The time for modifying or setting aside the decree of distribution or to appeal therefrom has expired, and defendants were not parties thereto. (11) Defendants received no money or consideration for becoming sureties, and believed Bowman to be honest, and acting in good faith, and that no money ever came into Bowman's hands as executor. The testator had no money at the time of his death, and the executor imposed upon them, the court, and the community; pretended to have funds of the estate, when in fact there were no funds in such estate, and he had none, either of his own or belonging to such estate. (12) Plaintiff is seeking by this action at law to fraudulently avail himself of Bowman's wrongful acts, and recover from them. (13) Defendants had no knowledge or means of knowledge of Bowman's wrongful acts until 1885, when they communicated all the facts to plaintiff and his assignors. (14) That by reason of the matters stated plaintiff is guilty of fraud in seeking to recover. (15) Bowman was not, as executor, accountable to the estate or to plaintiff for the $15,000 so embezzled by him, and it was not collectible by him, by reason of his insolvency before, at the time of, and after the death of said Nicholas Treweek, by reason whereof, without any fault in him as executor, he could not collect it from himself as an individual. Sureties are entitled to stand upon the precise terms of their contract, and in the present case the bond is limited to the duties cast upon the principal, and the liabilities of the sureties cannot be extended. Lacoste v. Splivalo, 64 Cal. 35, 30 Pac. 571; City of San Jose v. Welch, 65 Cal. 358, 4 Pac. 207; Brown v. Lattimore, 17 Cal. 93; U. S. v. Cheeseman, 3 Sawy. 425, Fed. Cas. No. 14,790. The condition of the bond in this case is as follows: "Now, therefore, if the said Arthur W. Bowman, as such executor, shall faithfully execute the duties of the trust according to law, then this obligation shall be void; otherwise to remain in full force and effect." The decree of distribution entered in the superior court, and the order of such court in passing upon and approving the account of the executor, were, in the absence of fraud, binding upon the executor and his sureties, although the latter were not parties to the proceeding. Irwin v. Backus, 25 Cal. 214; McClellan v. Downey, 63 Cal. 520; Chaquette v. Ortet, 60 Cal. 595 Fox v. Minor, 32 Cal. 112; Murdock v. Brooks, 38 Cal. 596; Brodrib v. Brodrib, 56 Cal. 563.

The question remains, is there any such fraud charged in the fifth defense and cross complaint as entitled the defendants here to attack the decree of distribution? The gravamen of the charge of fraud is: That Bowman, the executor, had the money in his hands; had embezzled it in the lifetime of the testator; concealed this fact from the sureties; led them to believe, and they did believe until May, 1885, that he was solvent. That they knew nothing of the facts as to such indebtedness or embezzlement until the last-named date, and that plaintiff and his assignors have been cognizant of all the facts since said date. This was subsequent to the decree of distribution, which was entered January 15, 1884. The facts charged do not constitute such fraud as entitles the sureties to attack the decree of distribution. Much controversy had existed as to the extent of the liability of an executor and his sureties for debts and demands due or to become due from him to the testator of the estate which he represented. Our Code of Civil Procedure, with a view, as may be supposed, of setting all such questions at rest, has provided (section 1447) as follows: "The naming of a person as executor does not thereby discharge him from any just claim which the testator has against him, but the claim must be included in the inventory, and the executor is liable for the same, as for so much money in his hands, when the debt or demand becomes due." Thus it will be seen the law treats a debt or demand due from the executor, from the time it becomes due, as so much money in his hands. This debt was due, as is shown by the pleading, long before the death of the testator, and hence was properly included in the inventory as money in the hands of the executor. The law required him to so report it, and, had he failed to do so, and taken the oath required of him by section 1449, he would have been guilty of perjury. The sureties are presumed to have signed the bond in view of the law as it existed, and are as liable as they would have been had section 1447 been incorporated in the bond. This debt was as money in the hands of the executor, and as such was a part of the estate for the due administration of which the sureties became liable, just as they did for the residue thereof. The poverty or riches of their principal—the condition of the estate, where and how invested—were proper subjects of inquiry for the sureties in determining whether or not to become responsible, but cannot be urged as reasons to excuse them from the liability which they assumed. Nor can the representations of their principal as to his financial position, or his failure so to do, avail the sureties. Should such circumstances prevail to release sureties, it is apprehended few would be bound. The executor was liable, under the law, as for money in his hands, and the sureties must be presumed to have known it. Beyond this, and stripped of verbiage and accessories which cannot control in the decision, and the simple fact remains that Bowman was insolvent, and the sureties were not aware of that fact nor of his indebtedness to the estate. The case serves to illustrate the wisdom of Solomon, where he says (Prov. xi. 15): "He that is surety for a stranger shall smart for it, and he that hateth suretyship is sure."

The other errors assigned are not important, and do not call for a reversal. The judgment and order appealed from are affirmed.

(105 Cal. 486)

## PEOPLE v. LEARY. (No. 21,123.)[1]

(Supreme Court of California. Jan. 5, 1895.)

CRIMINAL LAW—MISCONDUCT OF JURY—ORAL INSTRUCTIONS—PARTIAL INSANITY.

1. The reading by a jury, during a murder trial, of newspaper accounts correctly reporting the proceedings, and containing nothing of an unfair or prejudicial character, is not such misconduct as will require the granting of a new trial.

2. The fact that several half-pint flasks filled with intoxicating liquor were introduced into the jury room by jurors during the early stages of the trial, and that some of them drank therefrom, is not such misconduct as necessitates a new trial, where none of the jurors were affected by the liquor, and none was drank during the deliberations of the jury.

3. Under Pen. Code, § 190, which provides that one found guilty of murder in the first degree shall suffer death or imprisonment for life, "at the discretion of the jury," the court has no power to review the action of the jury in fixing the penalty.

4. On a murder trial, the jury returned into court for further instructions, in the absence of the official reporter, but all the other officers of the court and defendant and his counsel were present. Questions were asked of the court, some of which were answered orally without being reduced to writing, and some by reading instructions previously given. The language of the court was, however, preserved in the bill of exceptions, and it appeared that nothing whatever was said to the jury except what in substance and more in detail had been told them before in the charge of the court. *Held*, that there was no violation of Pen. Code, § 1093, which requires the charge of the court to be in writing or taken down by the official reporter.

5. On a murder trial it appeared that the killing was done under the influence of anger not caused by any adequate provocation, and after the lapse of a sufficient cooling time. There was evidence that defendant was to some extent mentally unsound as a result of long-continued abuse of intoxicating liquors, though not insane to the extent of not knowing what he was doing, or that his act was a crime. *Held*, that it was not error to instruct that any partial defect of understanding, which might cause defendant more readily to give away to passion than a man ordinarily reasonable, cannot be considered for any purpose. Beatty, C. J., dissenting.

In bank. Appeal from superior court, Monterey county; N. A. Dorn, Judge.

William Leary was convicted of murder in the first degree, and appeals. Affirmed.

W. A. Kearney and C. F. Lacey, for appellant. Atty. Gen. Hart, for the People.

VAN FLEET, J. Defendant was convicted of murder in the first degree, and sentenced to be hanged. He appeals from the judgment and an order overruling his motion for a new trial. Several grounds are urged for a reversal, which we shall notice in the order in which they are presented and discussed by appellant, though not in the logical sequence in which they arise on the record.

1. It is claimed that the jury were guilty of such misconduct as to entitle defendant to a new trial. The first assignment under this head is that the jury read published accounts of the trial in a newspaper, to the prejudice of defendant's rights. It appeared on behalf of defendant on the motion that the Salinas Daily Journal, published at Salinas City, where the trial was had, printed, from day to day, a synopsis or résumé of the evidence in the case, and that on various occasions during the progress of the trial, but prior to their retiring for deliberation, copies of the paper fell into the hands of the jury, and were read by some of them, including the matter therein relating to the trial; and that on one occasion one of the jurors made a suggestion that "they got that mighty straight," or some such remark,—referring to an account of the trial in the paper. In rebuttal of this showing, the prosecution were permitted to put in the testimony of the members of the jury to the effect that they were not influenced in any manner whatever in considering the case or rendering their verdict by anything they read in the paper in question. This evidence was inadmissible for such purpose (People v. Stokes [Cal.] 37 Pac. 208); but, in the view we take of the question, this was immaterial. It is not claimed by defendant that the matter published contained anything of an essentially prejudicial character, or that the evidence or proceedings were in any manner garbled, unfair, or even incorrectly reported, or in any instance intended or necessarily calculated to improperly influence or prejudice the minds of the jury. To the contrary, counsel for defendant in his brief refers to the statements in the paper as "prepared by a person apparently fair and impartial," and frankly admits that he does not base his claim for a reversal upon the ground that the jury had imperfect or inaccurate reports of the trial; but his contention would seem to be, substantially, that the mere fact that the jury has been permitted to read matter in a newspaper referring to the trial, which might possibly in some manner injuriously affect their minds, immediately raises a presumption of improper influence which affords ground for a new trial. This, we think, is carrying the doctrine beyond a point where it can be sustained on reason or authority. Certainly counsel has referred us to no case going to such length. The rule upon the subject is correctly stated, we think, in People v. McCoy, 71 Cal. 397, 12 Pac. 272, one of the cases cited by defendant, where it is said: "The reading of newspapers by jurors while engaged in the trial of a cause is an act of inattention to duty which ought to be promptly corrected, and, if the newspaper contains any matter in connection with the subject-matter of the trial which would be at all likely to influence jurors in the performance of duty, the act would constitute ground for a motion for a new trial." If the matter, in other words, be such as would

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[1] Rehearing denied

from its character, or the manner or connection in which it is stated, be calculated to prejudice or injuriously affect the minds of the jury, a presumption of improper influence arises, and a new trial will be granted, without requiring defendant to show that harm has in fact been done his cause. But the application of this rule does not help defendant. The several articles complained of are found in the transcript, and we have taken pains, not only to examine them at length, but to carefully compare the statements of the evidence therein with the evidence in the case as presented in the record, and find nothing therein calculated to mislead or improperly affect the minds of the jury. The matter is exceptionally free from objectionable features, such as expressions of opinion or misleading statements. In fact, we may add that, if all newspaper reports of criminal proceedings were as fair, impartial, and circumspect as would seem to have been the desire here, there would be few instances in which verdicts would have to be set aside by reason of improper influence through the press.

A second ground urged under this head is that the jury were guilty of misconduct in the use of intoxicating drink. The jury were kept in charge of the sheriff during the trial, and not permitted to separate, and, when not engaged in the trial or going to and from their meals, they were kept in a room by themselves, under the care of an officer, and not permitted to go about town. It appears that during the trial, which lasted some five or six days, and more particularly, as the evidence shows, in the early stages of the trial, including the time before the jury was entirely completed, several pocket flasks of whisky were introduced into their room by members of the jury, without the knowledge of the court or parties, and some of the jurors would now and then take a drink "on the sly," as expressed by one juror, and "surreptitiously," as put by another; although it does not appear from the showing that there was any studied effort upon the part of those who had the liquor to conceal the fact. There is some disparity in the statements as to the number of flasks that were had in the jury room in all; the majority of the jurors putting the number they saw at different times at not more than two or three, while one put it as high as five or six. All who mentioned the character of the bottles, however, described them as half-pint pocket flasks or bottles; and the strong preponderance of the showing, in fact the general consensus, was that there was little, if any, liquor drank in the room after the first day or two of the trial, and none after the jury retired for deliberation. One juror said he saw one bottle of "something red" in the room while the jury were deliberating, but this was shown by another juror to have been medicine prescribed for him by a doctor, and procured by permission of the court. The evidence is not such as to make the impression that there was any frequent or considerable drinking by any of the jurors at any time, and a number of them drank none at all. As one or two of the jurors expressed it, "the liquor was drank in little swallows just before going to meals." There is no pretense on the part of any one that any member of the jury became in the least intoxicated or affected by the liquor so as to impair his faculties, or in the least interfere with the proper discharge of his duties; in fact, the evidence shows clearly to the contrary. Under these facts, it is contended that there is disclosed such misconduct upon the part of the jury as to render a new trial necessary. But we cannot agree with this contention. The cases of People v. Gray, 61 Cal. 164, and People v. Lee Chuck, 78 Cal. 317, 20 Pac. 719, relied upon by defendant, involved an essentially different state of facts from those presented here. In both of those cases the evidence tended to establish that the jurors had drank liquor or were under its influence after the jury had retired for deliberation upon their verdict. In the Gray Case, while the evidence disclosed that the jury had drank large quantities of malt and spirituous liquors during the antecedent stages of the trial, the reversal is rested upon the ground that the evidence afforded "strong reason to suspect that one of the jurors drank so much while deliberating on the verdict as to unfit him for the proper discharge of his duty." In People v. Lee Chuck, Mr. Justice Works, who wrote the opinion, went further, and held, in effect, that, where it appeared that the jurors drank liquor while deliberating on their verdict, the question as to whether it had any effect on their minds was immaterial, as injury would be presumed, and a new trial granted. This view of the law, however, was concurred in by but two other justices, the chief justice expressly dissenting from it, while concurring in the judgment. As the case was in bank, it is doubtful if the opinion can be regarded as authority on this point. This is merely by the way, however, as neither of those cases supports the defendant's position, the essential element upon which they rest being lacking in the facts of this case. Whatever may be the rule elsewhere, it is now well settled in this state that the mere fact that a member or members of the jury have been guilty of using strong drink during the trial is not of itself sufficient ground for a new trial, where the evidence is such as to rebut the presumption of injury flowing therefrom to the defendant. In the case of People v. Deegan, 88 Cal. 602, 26 Pac. 500, it is held that the fact that a juror drank intoxicating liquors out of court, and that at the noon recess on the day the verdict was rendered he was for a time under its influence, does not vitiate the verdict, if it appears that the juror, while sitting or deliberating as a juror, was sober, intelligent, and in a fit condition to understand and deliberate upon the evidence, and render a proper verdict. In the case of People v. Sansome, 98 Cal. 239, 33 Pac. 202, where it appeared that after the submission of the case, when the jury were taken to dinner, two of their number drank whisky, but not to an extent to intoxicate them, it is said: "It is argued that the admitted indulgence in intoxicating liquor by two of the jurors constituted misconduct on the part of the jury sufficient to reverse the judgment. We do not think this position can be maintained. If the two jurors who drank a little liquor were not affected by it,—and, in view of the conflicting affidavits and the action of the court below, it must be assumed they were not,—then it would seem that neither law nor sound reason would require the judgment to be reversed on this ground." See, also, People v. Williams, 24 Cal. 31; People v. Brannigan, 21 Cal. 339; People v. Dennis, 39 Cal. 625; People v. Symonds, 22 Cal. 349; People v. Bemmerly, 98 Cal. 299, 33 Pac. 263.

But it is contended by defendant that "smuggling" the liquor into the jury room without the knowledge of the court or parties evinces such a total misconception by the jurors of the importance of their duties and obligations as of itself to cast grave suspicion on the verdict, and warrant a new trial. The act of carrying liquor to the jury room clandestinely is undoubtedly a very reprehensible dereliction of duty on the part of a juror, if done willfully or wantonly, and, upon coming to the knowledge of the trial court, should be severely punished, and cause the verdict to be jealously scrutinized. But that it should necessarily vitiate the verdict we cannot concede. It might well happen that investigation in a given instance would disclose that the liquor had been procured innocently or under a supposed or actual necessity, with no intent to drink it for the mere love of it. It is a matter of common knowledge that many men require daily a certain quantity of artificial stimulant to maintain their physical, if not mental, equilibrium,—some by reason of physical ailment, others because of long years of habit,—and to be deprived of it is to be unfitted for their usual functions to perhaps as great a degree as another might through overindulgence. Such a man upon a jury might, if locked up for days, feel, without thought of impropriety, that it was necessary and justifiable for him to take a small quantity of liquor to his jury room. Such an instance, in no way affecting the juror's capacity, should not necessarily set aside a verdict free from all other legal exception. After all, the act, if wrongfully done, is but an act of misconduct, differing only in degree from any other, and the pertinent question is whether it has resulted in injury to the defendant. In this instance that question was involved in the ruling of the lower court denying the motion for new trial, and we cannot upon the facts say that it was wrong. If every relaxation from the strict line of duty on the part of jurors, irrespective of its effect upon their verdict, were to furnish ground for retrial, very few verdicts could be sustained, and the administration of criminal justice would be rendered difficult indeed.

2. It is next objected that "the verdict is against law and evidence." We do not understand counsel as attacking, under this head, the sufficiency of the evidence to justify the jury in finding the defendant guilty of murder, but the contention seems to be that the facts of the case were not such as to warrant the infliction of the death penalty. We confess to some cloudiness of apprehension of this point, and are at a loss to understand exactly upon what ground counsel expects us to review the action of the jury in this respect. The law submits to the jury, under the instruction of the court, the question as to the degree of murder, if any, of which the defendant is guilty in any instance; and section 190 of the Penal Code further provides that one found guilty of murder in the first degree "shall suffer death or confinement in the state prison for life, at the discretion of the jury." Whatever may have been the actuating consideration in the minds of the legislature in enacting section 190,—whether because they believed there are instances of murder falling within the definition of murder of the first degree, which, because characterized by a less degree of atrocity or other mitigating circumstances, call for a milder punishment than that of death, or whether their reason was something else,—the fact remains that they have confided the power to affix the punishment within these two alternatives to the absolute discretion of the jury, with no power reserved to the court to review their action in that respect.

3. It is contended that the court committed error in giving the jury certain instructions orally, which were neither reduced to writing nor taken down by the shorthand reporter. The facts with reference to this point are recited in the bill of exceptions, from which it appears that after the jury had retired for deliberation they returned into court for further instruction. The defendant and his counsel, and all the officers of the court, except the official reporter, were present when the following proceedings took place: "The court said to the jury: 'Have you agreed on a verdict?' The foreman answered: 'We have not.' The foreman then handed to the court the form of verdict theretofore given to the jury to use if they found him guilty of murder in the first degree, and fixed his punishment for life, and said to the court: 'Can we bring in that verdict?' The court orally answered, without reducing the same to writing: 'Yes; if it is your verdict. If you agree to that, it can be returned.' Some juryman then asked: 'Can we bring in that verdict on the same evidence as the other one?' The court made no answer to that question, except by reading from the written instructions as follows: 'Should the verdict of the jury convict the defendant of murder in the first degree, the law

permits the jury to award the penalty. This may be death or imprisonment for life in the state's prison.' Some other questions were asked by the jury relating to the grades of the offense, and the court said, orally, without reducing it to writing: 'I will read the instructions as to grades of the offense;' and thereupon read to the jury the written instructions theretofore read to them, defining the grade of the offense, but gave no oral instructions. One of the jurymen then asked this question: 'Can we bring any one of the six verdicts given us we agree on?' The court answered, 'Yes'; which answer was not reduced to writing. The court then asked the defendant if he had any suggestions to make or desired anything further, and his counsel answered: 'No; nothing.' None of the questions asked by the jurors were reduced to writing. The jury then retired for further deliberation." Conceding that this amounted to an oral instruction, we cannot perceive wherein the defendant could be in any wise injured by what took place. The language of the court has been preserved, and it appears that nothing whatever was said to the jury except what in substance, and more in detail, had been told them before in the charge of the court. They were instructed upon no new point, and what was said in no way qualified what had been theretofore given them. It was held in People v. Cox, 76 Cal. 281, 18 Pac. 332, that, although it is error to charge a jury in a criminal case orally, yet, where the record shows that the language used, which was not taken by the reporter, merely led up to an instruction which was properly taken down, and did not affect nor in any way qualify the charge which was taken down, it is not ground for reversal. There is no distinction in principle between the effect of what was done in that case and what occurred here. If any more absolute rule was intended to be announced in People v. Hersey, 53 Cal. 574, it is to be taken as modified by what is held in the Cox Case. In this connection we have carefully examined the complaint made as to several instructions of the court, and are unable to discover error in any of them. The criticism in appellant's closing brief as to the effect of certain instructions is not justified. The charge is to be considered as a whole, and, so regarded, we do not think it open to the construction put upon it. The charge seems to cover the whole case very fairly and correctly, and in a manner to leave no misapprehension in the minds of the jury arising from any particular or isolated part.

4. A considerable number of other points are urged in the able and ingenious brief of appellant, based upon objections to the mode of securing the jury, alleged improper conduct of the prosecuting attorney, and rulings of the court on questions of evidence, and some others. To discuss each one of these in detail would unnecessarily extend this opinion and serve no useful purpose. Having in view the gravity of the case, we have examined each point made with the most earnest and zealous scrutiny, and we are unable after such examination to discover any error affecting the substantial rights of the defendant or warranting a reversal of the case. The judgment and order are therefore affirmed.

We concur: McFARLAND, J.; HARRISON, J.; DE HAVEN, J.; GAROUTTE, J.

BEATTY, C. J. I dissent. As to the irregularities and misconduct of the jury, they were probably not sufficient to justify the superior court in granting a new trial. What drinking of intoxicating liquors was done occurred during the various recesses and adjournments of the court prior to the submission of the cause. It was slight in amount, and seems to have produced no perceptible effect. The worst feature of it was the secrecy with which it was done, the efforts at concealment manifesting a consciousness on the part of the offending jurors that they were violating their duty. But since it does not appear that any juror was intoxicated or sensibly affected by what he had taken during the trial, or that there was any drinking after the cause had been submitted to the jury, the court was justified in holding that the defendant had not been prejudiced. The reading of the newspaper reports of the trial was a violation of the admonition which the judge is required to give to the jury at each recess or adjournment of the court, not only by the offending jurors but by the officer in charge. As to this irregularity, however, as well as the other, it may be safely concluded that the defendant was not prejudiced because the reports so read consisted merely of a fair and truthful statement of the evidence given in court and of the line of defense. It was, nevertheless, serious misconduct on the part of the jurors to disregard the admonition of the court, and it is no merit in them that what they read happened to be of a character which the court can hold to have been harmless. If, as well might have happened, it had been of a different character, their misconduct would have necessitated a new trial.

Neither do I think that the judgment or order appealed from should be reversed because of the oral instructions to the jury given by the court in the absence of the official reporter. But my views upon that point differ radically from those stated in the opinion of the court, and because I think the decision, as it stands, will lead to mischievous consequences, I feel bound to state the reasons for my dissent. It is, to my mind, clear from the record in this case, and that part of it copied into the opinion of the court, that the trial judge did orally instruct the jury in the absence of the official reporter. The jury came into court, and by several questions sought information for their guidance in finding a verdict. These questions were answered, and the answers so given, taken in connection with the questions, were instructions. It is true these instructions as set forth in the bill of exceptions were correct and proper. But this does not cure the error. The error consists, and is complete, in giving the oral instructions in the absence of the official reporter. People v. Hersey, 53 Cal. 575. The object of the statute in requiring the instructions of the court, if not in writing, to be taken down by the reporter, is to insure defendant the means of getting a correct statement of the charge really given; and this object would be completely frustrated if the judge, who has orally charged the jury in the absence of the reporter, could cure the error by putting into the bill of exceptions a correct charge. The case of People v. Cox, 76 Cal. 281, does not overrule People v. Hersey. There the reporter was present and engaged in taking down the charge while it was being delivered. And the bill of exceptions showed that he had taken down the whole charge, omitting only a few words "leading up to and in no way touching upon" the charge which was given. The substance of the decision is that the court does not err in giving an oral charge when the reporter is present, and that if the reporter fails to perform his duty to take it down fully and correctly the judge may, nevertheless, put into the bill of exceptions what was actually said, and that the fault of the reporter will not be imputed as an error to the court. But there is a vast difference between the case in which the reporter is present, with the opportunity of performing his duty and apparently engaged in its performance, and the case where he is absent, and necessarily unable to take down the charge. In delivering an oral charge in the absence of the reporter, the court, by its own act, makes it impossible that the defendant shall be secured in his rights; and this is necessarily an error of the court. In the other case the reporter alone is at fault. In the Cox Case it was merely held that such a fault on the part of the reporter is not necessarily fatal, but it is not questioned that it would have been fatal if the court had committed the error disclosed in People v. Hersey. If it be said that this is a distinction without a difference, that a defendant may be as greatly prejudiced by the incompetence or inattention of a reporter who is present as by the fallible recollection of a judge, I answer that, while such a thing is possible, it is not probable. In the vast majority of cases the court, with the aid of the reporter's notes, however imperfect, will be able to restate his oral charge correctly. Without any such notes, it would rarely happen that it could be restated at the time of settling the bill of exceptions with substantial accuracy. The chance that a defendant may be prejudiced when the law is complied with is no reason for depriving him altogether of its protection. I cannot, therefore, concur in the views of the court upon this point. But, for a different reason, I do not think the defendant should be allowed to avail himself of this objection here. He was present with his counsel when the jury came into court for further instructions. He knew as well as the judge, and possibly better, that the reporter was not present, but he failed to call the fact to the attention of the court, or to make any objection, or take any exception at the time to what was said. If he had done so, the court could have reduced its charge to writing, or could have sent for the reporter, and had the questions and answers reported, and by him taken down, together with an instruction to the jury to regard only what was said in presence of the reporter. This course would have secured to the defendant all the rights which the statute was designed to secure him. Having failed to object then, I think he should not be heard to object now. I am not unaware that many of the former decisions of this court, made under the old statute before the adoption of the Code, held that the giving of oral instructions, although unobjected to at the time, was fatal error on appeal; but I conceive that these rulings were based upon the mandatory terms of the statute as quoted in People v. Sanford, 43 Cal. 35. Since the adoption of the Codes, I think the law as thereby amended (Pen. Code, § 1093) does not require so strict a construction, if it ever did. At all events, while I am willing to go to the extent of holding that a defendant cannot assign error upon the giving of an oral instruction in the absence of the reporter, unless it appears that he objected at the time and reserved his exception, I am not willing to say that such disregard of the statute by the court, when objected to, can be remedied by making it appear in the bill of exceptions that the charge so given was a very small matter and in fact correct; for this defeats the whole object of the statute.

There is a point, however, upon which I not only dissent from the reasoning of the court, but also from the conclusions and the judgment. The defendant was tried upon a charge of murder, convicted of murder in the first degree, and sentenced to death. In every charge of murder the distinction which the law makes between murder in the first degree and murder in the second degree is in the highest degree material, and an instruction to the jury to disregard evidence which ought to be considered in determining the degree of the crime is necessarily erroneous; and, if the instruction is to disregard evidence tending to prove the lesser degree, such an instruction is not only erroneous, but is also prejudicial to a defendant who has been found guilty of the higher degree. In this case all the evidence went to show that the killing was done under the influence of anger caused by insulting language addressed by the deceased to the defendant in the presence and hearing of female members of his family. The provocation was not in law sufficient to mitigate the offense to manslaughter, and the time elapsing between the provocation given and the fatal blow was probably sufficient to have cooled the passion of a reasonable man, for which reason also the crime was not mitigated to manslaughter. But when an unlawful killing is actually the result of that sudden and violent impulse of passion which is supposed to exclude deliberation, it cannot be murder of the first degree, notwithstanding the inadequacy of the provocation or the lapse of cooling time. These are merely grounds for implying the malice essential to the second degree of murder, while in murder of the first degree (except when perpetrated in the commission or attempt to commit arson, robbery, etc.) there must be that express malice which consists only in the deliberate purpose unlawfully to take away the life of a human being. For this reason it is everywhere held that the voluntary intoxication of the slayer may be considered by the jury for the purpose of determining whether, under the circumstances, the killing was deliberate and premeditated, and this notwithstanding such intoxication is not an excuse for any crime. Although not an excuse for the commission of a criminal act, the character of which is not dependent upon the state of mind of the perpetrator, it is admissible where such state of mind is an element of the offense, for the reason that it has a tendency to disprove the necessary state of mind. If this is true as to voluntary intoxication, it must be true a fortiori as to partial insanity. A person may fall far short of that degree of insanity which exempts him from criminal responsibility, and may yet be in a condition mentally which a jury ought to consider in determining whether he has committed a homicide with express and deliberate malice. This, in my opinion, is precisely such a case. There was much evidence as to the defendant's sanity, the result of which was to show that, while he was not insane to the extent of not knowing what he was doing or that his act was a crime, he was nevertheless to some extent mentally unsound as the result of long continued abuse of intoxicating drinks, that he was easily excited to violent anger, and in short that he was not in that respect a reasonable man. In view of this evidence, I think the giving of the following instruction was manifest error: "If the defendant was so far in the possession of his mental faculties as to be capable of knowing that the act of killing was wrong, any partial defect of understanding, which might cause him more readily to give away to passion than a man ordinarily reasonable, cannot be considered for any purpose." And, the defendant having been convicted of murder in the first degree, the error is as manifestly injurious. For this reason I think the judgment and order should be reversed.

105 Cal. 641

## PEOPLE v. NAPTHALY. (No. 21,132.)

(Supreme Court of California. Jan. 17, 1895.)

CONSTITUTIONAL LAW — RIGHT TO EMPLOY COUNSEL.

The fact that one accused of crime is a lawyer does not deprive him of the right to be represented by counsel, as guarantied by Const. art. 1, §§ 8, 13, and the statutes enacted in pursuance thereof; and the refusal of the committing magistrate to continue the hearing to enable the accused to employ counsel is ground for setting aside the information.

Commissioners' decision. In bank. Appeal from superior court, city and county of San Francisco; James M. Troutt, Judge.

B. F. Napthaly was convicted of the crime of assisting a prisoner to escape, and appeals. Reversed.

Carroll Cook, for appellant. Atty. Gen. Hart, for the People.

SEARLS, C. The defendant was accused by information of the crime of assisting a prisoner to escape. It is averred in the information that on the 23d day of February, 1892, at the city and county of San Francisco, one Adam Stroh, alias Johnson, had been arrested for vagrancy, and was then and there confined in the city prison of the city and county of San Francisco, and was then and there in the legal and lawful custody of the chief of police of said city and county, pending an examination upon said charge; that on said 23d day of February, 1892, in said city and county, defendant knowingly, willfully, and feloniously presented to one John Parrot, the acting keeper of said prison, an order of discharge, purporting to be a legal and lawful discharge, from custody of said Adam Stroh, alias Johnson, on said charge of vagrancy. The order of discharge is set out in full, and purports to show that said Stroh, alias Johnson, on charge of vagrancy, has deposited a bail bond "with me [the clerk] in the sum of $300, for his appearance to answer said charge," and is dated February 23, 1892, and signed as follows: "A. A. Watson, Clerk Police Court, per N." It is then charged that said Stroh, alias Johnson, was thereupon discharged by the jailer, who believed the order was genuine, but that in fact it was not a legal and lawful order of discharge, as the defendant well knew, whereby said prisoner, through the unlawful acts and contrivance of defendant, did escape from prison, and go at large, etc. Before pleading to the information, defendant moved to set aside the information upon the ground that he had not been legally committed by any magistrate before the filing of the information, and upon the ground that he had been committed without reasonable or probable cause. The motion was heard upon the evidence taken before the magistrate, which the bill of exceptions certifies was the same as that taken at the trial on behalf of the prosecution, and which is included in the bill of exceptions; and (2) also upon the record of the magistrate, which "showed that, at his preliminary examination before said magistrate, he was not represented by any counsel; that the magistrate refused to continue the examination for the purpose of enabling him to employ counsel; and that said magistrate entirely failed to inform said defendant of his rights, as required by sections 858–860 of the Penal Code of the State of California. The motion was denied, and the ruling is assigned as error.

Our constitution (article 1, § 13) guaranties the right of every person charged with crime, in any court whatever, "to appear and defend in person and with counsel." In obedience to this constitutional guaranty, section 858 of the Penal Code provides that when a defendant is brought before a magistrate, under arrest on a charge of having committed a public offense, the magistrate must at once inform him of the charge against him, and his right to the aid of counsel. Section 659 is as follows: "He must also allow the defendant a reasonable time to send for counsel, and postpone the examination for that purpose; and must, upon the request of the defendant, require a peace officer to take a message to any counsel in the township or city the defendant may name. The officer must without delay and without fee perform that duty." Under section 8 of article 1 of the constitution, "offenses heretofore required to be prosecuted by indictment shall be prosecuted by information, after examination and commitment by a magistrate, or by indictment with or without such examination and commitment as may be prescribed by law." It will be observed that, under this provision of our constitution, an offense can be prosecuted by information only after an examination and commitment by a magistrate. Among the causes for setting aside an information is "that before the filing thereof the defendant had not been legally committed by a magistrate." The necessity of such examination and commitment was recognized and upheld in People v. Wilson, 93 Cal. 377, 28 Pac. 1061, and in Ex parte Baker, 88 Cal. 84, 25 Pac. 966. An examination which denied to defendant the right guarantied him alike by the constitution and statute, of being defended by counsel, was in no sense a legal examination. It was a plain and palpable violation of a fundamental right of the defendant, which rendered the commitment illegal.

It is said defendant is a lawyer, and there was no need of informing him of his right to have counsel, or of continuing the case to permit him to procure such counsel. There is some evidence in the record tending to show that defendant was a lawyer. The very fact that the defendant asked for a continuance to procure counsel is evidence of his knowledge of his right thereto, and obviated the necessity of his being informed thereof. Thus far, and no more. Under the constitution and law, a lawyer who is accused of crime is equally entitled, in every stage of his trial, to the presence and aid of counsel ("to appear and defend, in person and with counsel"), with other persons. The rights of individuals in this respect are not to be gauged by their profession or occupation. The evidence shows that defendant was in custody and imprisoned on a charge of felony. Suppose, however, it did not. Whatever the rule may have been at common law, under our law every person accused of a felony is entitled to the aid of counsel, whether imprisoned or admitted to bail; and a refusal of an opportunity to procure such counsel amounts to the deprivation of an important right, essential to his safety. The court below erred in refusing to set aside the information, for which error the judgment and order appealed from should be reversed, and the court below directed to set aside the information against the defendant.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, and the court below directed to set aside the information against the defendant.

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(4 Cal. Unrep. 966)

In re LI PO TAI'S ESTATE. (No. 15,746.)[1]

LI TAI WING v. FREESE, Public Administrator.

(Supreme Court of California. Jan. 28, 1895.)

ADMINISTRATOR WITH WILL ANNEXED—RIGHT TO REMOVE.

Code Civ. Proc. § 1383, providing that when letters of administration have been granted to any other than the surviving wife, child, etc., of the intestate, any one of them may obtain the revocation of the letters, and become entitled to the administration, does not apply to letters of administration with the will annexed.

Department 1. Appeal from superior court, city and county of San Francisco; J. V. Coffey, Judge.

Petition by Li Tai Wing for the removal of A. C. Freese, public administrator, as administrator with the will annexed of Li Po Tai, and that letters of administration with the will annexed be issued to petitioner. From an order denying the application, petitioner appeals. Affirmed.

Alexander D. Keyes and Philip Teare, for appellant. J. D. Sullivan, R. H. Countryman, and Wm. Willett, for respondent.

PER CURIAM. On the 28th of February, A. D. 1894, appellant, Li Tai Wing, filed a petition in the probate court of the city and county of San Francisco, in which, with other allegations, he stated that Li Po Tai died in said city and county March 20, 1893, testate; that by his will he nominated petitioner and his mother executor and executrix of the will; that at the time of the death of Li Po Tai, and when the will was probated and letters testamentary were issued to his mother, petitioner was a minor, and was absent from the state of California; that his mother, Lee See, was appointed executrix April 11, 1893, and duly qualified; that afterwards, on the 27th day of October, 1893, said Lee See was removed from office, and her said letters revoked, and afterwards, on the 15th day of November, 1893, A. C. Freese, public administrator, was appointed administrator with the will annexed to take charge of the estate, and said Freese duly qualified, and is still acting as such administrator; that said Freese was not the husband or wife, child, father, mother, brother, or sister of said Li Po Tai, deceased. Petitioner is the eldest son of said Li Po Tai, is over the age of 21 years, and a resident of the city and county of San Francisco; wherefore, he asked that the letters of administration issued to A. C. Freese be revoked, and letters of administration with the will annexed be issued to petitioner. Freese was duly cited to appear and answer. He filed no answer, but did appear, and was allowed to contest the right of the petitioner. Petitioner bases his claims upon the language of section 1383, Code Civ. Proc., and succeeding sections. He contends that under these provisions his right to relief asked is absolute, provided only that he be found to possess the statutory competency. Section 1383[1] is expressly limited to the estates of those who died intestate, and section 1354 is made applicable to the estates in which a will has been probated and an administrator with the will annexed has been appointed. The last section, however, does not provide that the administrator with the will annexed may be removed to permit a relative or a person entitled to administer to be appointed; but only one who has been named as executor. In section 1350 it is provided that, if it becomes necessary to appoint an administrator with the will annexed, they must be issued as designated and provided for in the grant of letters in case of intestacy. Section 1426 provides that, if the administrator with the will annexed become incapable or die, "letters of administration with the will annexed may be issued to the widow, or next of kin, or others, in the same order and manner as directed in relation to original letters of administration." Appellant contends that a fair construction of these sections indicates that the legislature intended that the rules for the issue of letters of administration with the will annexed shall be the same as the rules for the issuance of letters of administration where the decedent has died intestate. Inasmuch as the statute in regard to the requirement that an administrator may be required to give way to the claims of another expressly limits its operation to estates of those who died intestate, this would not be to construe a statute, but to add to it. Section 1354 only provides that an administrator with the will annexed shall be removed in favor of one who has been named executor, and leaves that to the discretion of the court. Under section 1383, the right of the relative possessing the statutory competency seems to be absolute. Is there any reason in the nature of the two offices for this difference? I think there is, though, without such reason, the law, being unambiguous, must prevail. In the first place, where there is a will, the next of kin may have no interest in the estate, and there may be no reason why he should be put in charge of it. But there is, I think, a better reason in the case of an administrator with the will annexed,—the matter should be left to the sound discretion of the court. Under section 1356, Code Civ. Proc., administrators with the will annexed have the same authority over estates which executors named in the will would have. Executors often have to execute trusts reposed in them by the testator very different from those which administrators assume under the statute. These trusts vary greatly. They may require time and delicate management to perform. While in the performance of such a trust it might be very unfortunate for the estate if at any time one near of kin could stop the proceeding, and have a change in the administration. But, whether the reason suffices or not, the statute seems plain. Appellant applied to have respondent removed, and to be himself appointed executor. That application the probate judge had already refused. Appellant immediately made this application to be appointed administrator with the will annexed. Is the court now compelled to give him the same office, under another name, which it had already refused, using a discretion expressly conferred upon it by statute? It is obvious that the statute has not given appellant any such privilege. Estate of Pacheco, 23 Cal. 476, is cited as an authority for appellant's proposition. When that decision was made, there was no provision such as is now found in section 1354, Code Civ. Proc., giving a discretion to the probate judge. The different policies as to the removal of administrators with the will annexed and ordinary administrators was not as marked then as now. The order appealed from is affirmed.

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[1] Reversed in banc. See 41 Pac. 486, 108 Cal. 484.

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[1] Code Civ. Proc. § 1383, provides that when letters of administration have been granted to any other than the surviving wife, child, etc., of the intestate, any one of them may obtain the revocation of the letters, and become entitled to the administration.

105 Cal. 660

PEOPLE v. HERTZ et al. (No. 21,152.)

(Supreme Court of California. Jan. 24, 1895.)

CRIMINAL LAW—WEIGHT OF EVIDENCE—INSTRUCTIONS AS TO FACTS.

1. While it is proper to instruct that, in weighing the testimony of a defendant in a criminal case, the jury may consider his peculiar situation and relationship to the case, the rule cannot be extended beyond defendant, so as to include his relatives.

2. In a prosecution for receiving stolen goods, it appeared that defendant had purchased them from the thief for $12, and the state's evidence showed them to be worth from $90 to $140, while defendant's witnesses testified that they were worth only from $18 to $21. *Held*, that an instruction which stated the lowest value of the goods to be $90, and that defendant consequently purchased them at less than one-seventh of their value, violated Const. art. 6, § 19, which prohibits the judge from charging the jury as to matters of fact.

In bank. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

Dora Hertz was convicted of the crime of receiving stolen goods, and appeals. Reversed.

Robert Ferral and Naphtaly, Freidenrich & Ackerman, for appellant. Atty. Gen. Hart, for the People.

GAROUTTE, J. Defendants were informed against by the district attorney for the crime of receiving stolen goods. Defendant Dora Hertz demanded a separate trial, which was duly accorded her, and, being found guilty, was sentenced by the court to serve a term of four years in the state prison located at San Quentin. This appeal is taken from the final judgment, and also from the order of the court denying defendant's motion for a new trial. It is claimed by the prosecution that defendants bought and received the goods, consisting of pants, coats, and vests, of one McClellan, and that McClellan stole these articles of clothing from one Hornburg, a tailor. At the trial, McClellan himself took the stand as a witness, and stated that he was the thief, and that he sold the goods to defendants. We think the defendant has not had a fair trial, and the judgment of conviction must be reversed upon various grounds.

1. The daughters of defendant were important witnesses in her behalf, and the court gave the following instruction to the jury, bearing upon their credibility: "In judging the credibility of witnesses, I know that gentlemen of your intelligence need not be told that you are to look to the witness himself or herself; observe their method of testifying; see what their motive is, if they have any, in the case. In this connection, you have heard the testimony of parties near akin or related to the accused woman. Now, of course, as men of common sense, you must recognize the interest that they certainly feel in the outcome of this case; and you certainly would comprehend the proposition that they would not say anything unfavorable to her, that they could well avoid saying, or properly avoid, and that they certainly would not take the trouble to volunteer anything against her case." This instruction is erroneous. While this court has often sustained instructions to the effect that the jury, in weighing the testimony of a defendant, are justified in taking into consideration his peculiar situation and relationship to the case, and the grave consequences to him, depending upon the verdict of the jury, still the court has never gone to the length of holding that such an instruction would be proper, applied to the testimony of the relatives of the defendant. Neither have the people cited a single authority from any other state supporting such a doctrine. If the rule is to be extended beyond the defendant, and include the relatives of the defendant, there is no reason why it should not equally apply to the friends of the defendant. The result would be that the evidence offered in defendant's behalf, in many cases, would be so distrusted and suspicioned as to go to the jury handicapped out of all practical usefulness. An instruction to the jury, bearing upon the credibility of a defendant's testimony, is not looked upon with favor by this court. We have repeatedly frowned upon the doctrine, and said that it would be limited within the strictest lines. To now apply the principle to the relatives of a defendant would be giving it an elasticity which we cannot for a moment sanction.

2. The value of the stolen goods was a material element of fact in the case, as bearing upon the presence of a guilty knowledge in the mind of the defendant when she purchased the articles. Considerable evidence was introduced at the trial upon this question of fact, and in treating of this subject, to the jury, the court said, referring to evidence offered by the people: "There are estimates of this value which have been made before you by men of experience in the clothing business, and in the value of such clothes as these, going all the way, as I understand it, from $90 to $140; but the owner of the goods himself, who, perhaps, is a competent judge of the value of the goods, or should be, has estimated them at the sum of $90, which is the lowest estimate of those gentlemen tailors who came here, as I understand it. * * * Assuming that the value of these goods was $90, which is the lowest estimate, the offer of the seller to her was to take just exactly one-sixth of their value. He offered to throw off five-sixths of their value if she would purchase. She, having failed to obtain from him, according to her statement, any information as to where or how he got the goods, offered him a sum, $12, which still further reduced the price, and in the acceptance of which the seller actually threw off from the value of the goods, estimated at $90, over six-sevenths." In view of the fact that the defendant placed three or four wit-

nesses upon the stand who testified that the goods were only worth from $18 to $21, the statement of the court to the jury upon a matter of fact as to the value cannot be sustained. The value of this property, as we have seen, was pre-eminently and essentially a question of fact, for the jury, and in no sense a question of law, for the court. It was for the jury alone to say whether the witnesses of the people or the witnesses of the defendant told the truth in this respect. And, while, under the constitution (article 6, § 19), the judge may state the testimony to the jury, yet the same section positively forbids the judge from charging the jury with respect to matters of fact. The portion of the charge we have quoted, as to the value of the property, embraces no element of law, but is confined solely to matters of fact, and is therefore violative of the provision of the constitution of this state.

3. The circumstances tending to show defendant's guilt were taken up by the court seriatim, and reviewed argumentatively by the court in its charge to the jury. That review of the evidence, we at least can safely say, did the prosecution's cause no harm, and the defendant's cause no good. In this regard, we quote from People v. Williams, 17 Cal. 147, approved in People v. Gordon, 88 Cal. 426, 26 Pac. 502, wherein Justice Baldwin used the following language in a criminal case: "The experience of every lawyer shows the readiness with which a jury frequently will catch at intimations of the court, and the great deference which jurors pay to the opinions and suggestions of the presiding judge, especially in a closely-balanced case, when they can thus shift the responsibility of a decision of the issue from themselves to the court. A word, a look, or a tone may sometimes, in such cases, be of great or even controlling influence. A judge cannot be too cautious, in a criminal trial, in avoiding all interference with the conclusions of the jury upon the facts." For the foregoing reasons the judgment and order are reversed, and the cause remanded for a new trial.

We concur: McFARLAND, J.; HARRISON, J.; VAN FLEET, J.

105 Cal. 652

## PEOPLE v. WARD. (No. 21,166.)

(Supreme Court of California. Jan. 24, 1895.)

Criminal Prosecution — Preliminary Examination—Transcript of Testimony — Sufficiency of Certificate — Larceny — Instructions — Credibility of Witness.

1. Under Pen. Code, § 869, making the transcript of the testimony on preliminary examination, when certified by the reporter to be a "correct statement" of such testimony, prima facie evidence thereof, a certificate reciting that the transcript is a "true copy" is insufficient.

2. The certified transcript of the testimony at the preliminary examination, in order to be admissible at the trial, must show affirmatively that the testimony therein set out was taken at the examination of the accused, and the defect cannot be cured by oral testimony.

3. On trial for larceny of a cow, where there was no direct evidence of a taking by defendant, and he testified that he obtained the animal by a trade made on a certain day in January, with one who testified that no such trade took place, and that defendant was not at his place during that month, defendant, after stating that he was at such place during that month, should be allowed to state whether such witness was then there, since the statement would affect the credibility of such witness' testimony.

4. An instruction that if defendant took possession of the animal, with the larceny of which he was charged, by virtue of a trade with one then having possession, and such trade was made by defendant in good faith, he was not guilty, though the other party to the trade had stolen the animal, is erroneous, the good faith of the trade being immaterial.

5. Such instruction is inconsistent with an instruction that, if defendant had no connection with the original fraudulent taking, he could not be convicted, and that his subsequent taking of possession, whether in good or bad faith, would not be larceny.

In bank. Appeal from superior court, Orange county; J. W. Towner, Judge.

Richard Ward was convicted of larceny, and appeals. Reversed.

J. W. Ballard, for appellant. Atty. Gen. Hart, for the People.

HARRISON, J. The appellant was convicted of having stolen a cow, and was sentenced to imprisonment in the state prison for the term of two years.

1. At the preliminary examination of the defendant before the committing magistrate, one Bane was a witness; and at the trial in the superior court the prosecution, not being able to produce Bane before the jury, offered to read in evidence what was claimed to be a transcript of the testimony given by him at that examination. This transcript was filed with the papers in the case against the defendant that had been sent up by the committing magistrate, and had the following indorsement: "I hereby certify the foregoing to be a true copy of the testimony and the proceedings in the within-entitled action. Anna Grooms, Reporter." It was shown at the trial that the magistrate had appointed Miss Grooms, a shorthand reporter, to take the testimony at the examination; and she testified that the indorsement had been made by her, and that the document from which they proposed to read had been prepared by her in the case against the defendant before the examining magistrate. The document itself did not, however, have the title of any court or cause in which the testimony was taken, nor the time at which it was taken. The defendant objected to the reading of the proposed testimony upon the ground that the document itself did not show when or where or before whom it had been given, or that it had been taken in any court, and that it was not properly certified. The court overruled the objection, and allowed the evidence to be read, to which ruling defendant excepted. The right of the defendant in a

criminal prosecution to be confronted with the witnesses against him, in the presence of the court, is one of the fundamental principles of the common law, and can be taken from him only by the provisions of some express statute. As this is a right clearly connected with his personal liberty, any statute purporting to impair the right is to be liberally construed in his favor; and whenever the state, in its prosecution for a crime, would offer against the accused the testimony of witnesses, not given in the presence of the court, it must point to a statute which authorizes such procedure, and bring itself clearly within the provisions of that statute. People v. Mitchell, 64 Cal. 85, 27 Pac. 862. This rule has been established in this state in section 686 of the Penal Code, and in the same section there is created, as an exception to the rule: "Where the charge has been preliminarily examined before a committing magistrate, and the testimony taken down by question and answer, in the presence of the defendant, who has either in person or by counsel cross-examined, or had an opportunity to cross-examine the witness, the deposition of such witness may be read, upon its being satisfactorily shown to the court that he is dead or insane, or cannot with due diligence be found within the state." The manner of taking this testimony is prescribed in section 869 of the same Code, and the two sections are to be taken together. People v. Morine, 54 Cal. 575. Section 869 provides that the examining magistrate may appoint a shorthand reporter, who may take down the testimony in shorthand, and that "the reporter shall within ten days after the close of the examination transcribe into longhand writing his said shorthand notes, and certify and file the same with the county clerk of the county, or city and county, in which the defendant was examined, and shall in all cases file his original notes with said clerk," and that the transcript of the reporter, "when written out in longhand, and certified as being a correct statement of such testimony and proceedings in the case, shall be prima facie a correct statement of such testimony and proceedings." The requirement that the reporter shall certify to his transcript that it is "a correct statement of such testimony" is essential to its competency as evidence against the accused, and is not satisfied by his certificate that it is "a true copy of the testimony." When the testimony is taken in shorthand, and is afterwards written out in longhand by the reporter, the statute does not require it to be signed by the witness, but, as a substitute, requires the reporter to certify that it is a correct "statement" of the testimony. The testimony thus written out by the reporter is the original testimony of the witness, and his certificate gives it the same authentication as does the subscription by the witness himself when the testimony is originally taken in longhand. The reporter is no more at liberty to substitute a copy of this testimony for the original statement, which he is required to write out in longhand, than would be the magistrate to substitute a copy of the testimony taken by him. The transcript of the testimony should, moreover, be so authenticated that an inspection of it will show that it is testimony which was taken at the preliminary examination of the accused who is then on trial, and must not depend upon the memory of the magistrate or of the reporter. To allow oral proof at the trial for the purpose of showing against what defendant, or upon what charge, or at what time the testimony was taken, reduces the proceeding from a record required by the statute to the memory of the reporter,—shadowy or clear, according to the length of intervening time or the number of examinations that he may have reported. See People v. Carty, 77 Cal. 215, 19 Pac. 490. In the present case the reference in the certificate of the reporter to the "within-entitled action" has no effect in identifying the "copy of the testimony" with the examination of the defendant, since it appears by the bill of exceptions that the copy so certified does not contain the name of any court or cause.

2. The appellant claimed in his defense that on the 21st of January he had received the cow from Bane in a trade with him for a pasture bill, while Bane, in the testimony which was read to the jury, stated that he had not traded any cow to the defendant at any time in January. Upon his cross-examination, Bane stated: "I cannot remember of seeing defendant, Ward, at any place in San Bernardino county, during January. He was not at my place in San Bernardino county." The defendant testified in his own behalf that he went to Bane's ranch on Tuesday, the 23d of January, and arrived there about 4 o'clock in the evening. He was then asked, "Was Bane there at the ranch when you got there?" Upon the objection of the prosecution to this question as irrelevant, incompetent, and immaterial, the court refused to allow the defendant to answer. This was error. The main issue before the jury was whether the defendant took the cow from the pasture himself, or whether it was taken by some one else, from whom he received it. There was no direct evidence to connect the defendant with the taking, and his statement that he took the cow in a trade with Bane would, in the absence of other evidence, have justified the jury in acquitting him. Bane's statement, however, that he had not traded with him, if believed, showed the falsity of the defendant's claim, and placed him in the position of having the possession of the stolen cow without accounting for such possession. The respective credibility of Bane and the defendant became important. If Bane's statement that the defendant was

not at his ranch in January was false, the jury might have distrusted his other testimony. If Bane was at the ranch when the defendant got there, the jury might have believed that Bane had testified falsely in stating that the defendant was not at his place in January. Hence, the defendant should have been permitted to answer the question.

The court gave to the jury the following instruction: "If you believe, gentlemen, from the evidence, that the defendant traded for the said cow from one John M. Bane, and that he took and had possession of the same by reason of such purchase, although you may believe from the evidence that it had been stolen by the said Bane, you are instructed that such a taking, if in good faith, would not constitute larceny by this defendant, and in that case you will find the defendant not guilty." This instruction was in the form requested by the defendant, except that the words "if in good faith" were inserted by the court, and the defendant claims that such modification of the instruction made it erroneous. The effect of this modification was to tell the jury that it was incumbent upon the defendant to establish his good faith in trading with Bane for the cow, even if they should believe that he had not been connected with the original taking, and had not known of the theft until after it had been completed. If the defendant had no connection with the taking of the cow, and did not know that it had been stolen until the time of his trade with Bane, the question of good or bad faith in making this contract would be immaterial. Curlin v. State, 23 Tex. App. 683, 5 S. W. 186; Boyd v. State, 24 Tex. App. 570, 6 S. W. 853. The crime of larceny is distinct from that of receiving stolen goods, and proof of the latter crime is insufficient to convict a person who is accused of the former. The instruction thus given is also inconsistent with the following instruction given by the court: "Before you can convict defendant you must believe beyond a reasonable doubt that he is guilty of, or in complicity with, the original fraudulent taking, and any subsequent connection after the taking would not be larceny in him, either in good or bad faith; and if you believe that the defendant traded for the cow from Bane, or any other party, after the felonious taking, either in good or bad faith, he is not guilty of larceny, and you must acquit him." By this instruction the jury were told that, if the defendant had no connection with the original taking, the question of good or bad faith in receiving the cow from Bane was immaterial, whereas in the other instruction they were told that it was essential that he should have received it in good faith. The judgment and order are reversed.

We concur: GAROUTTE, J.; VAN FLEET, J.

McFARLAND, J. I concur in the judgment upon the last two points discussed in the opinion. As to the first point, I express no opinion.

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105 Cal. 669

## PEOPLE v. DEMASTERS. (No. 21,170.)

(Supreme Court of California. Jan. 26, 1895.)

ASSAULT WITH INTENT TO COMMIT MAYHEM — CHARGE ON SIMPLE ASSAULT—ERRONEOUS REFUSAL.

1. Under Pen. Code, § 1127, requiring the court to state to the jury all matters of law necessary for their information, and section 1159, providing that "the jury may find the defendant guilty of any offense the commission of which is necessarily included in that with which he is charged," it was error for the court, on a trial for assault with intent to commit mayhem, to refuse to charge on simple assault, though a request therefor was not made till after argument, and a rule of court provided that requests to instruct should be presented before argument.

2. The word "bite" is not equivalent to the word "slit," as used in Pen. Code, § 203, defining "mayhem."

Commissioners' decision. In bank. Appeal from superior court, Tulare county; Wheaton A. Gray, Judge.

W. F. Demasters was convicted of an assault with intent to commit mayhem, and appeals. Reversed.

Roth & McFadzean, for appellant. Atty. Gen. Hart, for the People.

HAYNES, C. The information charged that the defendant "did willfully, unlawfully, and feloniously assault one James Crawford with intent to commit mayhem." At the conclusion of the evidence certain written requests to instruct the jury were submitted by counsel for defendant, and at the conclusion of the argument these and also certain instructions prepared by counsel for the people were given, and following these the court gave certain other instructions of its own motion, and was proceeding to instruct the jury as to the form of their verdict, when counsel for defendant, Mr. Roth, said: "If the court please, have you forgotten an instruction as to the degrees? There are two degrees. The Court: You have offered no instruction on that subject. Mr. Roth: I thought it customary for the court to give those instructions. The Court: I was going to instruct them as to the form of the verdict. Mr. Roth: Very well, the form may give it." Thereupon the court instructed the jury that, if they found the defendant guilty of an assault with intent to commit mayhem, their "verdict should be, 'We, the jury, find the defendant guilty of an assault with intent to commit mayhem.' Should you find the defendant not guilty, the form of your verdict should be, 'We, the jury, find the defendant not guilty.'" "Mr. Roth: I would like to ask, can we have an instruction as to the degree of this crime? I think the charge includes the charge of simple assault." The court replied, in substance, that a rule of that court required a party who desired instructions given to present them to the court before the argument; that it did not like to take chances on giving an instruction on the spur of the moment, and declined to instruct the jury upon that subject.

The court erred in not instructing the jury as requested. Section 1127, Pen. Code, provides: "In charging the jury the court must state to them all matters of law necessary for their information. Either party may present to the court any written charge, and request that it be given. If the court thinks it correct and pertinent, it must be given; if not, it must be refused." Section 1159, Pen. Code, provides: "The jury may find the defendant guilty of any offense the commission of which is necessarily included in that with which he is charged, or of an attempt to commit the offense;" and a charge of an assault with intent to commit mayhem, murder, robbery, or any offense involving violence to the person, necessarily includes the assault. The rule of court referred to may be proper and beneficial as a general rule, and, when applied to doubtful and controverted questions of law, ought to be usually adhered to; but, as was said in Pickett v. Wallace, 54 Cal. 148: "Rules of court are but a means to accomplish the ends of justice, and it is always in the power of the court to suspend its own rules, or except a particular case from their operation, whenever the purposes of justice require it." The instruction desired by the defendant was one usually given by courts of their own motion. If the court had overlooked it, and counsel had not called the attention of the court to the omission, a different question would be presented; but in this case the observance of the rule operated to subvert its object, viz. to promote the purposes of justice. Having made the ruling, the defendant's motion for a new trial should have been granted upon that ground. Respondent's contention that the omission or refusal of the court to instruct the jury that they might find the defendant guilty of assault was proper, because "the crime was the greater one or none at all," is without merit. Cases for murder, where the court refused to instruct that a verdict for manslaughter might be found, are broadly distinguishable from the case at bar, since here an assault is directly charged; and, if no assault was made, the higher offense could not be committed. See People v. Defoor, 100 Cal. 150, 34 Pac. 642.

The words "or bite the lip," used in the third instruction given at the request of the prosecution, is not the equivalent of the word "slit," used in section 203 of the Penal Code. If this injury to the lip was such as to constitute mayhem, the defendant should have been charged with that offense; but, as it is not claimed that the bite amounted to mayhem, the instruction should have followed the statutory definition, and used the word "slit." Since the case itself proves that the lip may be bitten in such a manner as not to amount to mayhem, it follows that the intent to "bite" is not necessarily the equivalent of an intent to "slit." The judgment and order appealed from should be reversed, and a new trial ordered.

We concur: VANCLIEF, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are reversed, and a new trial ordered.

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105 Cal. 666

## JOHNSON v. SUPERIOR COURT OF NAPA COUNTY. (No. 15,982.)

(Supreme Court of California. Jan. 26, 1895.)

ADMINISTRATION OF ESTATE — NOTICE TO CREDITORS—MANDAMUS.

1. Under Code Civ. Proc. § 1490, providing that in the administration of a decedent's estate notice to creditors shall be published as often as the court shall direct, but not less than once a week for four weeks, and that the court may direct additional notice, the court cannot, after due publication of the notice as ordered, and after the time for the presentation of claims has elapsed, order additional notice to be given, and thereby extend the time for the presentation of claims.

2. Where the court recognizes the publication already given as notice, but refuses to sign an order stating that due proof of publication had been given until additional notice has been given the time for the presentation of claims having already expired, mandamus will lie to compel him to do so.

In Bank.

Petition by F. E. Johnson, administrator of the estate of James Riley, deceased, against the superior court of Napa county for a writ of mandamus. Granted.

Stanley, Hayes, McEnerney & Bradley, for petitioner. T. B. Hutchinson, for respondent.

TEMPLE, J. This is an application for a writ of mandate to compel the superior court of Napa county to make a decree showing that due notice to creditors has been given in the above estate. The order for the publication of the notice was made June 11, 1894, and directed its publication once a week for four weeks. The paper in which it was to be published was not designated. The publication was made as directed in the Napa Daily Journal, the first publication being on July 12, 1894. The value of the estate was less than $10,000, and accordingly creditors were required in the notice to present their claims within four months after the first publication. December 3, 1894, due proof of publication was filed in the probate court of Napa county, and presented to the court, which was asked to decree that due publication of the notice to creditors had been made. The court refused to make the order, not, however, objecting that the proof was insufficient, but because the judge thought the publication in the newspaper selected did not give sufficient notice. In his answer to the petition herein the respondent makes the following statement as to his action in the matter: "That upon such showing the court was not satisfied that due notice had been given to the creditors of said James Riley, deceased, and therefore announced that it believed it was its duty to cause additional notice to be given to the creditors of said deceased, especially any creditor who might live or reside in Pope Valley. That said administrator was then and there questioned by the court concerning the place of residence of said deceased prior to and at the time of his death, and where he did business, and where his creditors would likely be; and the court, from said examination,was of the opinion that the creditors of said deceased, if any, would be residents of Pope Valley and St. Helena. The court further believed, and so stated to said administrator, that, in the opinion of the court, said notice thus published in the Napa Daily Journal was a notice in form only, and did not give due notice to the creditors of said deceased; and the court believed that it was its duty to require additional notice to be given in the case, especially to any creditor who might live in Pope Valley. The court then and there in open court made an order in said case that said administrator give four weeks' additional notice to the creditors of said estate by posting a copy of the notice published in said Napa Daily Journal for four weeks in two public places in Pope Valley (naming the places), and directed the administrator to prepare the order. That it is the usual practice in the said superior court, under and in accordance with the rules of said court in all probate matters, for an attorney representing the estate to prepare all formal orders in probate for the court, and the court on that occasion believed that the administrator herein would do so, petitioner herein acting as his own attorney in said estate. That said order gave the creditors but four weeks' additional time in which to present their claims from the date of posting said notice, and said administrator was informed by the court that at the expiration of such time the court would sign an order declaring that due notice to creditors in said estate had been given." A demurrer was interposed to the petition, but we understand that it is not insisted upon or is submitted to be decided after a consideration of the whole case. The petitioner, on the other hand, does not desire to introduce any evidence, but the case is submitted on the facts stated in the answer.

Section 1490 of the Code of Civil Procedure requires the notice to be published in "some newspaper of the county, * * * as often as the judge or court shall direct, but not less than once a week for four weeks;" and provides that "the court or judge may also direct additional notice by publication or posting." The notice must require all persons having claims against the estate to present them to the executor or administrator. Section 1491 provides that the time expressed in the notice for the presentation of claims must be ten months after its first publication when the estate exceeds in value $10,000, and four months when it does not. Under these provisions we think the judge, when he made the order for the publication of notice, might have also directed additional notice, and that he could have done so afterwards within the period allowed for the presentation of claims. So, too, when proof was made, the judge could have determined that the publication did not give notice to the creditors. Had he so determined, his action could not have been reviewed in a proceeding of this character. Upon so determining it would have been his duty to direct notice to be given as though there had been no previous attempt to do so, and the time for the presentation of claims would begin to run only from the giving of the new notice. But, recognizing the publication already made as notice, though, in the opinion of the judge, not the best notice, he could not extend the time for the presentation of claims by then ordering additional notice. This is precisely what the respondent attempted to do, for he says that at the expiration of the four weeks he would have signed the order, and that, when he refused to sign the order presented to him, he so informed the petitioner. The demurrer is overruled, and it is ordered that a peremptory writ issue as prayed for.

We concur: BEATTY, C. J.; McFARLAND, J.; GAROUTTE, J.; VAN FLEET, J.; HARRISON, J.; HENSHAW, J.

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105 Cal. 674

## In re CLISHAM. (No. 21,179.)

(Supreme Court of California. Jan. 26, 1895.)

INTOXICATING LIQUORS — SELLING WITHOUT LICENSE—SUFFICIENCY OF COMPLAINT.

A complaint which merely charges defendant with carrying on "the business of selling liquor" without a license does not charge a violation of an ordinance which requires a license for "keeping or conducting a bar-room, saloon or other place where vinous, spirituous or malt liquors are sold * * * to be drank upon the premises."

In bank.

Petition by William Clisham for a writ of habeas corpus for the purpose of obtaining his discharge from the custody of the authorities of the city of San Luis Obispo, Cal., to which he was committed on conviction for violation of a city ordinance. Petitioner discharged.

E. P. Cole and Graves & Graves, for appellant. W. H. Spencer, for respondent.

GAROUTTE, J. The prisoner asks to be discharged upon habeas corpus, and his petition shows facts entitling him to such discharge. An ordinance of the city of San Luis Obispo provides as follows:

"Sec. 14. A license must be procured from the city tax-collector, * * * and a license tax must be paid therefor for engaging in carrying on or pursuing every business or occupation mentioned hereinafter in this ordinance, within the corporate limits of the city of San Luis Obispo, as follows: * * *.

"Sec. 26. For each bar-room, saloon or other place where vinous, spirituous or malt liquors are sold by the glass, bottle or otherwise, to be drank upon the premises where sold, twenty-five dollars per quarter."

The petitioner was prosecuted and convicted for a violation of the foregoing ordinance, and is now held a prisoner by virtue of a commitment based upon such conviction. The complaint does not state a cause of action. It is fatally defective in not bringing the acts of petitioner within the prohibitions found in the ordinance. A license is required for keeping or conducting a bar-room, saloon, or other place where vinous, spirituous, or malt liquors are sold, to be drank upon the premises. The complaint charges the prisoner with carrying on "the business of selling liquor." Upon the slightest inspection of the ordinance, it will be perceived that it does not forbid "the business of selling liquor." No reference is made in the complaint to that part of the ordinance referring to "a saloon or bar-room or other place"; and, conceding the term "liquor" to be broad enough to include "vinous, spirituous or malt liquors," still the complaint contains no allegation that the liquors were to be drank upon the premises where sold; and this element of the ordinance is certainly a most material one, and must necessarily form a material element in the case. The allegations of the complaint are broad enough to include a dealer who sells liquor by wholesale, and not to be drank upon the premises, yet the ordinance covers no such case. The allegations of the complaint are sufficiently broad to include a retail vendor who travels about the country selling liquors, and who has no "bar, or saloon or other place"; yet the ordinance does not cover that case. The prisoner is committed for the offense "charged in the complaint," and the commitment necessarily falls with the complaint. We conclude that the allegations of the complaint charge no violation of any ordinance of the city of San Luis Obispo to which our attention has been directed. For the foregoing reasons the prisoner is discharged.

We concur: BEATTY, C. J.; McFARLAND, J.; HARRISON, J.; VAN FLEET, J.; TEMPLE, J.; HENSHAW, J.

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105 Cal. 676

## PEOPLE v. SMITH. (No. 21,163.)

(Supreme Court of California. Jan. 28, 1895.)

CRIMINAL LAW—INSTRUCTIONS.

1. An instruction to the jury that "their opinion of the guilt of the defendant, based upon the evidence in this case, must nearly approach absolute certainty; that is, a condition of their minds so perfect, complete, and unconditional as to exclude the possibility of a doubt,"—is properly refused, as belief beyond a reasonable doubt of the guilt of the accused is alone required.

2. An instruction in regard to making one a principal in a crime who aids in its commission is presumably injurious, where there is no evidence to base it upon, but this presumption may be rebutted by an affirmative showing that the error was harmless.

Commissioners' decision. In bank. Appeal from superior court, Nevada county; John Caldwell, Judge.

The defendant, George B. Smith, was convicted of manslaughter. From an order denying a motion for new trial, defendant appeals. Affirmed.

A. J. Ridge and C. W. Cross, for appellant. Atty. Gen. Hart, for the People.

VAN CLIEF, C. Upon an information accusing him of the crime of murder, the defendant was convicted of manslaughter, and sentenced to imprisonment in the state prison for the term of five years. and has appealed from the judgment, and from an order denying his motion for a new trial.

1. Counsel for appellant contends that the verdict of the jury is contrary to the evidence. No particular in which the verdict is claimed to be contrary to the evidence is specified either in the brief of counsel for appellant or in the bill of exception; and, though the evidence is wholly circumstantial, it strongly tends to prove that the defendant committed the crime of which he was found guilty, and appears to be sufficient to justify the verdict.

2. It is contended that the court erred in refusing to give to the jury the following instruction: "(2) The jury are directed that their opinion of the guilt of the defendant, based upon the evidence in this case, must nearly approach absolute certainty; that is, a condition in their minds so perfect, complete, and unconditional as to exclude the possibility of a doubt." This requested instruction is obviously erroneous, in that it requires a condition in the minds of the jurors which shall exclude "the possibility of a doubt," whereas the law requires only a belief to that degree of moral certainty which excludes all reasonable doubt of the guilt of the accused. And this legal qualification of the doubt to be excluded implies the "possibility" of unreasonable doubt, which the requisite degree of belief need not exclude.

3. At the request of the district attorney, the court instructed the jury as follows: "The jury are instructed that all persons concerned in the commission of a crime, whether it be a felony or a misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission; and all persons counseling, advising or encourag-

ing children under the age of fourteen years, lunatics, or idiots to commit any crime, or who by fraud, contrivance, or force occasion the drunkenness of another for the purpose of causing him to commit any crime, or who by threats, menaces, command, or coercion compel another to commit any crime,—are principals in any crime so committed." Appellant contends that there is no evidence of the hypothetical facts upon which this instruction was based; that the propositions of law therein stated are merely abstract propositions, having no concrete connection with the evidence; and that they probably had the effect to confuse or mislead the jury to the prejudice of the defendant. It it true that there was no evidence substantially tending to prove any fact stated in either of the propositions of which the instruction is composed, except that defendant alone committed the crime of which he was convicted; and the only question to be decided is whether or not it affirmatively appears from the record that the jury could not have been misled or confused by the instruction to the prejudice of the defendant, for, while it is well settled that such an instruction is erroneous, and therefore presumably injurious, yet the presumption of injury may be rebutted and overcome by an affirmative showing or appearance upon the record that the error was harmless, and I think it so appears in this case, since the jury was imperatively instructed that "unless the jury are entirely satisfied from the evidence that the defendant, and no other person, killed the deceased, they should acquit the defendant." I think the judgment and order should be affirmed.

We concur: BELCHER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

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(106 Cal. 1)

## SOBERANES v. SOBERANES. (No. 15,462.)[1]

(Supreme Court of California. Jan. 28, 1895.)

REVIEW ON APPEAL—CANCELLATION OF DEED—CAPACITY.

1. Evidence that is really and substantially conflicting will not be considered upon appeal.

2. The evidence showed that the grantor was an illiterate woman, and was ignorant of business outside of her household and domestic affairs, but had good natural intellectual faculties, and that, after the execution of the deed in question, she had given to some of the witnesses her motive for making it. *Held*, that the grantor had sufficient capacity to execute a deed.

In bank. Appeal from superior court, Monterey county; James F. Breen, Judge.

Action brought by Benito Soberanes, guardian ad litem, to set aside deed given by plaintiff, Isabel Soberanes, to defendant, Abel Soberanes, on ground of plaintiff's mental incapacity to execute the deed. Tried by cour without a jury. Judgment for defendant. Plaintiff appeals. Affirmed.

D. M. Delmas (Morehouse & Tuttle, of counsel), for appellant. Myrick & Deering and Alexander & Daugherty, for respondent.

McFARLAND, J. This action was brought in the name of Isabel Soberanes by Benito Soberanes, who, for that purpose, procured himself to be appointed her guardian ad litem, to set aside a deed of conveyance of land executed by said Isabel to the defendant, Abel Soberanes, on the ground of her mental incapacity and undue influence of said defendant. Judgment went in the superior court for defendant, and this present appeal is from an order denying plaintiff's motion for a new trial. There was also an appeal by plaintiff from the judgment, which was determined here in favor of defendant. 97 Cal. 140, 31 Pac. 910. The findings are very full, and on the appeal from the judgment the case was considered in nearly all its aspects in the opinion delivered by Mr. Justice Paterson, the law applicable to it declared, and the conclusion reached that the findings supported the judgment. Appellant contends that, upon an appeal from an order denying a new trial, a former decision on an appeal from the judgment does not establish the law of the case; but, however that may be, we are satisfied that the views expressed in the opinion on the former appeal are correct. The only question, therefore, to be considered on this present appeal is the sufficiency of the evidence to sustain the findings.

To hold that the evidence does not warrant the findings would be to plainly violate the rule that we will not here weigh evidence that is really and substantially conflicting. That rule is, to some extent, founded on the fact that the trial judge has the opportunity of having the witnesses in person before him; and the advantage of seeing and observing, and to some extent at least knowing, the witnesses, is very important in such a case as the one at bar. Here was a family quarrel, and the members of the family were before the judge exhibiting their manners, tempers, interests, prejudices, and characters in forms which cannot be brought here in a printed transcript. We do not see anything in the evidence that would warrant us in disturbing the findings, and it would be a useless work to reproduce the evidence here. Indeed, the findings themselves show very fully what the evidence was; that is, no important or controlling fact can be deduced from the evidence that does not appear in the findings. In fact, the real question in the case is, and always has been, do the findings support the judgment? But that question was determined in the affirmative on the former appeal, in an elaborate opinion in which the whole case was fully stated and discussed; and, as we have said, we think it was correctly determined. The two main questions of fact were, was Mrs. Soberanes mentally capable of executing the deed? and was she fraudulently procured to do so by the undue influence of the respondent? And we cannot say that the evidence did not warrant the court in answering the former question in the affirmative and the latter in the negative. This is not a case where a woman had made a conveyance similar to the one here involved, and where afterwards she herself had asked to have it set aside on account of fraud or undue influence. Mrs. Soberanes did not bring this action; it was brought and has been prosecuted against her wishes. The execution of the conveyance to the defendant was in pursuance of an intention so to do long entertained by her, and she afterwards repeatedly expressed her satisfaction with it. Jose Soberanes, brother of her deceased husband, testified, among other things, as follows: "Sue said that when Francisco, her husband, died, the part that she would inherit of the property she would give to the son or sons who respected and took care of her. She repeated this at her house almost every time I went to visit her, both before and after her husband's death." This witness also testified that after the execution of the deed he asked her: "How is it that you have sold everything to Abel and given your other children nothing? What is your motive? And she answered that the reason she had for giving everything to Abel was because a long time before her intentions had been to give everything to Abel; that Abel was the one that always cared for her, and that Abel was her son, her father, her husband, and was everything in the world to her; and that her other children didn't do anything for her, and that she didn't give anything to her other children because they didn't respect her or attend her." About a month after the execution of the deed, when she was sick, her spiritual adviser remonstrated with her about giving nothing to the other children, and she said she would do the same thing "an hundred times." He testified that "in talking with the lady I told her, in substance, this: that before the judgment of God she ought to treat the children all equally, and what for you did so; you left everything to your son Abel, and not to your sons; and she gave me the reasons, and in consequence I found the reasons logic, and I considered as spiritual adviser I had no more to say." The evidence showed, as the court found, that she was an illiterate woman, and ignorant of business outside of her household and domestic affairs; but there was evidence that she had ordinarily good natural intellectual faculties, was of sound mind, and fully comprehended what she was doing when she executed the deed. Under these circumstances, we cannot interfere with the findings of the court below. Whether or not it was a proper and commendable thing for her to give all her property to one of her children is not a question for courts; that question was with her alone. The order denying a new trial is affirmed.

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[1] For opinion on rehearing, see 39 Pac. 527.

We concur: GAROUTTE, J.; HARRISON, J.; VAN FLEET, J.

(106 Cal. 73)

## PEOPLE v. SMITH. (No. 21,158.)

(Supreme Court of California. Feb. 6, 1895.)

MURDER — SUFFICIENCY OF EVIDENCE — EXPERT TESTIMONY—CAUTION TO JURY—EVIDENCE OF ANOTHER KILLING—INSTRUCTIONS.

1. In a trial for murder, it appeared that defendant, deceased, and another person lived in the same house. Two days after defendant left the house, the dead bodies of his partners were found in a river near by; deceased having been struck on the head, and the other having had the top of his head shot away. The door of the house was locked, and a piece of human skull and blood and brains were found on a platform in front thereof. There was a trail of blood from the house to the river, and also marks showing that a heavy body had been dragged to the river. There was evidence of an effort to hide the blood by covering it with dirt, and that the dirt was obtained with a tool with a protuberance on its back. In the house an ax was found, which appeared to have been washed since it was used. No bedding was in the house, though the men had beds. Defendant was arrested in another county three days after he went away, and with him were found a shotgun, a gold watch and chain, a shovel, six pairs of blankets, overalls, and half a dozen suits of clothes. The shovel had a protuberance similar to the tool with which the earth was dug, and there was a mark on it resembling blood. The overalls were smeared with human blood. Some of the clothing was too small for defendant, but might have fitted one of his partners. One key of the house was in defendant's pocket, the only other one being in the pocket of deceased. *Held* sufficient to warrant a conviction.

2. It was proper, as part of the res gestae, to admit in evidence the articles found in defendant's possession.

3. Defendant having testified that all the stuff he took when leaving the house was his own, and that all the goods of his associates were in the house when he left, it was proper, on cross-examination, to question him as to whether goods found with him did not belong to deceased.

4. Where, on a trial for murder, the expert testimony was that of a doctor, as to whether blood found on clothes was human blood, and his testimony was mainly as to the manner of determining the character of blood, and there was nothing to arouse suspicion as to his capacity or impartiality, it was not error to refuse to charge that expert evidence should be received with great caution.

5. In a trial for murder it appeared that deceased lived in the same house with defendant and another man, whose body, with the top of the head shot away, was found in the river along with that of deceased. Deceased was killed by a blow from an ax. *Held*, that evidence of the finding of blood stains, and portions of a human skull and brains, in front of the house, some distance from the river, was admissible to show that the person whose body was found with that of deceased could not have killed him.

Commissioners' decision. In bank. Appeal from superior court, Colusa county; E. A. Bridgford, Judge.

Fremont Smith was convicted of murder in the first degree, and appeals. Affirmed.

Edwin Gwinford, for appellant. Atty. Gen. Hart, for the People.

SEARLS, C. The defendant, Fremont Smith, was convicted of murder in the first degree, and sentenced to suffer the extreme penalty of the law, for the felonious killing of one Dolph, at the county of Colusa, state of California. The appeal is from the judgment and from an order denying defendant's motion for a new trial.

The first point relied upon by appellant for a reversal is that the evidence is insufficient to justify the verdict of the jury. The defendant was the owner of a span of horses, harness, and buckboard wagon. In the fall of 1893 he formed a partnership in the fishing business with two men, of whom but little seems to be known, except that they were fishermen, and that one was called "Charlie," and the other, "Dolph." The parties occupied a house in Moulton's pear orchard, adjoining the levee of the Sacramento river, county of Colusa. Charlie and Dolph did the fishing, and defendant, with his wagon, peddled the product about the surrounding country. On or about December 27, 1893, defendant left the house in which the parties had been living, and traveled with his team south. Two days after he left, the dead bodies of Charlie and Dolph were found in the Sacramento river, near the house in which they had lived. Charlie had been shot, a portion of his head being blown off, and Dolph had received fatal wounds upon and about the head, apparently from an ax or a similar instrument. The door of their house was found locked, and upon a platform in front of the house a piece of human skull was found, portions of brains, and blood. From near the house to the river there was a trail of blood, and evidence that a heavy body had been dragged, leaving a mark on the surface. The blood along the trail, and a pool of blood near the house, bore evidence of having been partially covered by earth being shoveled upon it. The small pits left in the ground, from which earth had been taken to cover the blood, showed that an instrument or tool had been used with a protuberance on the back of it. Upon opening the house, an ax was found within, which appeared as though washed since being used. No bedding was found, although the dead men were known to have had beds in the house. Defendant was arrested at Collinsville, Solano county, on or about December 30, 1893; and on his person and wagon a large number of articles were found, among which were a shotgun, a gold watch and chain, a silver or nickel watch, a broken-handled shovel, six pair of blankets, half a dozen suits of clothes, two pair of gum boots, overalls, etc. The shovel, upon being returned to the scene of the tragedy, and tested in the earth, was found to have a protuberance on its back making a similar mark to those found in the pits, and there was some evidence of a mark upon it resembling blood. The overalls were smeared with blood, which, upon being analyzed by Prof. Price, an analytical chemist, and examined microscopically, was pronounced to be human blood. A portion of the clothing was too small for defendant, but might have fitted one of the deceased men, who was much smaller. There were two keys to the house, one of which was found upon defendant, and the other in the pocket of the pants upon the body of Dolph.

The chain to the gold watch had been seen previously upon the person of Dolph. Upon a pair of old shoes found near the house, and admitted by defendant to be his, human blood was found. There were many other circumstances, of less importance, tending to point to defendant as the guilty person. Taken together, they are believed to be sufficient to uphold the verdict, and to stamp the defendant as the perpetrator of a most heinous murder.

Defendant asked the court to instruct the jury in the following language. The instruction was given as asked, except that portion included in brackets, which was refused, and such refusal is assigned as error: "When independent facts and circumstances are relied upon to identify the accused as the person committing the offense charged [and if together are regarded as sufficient basis for a presumption of his guilt to a moral certainty, yet] each material fact or circumstance necessary to complete such chain or series of independent facts, tending to establish the guilt, should be established to the same degree of certainty as the main fact which these independent circumstances, taken together, tend to establish,—that is, each essential and independent fact in the chain or series of facts relied upon to establish the main fact must be established to a moral certainty and beyond a reasonable doubt; and, if the jury should then have a reasonable doubt upon any single essential fact relied upon to complete the chain of circumstances, they cannot convict the defendant as long as they entertain such doubt." The instruction, as given, embodied the law relating to circumstantial evidence, and the necessity of the establishment of each independent fact essential to a conviction beyond a reasonable doubt, with great clearness. The sentence eliminated tended to involve and cloud the instruction, without rendering it more favorable to the defendant. If the sentence in brackets did not conflict with the other portions of the instruction, it at least detracted from their perspicuity, and tended to draw the minds of the jurors from a careful analysis of the independent facts which it was the object of the instruction to invoke. The case of People v. Phipps, 39 Cal. 333, cited by appellant, fails to support his contention. In that case the court below refused to instruct the jury that in case of a reasonable doubt they should acquit. This court, in reversing the case, laid down the rule precisely in accord with the instructions given in this case. In this action of the court no error was involved.

Two errors are assigned upon the action of the court in eliminating from instructions asked and given for defendant upon expert testimony. In the first the jury were instructed, in substance, that in considering expert testimony they should "weigh it with all the other evidence in the case, but are not bound to determine any fact in accordance with the opinion of such expert, if not convincing to the minds of the jury. The jury should weigh it carefully, and, if convincing, they have a right to act upon it, but they have a right to consider the conditions under which the testimony was given." The portion omitted was as follows: "The facts upon which the opinion of the expert is based, and caution should be exercised by the jury in accepting the opinion of an expert as a fact proven in the case." In the other instruction, which was quite favorable to defendant as given, the court struck out the words, "such evidence should therefore be received with great caution by the jury," and inserted in lieu thereof as follows. "After considering all these things, and any other circumstances in evidence, you are to give to such testimony such weight as you, in your judgment, think it entitled to," followed by the words, "If convincing, and carrying with it a belief in its truth, act upon it; if not, you have a right to reject it." Grigsby v. Clear Lake Water Co., 40 Cal. 396, is cited as authority for the contention that the court should have instructed the jury that "such evidence should be received with great caution by the jury." In the case cited the court, speaking through Temple, J., spoke of the propriety of having expert witnesses selected by the court, of the necessity of their being impartial as well as learned and skillful, and dwelt upon the fact that such witnesses are often but adroit advocates of the theory upon which the party calling them relies, etc. That all of this, and much more that might be said of expert testimony, in the abstract, is true, cannot be denied. It does not follow, however, that all that may be said by this court in discussing the facts or comparing different kinds of testimony, and determining their value, is properly question of law to be submitted to a jury. The reasons for a rule are not the rule itself. There is a wide difference of opinion to be found in the cases upon the question of the propriety of cautioning the jury against the dangers and uncertainty of expert testimony. Under our constitution (article 6, § 19), "judges shall not charge juries with respect to matters of fact, but may state the testimony and declare the law." It may be plausibly argued that to direct a jury to look with caution upon a class of testimony, which experience has demonstrated to be subject to uncertainties, is not, in effect, to instruct them as to matters of fact, but rather as cautionary to the mode of reaching such facts. Rogers, in his work on Expert Testimony, at chapter 11, has collected and cited a large number of cases bearing upon this point. We need not refer to them at length, for the reason that whatever the conclusion reached might be the case at bar is not one calling for the application of the caution contended for by appellant.

Prof. Price was called as a witness for the prosecution, to prove that blood found upon the clothing of defendant was that of a human being. There was nothing apparent in the character of the witness, his relation to the parties, or his manner of testifying, calculated to arouse suspicion as to his capacity, skill, or impartiality. His testimony was mainly as to facts, viz. the method resorted to for determining the character of the blood; the means by which it was separated, and the corpuscles or globules measured; their size and shape; the size and shape of the corpuscles found in the human family, in a variety of animals, fishes, etc.,—showing that the measurements indicated the corpuscles to come within the size found in the human family. This evidence was mainly demonstrative of well-established scientific facts, which, with proper appliances and instruments, and perhaps some skill, are open to all. Conceding, then, without deciding, that in a proper case the cautionary instruction contended for by appellant should be given, there was nothing here to call for its expression.

Objection was made to the introduction in evidence of certain clothing and a great variety of other articles found upon the person of defendant, and upon his wagon, at the time of his arrest. They were properly identified, and were properly admissible in evidence. There was certainly some evidence tending to show that a portion of them, at least, were the property of the murdered men, and, under the peculiar circumstances, constituted highly-damaging circumstances against the defendant. They were so intimately connected with the case as to form a part of the res gestae.

The fifth error assigned relates to the testimony admitted in regard to the killing of the man known as "Charlie." The witness Jamison was questioned, and his testimony admitted, showing blood stains upon the platform in front of the house, a portion of the skull and brains upon such platform, and one lobe of a human brain, containing shot, where it had fallen through a hole in the platform. As Charlie was shown to have had a large portion of his head blown off, these vestiges tended to point to the place of his death. The contention of appellant is that defendant being charged with the murder of Dolph, and not Charlie, it was error to admit testimony of the murder of another man. It is true that, in a criminal prosecution, it is not permissible to prove that the defendant has committed crimes other than that with which he is charged. People v. Gray, 66 Cal. 271, 5 Pac. 240; People v. Barnes, 48 Cal. 551; People v. Hartman, 62 Cal. 562; People v. McNutt, 64 Cal. 116, 28 Pac. 64. There are exceptions to the rule stated, which arise in cases where the intent or guilty knowledge is an element to be established, as in the case of uttering forged bills, etc., but they in no wise alter the general rule. Another exception to the rule is said to be that where two persons are killed at the same time and place, and apparently in the same transaction, or approximately so, evidence as to the circumstances of the killing of one is admissible on the trial under an indictment for the killing of the other. Brown v. Com., 76 Pa. St. 319; Com. v. Ferrigan, 44 Pa. St. 386; Fernandez v. State, 4 Tex. App. 419; Heath's Case, 1 Rob. (Va.) 735; People v. Foley, 64 Mich. 148, 31 N. W. 94; People v. Rogers, 71 Cal. 565, 12 Pac. 679; People v. McGilver, 67 Cal. 55, 7 Pac. 49; People v. Walters, 98 Cal. 141, 32 Pac. 864. We have no doubt of the soundness of the exception last mentioned. There was, however, in the present case, a more cogent reason for the introduction of the proffered testimony. Dolph and Charlie were living in the same house, in apparently an isolated place, and were left there by defendant alive and well, according to his statement. Under these circumstances, it might have appeared quite probable to the jury that Charlie, and not the defendant, it was who killed Dolph, and threw his body in the river. This was met by showing that Charlie, too, was killed, and his body also placed in the stream. Conceding this to be true, Charlie might still have killed his partner, and then committed suicide. This last theory was met by showing that Charlie was shot at the house, one-half of his head blown off, a part of his skull and one lobe of his brain being found there; thus showing that his death occurred at that point, and hence that he could not have gone to the river, where the body was found. In this point of view the evidence was highly important, and eminently proper. It should also be remarked that the evidence went to show that Charlie was killed, and not that defendant killed him.

Defendant offered himself as a witness, on his own behalf, and, on cross-examination, was interrogated in regard to the articles found in his possession when arrested at Collinsville. This was proper. On his direct examination he had testified explicitly that all the stuff he took upon leaving the house was his; that the bed was his, the tent, the gold and silver watches, etc., and that he was particular to take nothing that was not his own; and that, when he left, the boys' (Charlie's and Dolph's) things were in the house. In response to this it was legitimate cross-examination to ask him any questions tending to show that the articles, or some of them, belonged to Dolph, or to sift him as to where he got them. There is no error in the record calling for a reversal, and the judgment and order appealed from should be affirmed.

We concur: VANCLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed, and the cause remanded, with directions to the superior court to take the proceedings necessary for the enforcement of its judgment.

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106 Cal. 9

## BILLS v. SILVER KING MIN. CO. et al.

(No. 13,406.)

(Supreme Court of California. Jan. 28, 1895.)

CORPORATION — DEMAND FOR DIVIDEND — SUFFICIENCY—RUNNING OF LIMITATIONS—FRAUD.

1. An inquiry by an administratrix, at the offices of a corporation, as to whether all dividends on stock owned by decedent had been paid, which is answered affirmatively, is a sufficient demand for such dividends to put in operation the statute of limitations against a claim for all dividends then due decedent. Garoutte, J., dissenting.

2. An administratrix, in 1879, inquired at the office of a corporation in which decedent held stock, as to whether all dividends due decedent had been paid him, and was told that they had all been paid to A., decedent's agent. Without making further inquiry from the corporation or the agent, she and her successor administered the estate, and the estate was settled without reference to such dividends. An assignee of the next of kin's interest sued in 1886 to recover dividends due decedent, averring that he was not informed till 1885 that there were dividends due. *Held*, that the running of limitations was not suspended under Code Civ. Proc. § 338, subd. 4, providing that a cause of action for fraud shall not be deemed to have accrued till the discovery of the fraud by the aggrieved party. Garoutte, J., dissenting.

In bank. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Action by Albert V. Bills against the Silver King Mining Company and others to recover dividends. A demurrer to the complaint was sustained, and plaintiff appeals. Affirmed.

James L. Crittenden and James P. Bowie, for appellant. Garber, Boalt & Bishop and F. A. Berlin, for respondents.

McFARLAND, J. The court below sustained a demurrer to the complaint, and, plaintiff declining to further amend, judgment went for defendants. Plaintiff appealed.

The court below correctly sustained the demurrer, and gave judgment for defendants. The demurrer was upon various grounds,—among others, that the complaint does not state facts sufficient to constitute a cause of action, that the action is barred by several sections of the Code about the limitations of actions, and that the plaintiff is shown to have been guilty of laches. The material averments of the complaint, which are made upon information and belief, are these: The defendant the Silver King Mining Company is a corporation, and during the years 1877, 1878, and 1879 one Benjamin W. Reagan was the owner of a large portion of the shares of the capital stock of said corporation, which were represented by a certificate in due form, No. 72, issued to one J. W. Anderson, who was the agent of said Reagan for the purpose of holding said shares, and collecting the dividends thereon. It was averred that between the 24th day of October, 1877, and the 30th day of June, 1879, the said corporation regularly declared dividends on its stock, and that upon said dividends "there became and was due and payable from said defendant the Silver King Mining Company to said J. W. Anderson, trustee, as agent of said Benjamin W. Reagan, on the shares of stock represented by said certificate No. 72," the sum of $224,932.50. Said Reagan died intestate on the 26th day of July, 1879, and his widow, Mary A. Reagan, was duly appointed as administratrix. She entered upon said office of administratrix on the 10th of September, 1879, and continued to be such administratrix until the 7th of November, 1882, when she resigned, and one Joseph Nash was then duly appointed administrator, and remained such until the 6th of March, 1884, when there was a final decree of distribution of the estate, and a closing of the administration. It was averred that, at periods before and after the said decree, plaintiff herein, who married the said widow, took an assignment from all the heirs and distributees of their interest in the property of said estate. It is further alleged that said administratrix, Mary A. Reagan, on or about the 10th day of September, 1879, "applied to the defendant corporation and its officers in the city and county of San Francisco for information as to said shares of stock, and as to whether any dividend which had been declared thereon prior to the death of said Reagan, or any part of such dividend, was unpaid, and as to whether any money was due from said defendant corporation to said estate, or to her as administratrix, for or on account of any dividend or dividends declared by said defendant corporation prior to the death of said Benjamin W. Reagan," and that the said corporation and its officers, for the purpose of defrauding said administratrix at said time, stated to said administratrix "that all dividends due on said shares of stock had been paid to said J. W. Anderson, and that no money was due or owing or unpaid on account of * * * any dividends declared on said shares of stock during the lifetime of said Benjamin W. Reagan." It is further averred that said administratrix believed said statements as to said dividends. It does not appear that said administratrix, or her successor, the said Nash, or any other person interested in the estate, ever made any further effort to discover any facts with respect to said alleged dividends. No demand was made for an inspection of the books or papers of said corporation, and no effort was made to discover from said J. W. Anderson whether or not it was true that such dividends had been paid to him. Said dividends were not included in the inventory of said estate, as property thereof, and said estate was distributed and closed without any reference to said alleged dividends. No reason is shown why inquiries were not made about said dividends of the said Anderson, the only averment in that respect being simply that he was absent from the state at the time of the death of said Reagan. There is no averment of any conspiracy between said corporation and the defendant Anderson to conceal any facts about said dividends, and no misconduct whatever is charged against said Anderson. It is merely averred that Anderson refused to bring this suit, and that, therefore, he is made a party defendant; there being also an averment, "on belief," that he asserts some right over said dividends. It is further averred that on the 10th of January, 1885, the person who afterwards became the attorney of record of plaintiff in this present action informed plaintiff that said dividends had not been paid, and that this was the first information plaintiff had of that fact. This action was commenced, as appears by an amendment to the record, on the 27th day of April, 1886. The complaint contains nine counts, each on a separate dividend alleged to have been declared as aforesaid during the said period above mentioned; and judgment is demanded for the said sum of $224,932.50, with interest. It is further averred that on January 10, 1885, the said Mary A. Bills (formerly Mary A. Reagan) demanded of said corporation the payment to her of said dividends, and that on or about the 10th of January, 1885, the said plaintiff demanded of said corporation the payment to him of said dividends, and also made the same demand on the 6th of January, 1886, and that the defendant corporation wholly refused to comply with any of said demands.

The action was clearly barred by the statute of limitations. If the alleged liability sued on is to be considered as one founded upon an instrument in writing, it is barred by section 337 of the Code of Civil Procedure. If it be not an obligation founded upon an instrument in writing, it is barred by section 339 of said Code. And, under any view of the liability, it is barred by section 343. Appellant contends that an action cannot be maintained for a dividend declared by a corporation until a demand shall have been made for the same, and that, therefore, the statute of limitations did not commence to run in the case at bar until the time in 1885 or 1886 when the said demands last above stated were made. There is some conflict of authority upon the point whether such a dividend is a debt owing by the corporation to the holder of the shares, or mere property of the shareholder rightfully in possession of the corporation, and therefore a conflict as to whether a demand is necessary before suit. But in any event no particular form of demand is necessary; and therefore, waiving for the present the point above suggested, it is clear that what occurred between the administratrix and the corporation in 1879, as hereinbefore stated, amounted in law to a demand for the dividends. She was informed at that time by the corporation that there was no money due or owing or unpaid on account of said dividends; and it was a clear refusal of her request for the payment of said dividends, and a denial of any liability of the corporation thereon. The corporation then and there put itself in a state of hostility to the estate of said Reagan with respect to any alleged obligation in the matter of said dividends, and no further demand or refusal was necessary; and, if suit had been brought against it, want of demand would not have been a defense. Appellant contends, however, that he is entitled to relief on the ground of fraud, and that under subdivision 4 of section 338, Code Civ. Proc., the cause of action did not accrue until what he contends to be the discovery of the facts constituting the fraud in 1885. But waiving the question whether the averments of facts constituting the fraud in the complaint are specific enough, or whether such averments are sufficient if made only upon information and belief, still the statute of limitations cannot be avoided in a case where the facts are sufficient to put a person of ordinary intelligence and prudence on inquiry as to the truth. And in the case at bar the administratrix, Mary A. Reagan, was certainly guilty of the grossest laches in not making any effort to discover what she now alleges to be the real facts with respect to the dividends. She was informed that this large sum of money, amounting to nearly a quarter of a million, had been paid to Anderson, whom she avers to have been the agent of her deceased husband, yet she never made any inquiry of the said Anderson as to the truth of the statement that this large amount of money had been paid to him; and she went on to administer the estate, and, without any allusion to said large sum of money, she and her successor as administrator, and all interested in the estate, allowed it to be settled and finally distributed without any reference whatever to said dividends. Under these circumstances, the plaintiff in this case cannot be heard to say that his assignors were deceived for so many years by an alleged false statement of the defendant corporation, which, if false, could have been disproved so easily by the use of the slightest diligence. The foregoing views render it unnecessary to consider other points made by respondents,—as, for instance, that Anderson, being the holder of the certificate, could alone sue on it, and that the plaintiff is not the proper person to maintain an action upon said certificate; that plaintiff has not shown a proper deraignment of title from the heirs and distributees of the estate of Reagan; that the averments of fraud are not against the corporation, but simply against one or two of its officers; that, under any view the plaintiff should have sued Anderson, as trustee, and enjoined the corporation from paying dividends to him, and thus, through a decree in equity, have secured said dividends, etc. The judgment and order appealed from are affirmed.

We concur: HARRISON, J.; VAN FLEET, J.

BEATTY, C. J. I concur in the judgment of affirmance. The substance of the complaint is that between November, 1877, and October, 1878, the corporation defendant declared large dividends, of which $225,000, in round numbers, were payable to Reagan or his trustee, Anderson, in whose name Reagan's stock stood; that no part of these dividends has been paid; and that the plaintiff, Bills, has succeeded to the right to demand and sue for the same. Much of the voluminous matter contained in the complaint consists of a deraignment of plaintiff's title, and another large portion consists of excuses for the long delay in making demand and commencing the action. Excluding these matters, the cause of action is merely the refusal of the corporation to pay to its stockholder his share of declared dividends. This is a simple action at law, to which the defense of the statute of limitations is as clearly applicable as to any other, and it is barred in two years after it accrues. Code Civ. Proc. § 339. I concede that a preliminary demand of payment is necessary to perfect the right of action, and that if such demand is made within a reasonable time the statute does not begin to run until after demand and refusal to pay. But the stockholder cannot defeat the policy of the statute by unreasonable delay in making his demand. The policy of the statute is to prevent suits upon stale claims, and to exempt the debtor from the necessity of proving payment after the means of proof have been lost or impaired. If a creditor, in cases like this, could sue 10 or 20 or any number of years after his claim accrued, and maintain his action, upon the simple allegation that he had never demanded pay until at a date within the period of limitations, the debtor would never be secure, because the issue of payment could always be litigated by simply adding the other issue,—failure to demand. For this reason it has been held in a great number of instances, and is undoubtedly the law, that the creditor, in cases of this character, must make his demand within a reasonable time after the money is received to his use. As to what is a reasonable time is ordinarily determined by the analogy of the statutory periods of limitation. If the cause of action is barred by the lapse of two years after it becomes complete, then the demand must be made within two years after the right to make it accrues, or a valid excuse must be shown for the failure to make it within that time. Now in this case Mrs. Bills (then Mrs. Reagan, and administratrix of Reagan's estate) knew of these dividends as early as September, 1879, and inquired of the corporation, through some of its trustees, if they had been paid. She was informed that they had been paid to Anderson, the trustee. In other words, she was informed that Anderson had in his hands $225,000 belonging to the heirs of the estate of which she was administratrix; but she never made any inquiry of Anderson if he had the money, or the slightest effort to collect any part of it for the benefit of the heirs of Reagan, whose trustee she continued to be for three years after that date. Such a thing seems incredible, but, assuming the fact to be as it is stated, the neglect to make inquiry of Anderson was gross and inexcusable laches. It is not only contrary to every dictate of ordinary business prudence, but was a grave violation of her duties to the heirs and distributees of Reagan's estate. She had the means of knowledge in her possession, and the next step in the inquiry was plainly and unmistakably indicated. She had only to apply to Anderson in order to obtain certain and exact information as to what dividends he had received on account of her intestate, and her failure to make this inquiry is fatal to her claim that she was excused from making a demand for payment by her belief that the dividends had already been paid.

It ought not to be necessary to notice again the old argument or appeal so often advanced when the defense of the statute of limitations is interposed by demurrer, that it is a shame and an outrage to allow a defendant who admits his indebtedness to defeat a recovery by this technical defense. The bar of the statute is not a technical defense. The purpose of the law is not to prevent the recovery of money which is justly due, but to prevent the recovery of money that, according to all reasonable presumptions, has been paid, in an action commenced after the means of proving payment have been lost. It is a statute of repose and security, which can never operate unjustly against persons of ordinary prudence, and which undoubtedly prevents innumerable frauds. Its policy is sound and beneficent; but, even if it were not, it is the law, and is binding alike upon litigants and courts. And it is not true, in any substantial sense, that a demurrer on the ground of the statute of limitations admits an existing indebtedness as matter of fact. What the defendant really says by his plea is, "I admit I was indebted to you as you allege, but your pretense that I have not paid you is conclusively refuted by the other facts which you allege." In this case it appears that Anderson had express authority to collect these dividends, that all other dividends were actually paid, and that the corporation claims to have paid these, also, to Anderson. This is its real and meritorious defense, according to the allegations of the complaint; and it only demands, as every one may demand under the law, to be exempted from the necessity of proving after the lapse of years a fact which the law conclusively presumes.

I have not, in this brief statement of the grounds of my concurrence, attempted, and I cannot undertake, to review the authorities cited in the briefs; but I will notice one case upon which appellant specially relies,—the case of Schroeder v. Jahns, 27 Cal. 274. In that case, money was deposited by the plaintiff with defendant's intestate for safe-keeping, upon an express agreement that it should be kept by the depositary in trust for the depositor. As to the necessity of making a prompt demand of payment, there is a clear and manifest distinction between such cases, in which the very object of the transaction is the transfer of the custody of the money for the convenience of the parties during an indefinite period, and a case where the money is received for the mere purpose of paying it over to the person entitled upon his demand. This distinction is recognized in the carefully considered case of Palmer v. Palmer, 36 Mich. 487. These are, in brief, the grounds upon which I concur in the judgment of affirmance.

GAROUTTE, J. I dissent. A demurrer was sustained to plaintiff's complaint upon the ground that his cause of action was barred by the statute of limitations, and upon refusal to amend the action was dismissed, and thereupon this appeal was taken. The complaint contains the following allegation: "Plaintiff further complaining, avers and alleges upon information and belief that the said Silver King Mining Company, with the intent, object, purpose, and design to defraud the said Mary A. Reagan, the heirs of said Benjamin W. Reagan, said estate of said Benjamin W. Reagan, and said administratrix out of said dividend, and out of the moneys payable on account of said dividend, held by it in trust for said heirs and administratrix, and to deceive and impose upon said Mary A. Bills, as said administratrix and individually, and to fraudulently conceal the fact that said dividend had not been paid, so as to prevent an action or suit being brought therefor by said administratrix, and to make said Mary A. Bills, as said administratrix and individually, believe that such dividend had been paid, did on or about the 10th day of September, 1875, and thereafter, and at divers other times, at and in the said city and county of San Francisco, fraudulently state, declare, and represent to said Mary A. Bills and to said administratrix that said dividend on said 49,985 shares of stock had been paid to said John W. Anderson, and that all dividends due on said 49,985 shares of stock had been paid to said J. W. Anderson, and that no money was due or owing or unpaid on account of said dividend, or on account of, or on any dividends that had been declared on, said 49,985 shares of stock during the lifetime of said Benjamin A. Reagan; that said Mary A. Bills, as said administratrix, at and before the time when said statements, declarations, and representations were made to her, applied to the defendant corporation and its officers in the city and county of San Francisco for information as to said 49,985 shares of stock, and as to whether any dividend which had been declared thereon prior to the death of said Reagan, or any part of such dividend, was unpaid, and as to whether any money was due from said defendant corporation to said estate, or to her as such administratrix, for or on account of any dividend or dividends declared by said defendant corporation prior to the death of said Benjamin W. Reagan, and that such statements, declarations, and representations of the defendant corporation were made at the times of said inquiries, and when such information was being sought, and in reply to such inquiries by said administratrix that said declarations, representations, and statements to said administratrix were made for and in behalf of said defendant corporation by certain of its officers and directors, namely, * * *. That the said administratrix, and said Mary A. Bills, was at the times of the making of said false representations, statements, and declarations as aforesaid, and was known to said corporation and said James M. Barney and B. A. Barney to be, ignorant as to the fact whether said dividends had been paid or not, and that she believed said statements, representations, and declarations to be true, and relied upon the same as true, and had no suspicion that any of the same was or were untrue or false, and was imposed upon and deceived by said false and fraudulent statements, representations, and declarations, and was deceived and misled and defrauded thereby. That she, as such administratrix, and individually, continued to believe and rely upon said statements, representations, and declarations as true, and to act upon the same as true, until the discovery of the fact, as hereinafter alleged. * * * That said false statements, representations, and declarations were made to said Mary A. Bills, as aforesaid, with the fraudulent intent, object, purpose, and design to conceal the existence of the cause of action against said defendant corporation for said dividends until a sufficient time should elapse and expire to enable the defendant corporation to interpose a plea of the statute of limitations as a bar to any action to recover said dividends." The complaint further alleges that upon the 10th day of January, 1885, plaintiff discovered the falsity of these statements, and thereupon and upon that day made a demand for a payment of the dividends.

The foregoing facts are sufficient for the purposes before us. They form an interesting recital; and if, under the circumstances here detailed, the appellant can be deprived of his money, and the respondent be allowed to retain it as its own, there is something wrong in the law. It was held by the trial court that this action was barred by the statute of limitations, and this ruling is supported by counsel upon the grounds (1) that no demand for declared dividends is necessary to set the statute of limitations in motion; and (2) that, if such demand is necessary, then the foregoing facts set out in paragraph A constitute a demand on the part of appellant for these dividends, and a refusal upon the part of respondent to pay them, and by reason thereof the statute of limitations was set in motion, and the action fully barred before the filing of the complaint herein.

I cannot assent to either of these propositions. It is a well-established principle of law that a demand for declared dividends is necessary by the owner of stock in a corporation before a right of action exists. It can hardly be claimed that there is any authority to the contrary. It was said in State v. Baltimore & O. R. Co., 6 Gill, 387: "We are clearly of opinion that such demand was necessary before a right of action would exist on the part of the plaintiff to recover this dividend. The established principle that suits could be instituted without demand for dividends declared by banking and other corporations would greatly impair the value of stock held therein, by rendering it necessary to employ agents to hunt up stockholders in various parts of the state or Union, in order to prevent a multiplicity of suits, or, in the failure to do this, suits—and, of consequence, costs—might be multiplied to an alarming extent. Such a doctrine has certainly never been supposed to exist. Dividends are paid when called for, and we apprehend that limitations would not run until demand was made." See, also, Jones v. Railroad Co., 57 N. Y. 205; Railroad Co. v. Corwell, 28 Pa. St. 339; Scott v. Banking Co., 52 Barb. 69; Hagar v. Bank, 63 Me. 512. Upon sound reason, such should be the law. If it were otherwise, the corporation would be at the mercy of the stockholders; for, upon the declaration of a dividend, causes of action innumerable would be outstanding against the corporation. If the law were otherwise, the stockholders would be largely at the mercy of the corporation, for dividends might be declared, and the statute of limitations bar an action for a recovery, before the stockholders were even aware that such dividends had been declared.

The foregoing facts stated in paragraph A do not, in law, amount to a demand and refusal to pay dividends. At the time or times there specified, the administratrix, Mary A. Reagan, demanded nothing, and the corporation refused nothing. The occurrence was simply this: The administratrix, knowing that her late husband was a large owner of stock in the corporation, inquired at the office if any dividends accruing upon this stock prior to his death had not been drawn; and she was then informed that all such dividends had been paid to one Anderson, the agent of her husband, and that the corporation had no dividends in its possession belonging to the estate. To resolve the inquiry of the administratrix and the reply of the corporation to that inquiry into a demand and refusal would require a technical, close, and even strained construction of the language; and such a construction is not favored in law, in order that fraud and deception may not thrive. The complaint alleges that these statements of the corporation were false, and were made knowingly and intentionally for the express purpose of defrauding the administratrix out of this property by concealing from her her cause of action until it was barred by the statute of limitations. It will not be allowed to do these iniquitous things, and then plead them in bar of plaintiff's cause of action, if any reasonable construction can be given the language and the acts of these parties when they met, which will defeat it. Misrepresentation and falsehood, practiced for the very purpose of securing the unjust results which follow the decision of the trial court, if upheld and practiced for the very purpose of securing those results in the identical way they are proposed to be secured, do not commend themselves as matters for favorable consideration. It would be a gross wrong to deny plaintiff's right of action by construing this language into a demand and refusal, when by the language the administratrix intended to make no demand, and at the same time did not understand the language of the corporation to amount to a refusal. I find no case in the law books holding that similar acts and facts constitute demand and refusal. Conceding that no formal demand is necessary, still its equivalent in acts or language must be present. If a stockholder had called at the office of the corporation, and inquired if a dividend had been declared, and the corporation had falsely replied in the negative, a parallel case to the one at bar would be presented; and, according to the corporation's contention, the statute would begin to run from such demand and refusal. This cannot be the law. While the corporation, by its answer to the administratrix's inquiries, may have secretly placed itself in a position of hostility to her interests, yet that is not the character of hostility contemplated by the statute of limitations. The corporation's secret hostility to her interests amounts to nothing. It was full of that same secret hostility before she ever came to it for information. It follows that, if this hostility caused the statute to run, then the statute was already in motion prior to the time she made the inquiries. As far as the statute of limitations is concerned, secret hostility is no hostility; and outwardly the position of the corporation towards the administratrix bore every semblance of the greatest honesty, kindest intentions, and the friendliest feelings. This being the position of the corporation towards Mrs. Reagan, there was no hostility of interest between them, and the statute of limitations did not begin to run from the date of these conversations. If Mrs. Reagan had treated these conversations as constituting a demand and refusal, and brought an action for the dividends against the corporation, relying upon such demand and refusal, the corporation's conduct would have been such that very probably, upon a plea by it of no demand and refusal, the court would have held against it. But the converse of the proposition, as presented in this case, by no means follows, for the corporation, by its conduct, was tarnished with deceit and dishonesty, and no such taint was upon her.

It is further contended in the concurring opinion of the chief justice that the demand made in January, 1885, came too late; that, when a demand is necessary to set the statute of limitations in motion, it must be made within a reasonable time after the right to make it accrues; that this reasonable time must not exceed the period prescribed by statute for the limitation of the action, if no demand were necessary; and that if such demand is not made the action is barred, either because of the failure to make it, or that, owing to the lapse of time, it is presumed to have been made. The general principle here declared is somewhat elementary, and an abundance of authority is presented by counsel to support it. But, like other principles of law, there are exceptions to it; and, while broad in its terms, it is not broad enough to cover all cases, and this case comes within the exception. This exception is based upon the principle that the conduct of the defendant may be such as to excuse a plaintiff from sooner making a demand, and the soundness of this exception, as a legal principle, is as fully recognized by the courts as is the general rule itself. In Codman v. Rogers, 10 Pick. 112 (a leading case relied upon by respondents), the court said: "The question is whether a dormant claim may be revived by a demand after seventeen years, during the whole or nearly the whole of which time a demand might have been made, but was not, and no reason is assigned for the omission." And again: "What is to be considered a reasonable time for this purpose does not appear to be settled by any precise rule. It must depend upon circumstances. If no cause for delay can be shown, it would seem reasonable to require the demand to be made within the time limited by the statute for bringing the action." In Wright v. Paine, 62 Ala. 340, another case relied upon by respondents, the court said: "If there be any facts or circumstances which can excuse the long delay of the appellant in commencing suit and in making demand for the money, the record does not disclose them; * * * and it would be violative of the policy of the statute of limitations, and defeat the purposes it was intended to accomplish, if, without an explanation of the long delay in making demand, and the unwarrantable delay in bringing suit after the fruitless demand, until Winston was dead, the statute was held not a bar." It is thus apparent from the foregoing cases that a plaintiff may be excused from not making an earlier demand, and, if excuses are ever to be accepted by courts, then this plaintiff is excused. No case has been cited holding an action barred upon a state of facts in any way analogous to that here disclosed. All the cases assume that the plaintiff was aware that he had a claim which would ripen into a cause of action upon making a demand, and charge him with laches in not making the demand within a reasonable time. But here plaintiff could not be guilty of such laches, for she was not aware that she had any claim upon which to form a basis for a demand. More than that, she was falsely and mercenarily informed by defendant that she had no claim against it, and for this reason alone she was lulled into a quiescent state of ignorance which prevented a discovery. Whatever diligence she may have been required by the law to exercise in the discovery of a cause of action, as against third parties, it does not become the defendant, who by its fraud and misrepresentation caused the delay in making the demand, to now rely upon its bad conduct for the purpose of defeating rights based upon such demand. Much that we have said upon these lines in a previous portion of this opinion bears directly upon the question here presented. The fact that the present action is not one for relief founded upon the fraud of the corporation is not material to the case. Neither is it necessary to hold that fraud practiced by a debtor upon his creditor, whereby the creditor fails to bring his action within the time allowed, is sufficient to defeat a plea of the statute of limitations made by the debtor. The question here is not one of laches in discovering the existence of an indebtedness, but of laches in making a demand for the payment of such indebtedness. Every authority cited by respondents' counsel concedes full knowledge upon the part of the creditor of his rights during the entire period covered by the delay in making the demand, but this case presents no such state of facts. The concurring opinion goes against the appellant upon the ground that Mrs. Reagan was negligent in discovering her cause of action, but I think that question is foreign to the case, and involves an entirely different principle. Again, if Mrs. Reagan had made no inquiries whatever of the corporation as to dividends, but had assumed them to have been paid to Reagan or his agent, it appears she would now have a cause of action; but, strange as it may seem, the diligence that she used is so effectively arrayed against her as to cause her own downfall. Anderson was in no sense her trustee. He was the trustee and agent of her husband, and a payment to him was a payment to her husband, and she had a right to so consider it; for there is nothing whatever in the case to indicate but that she was perfectly justified in assuming that, if the money in fact had been paid to Anderson, it had been disbursed in proper and legitimate channels. If Reagan had not been insane, and Anderson had been a myth, and the corporation had stated to her at the time of her inquiries that these moneys had been paid to her husband prior to his death, as an ordinary, unsuspicious, trustful woman she would have believed the statement, and relied upon it; and she would have had a right to believe it and rely upon it. The fact that she was told the money was paid to Anderson, his trustee, does not alter the case.

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(4 Cal. Unrep. 940)

## BURLING et al. v. NEWLANDS et al. (No. 14,592.)[1]

(Supreme Court of California. Jan. 5, 1895.)

CHARGING TRUST ESTATE—LIMITATIONS—LACHES.

1. For the convenience of certain lenders and borrowers of money, who did their business through a bank, a firm of stockbrokers were in the habit of giving their promissory notes, and securing themselves by bank stock and other collaterals delivered to them by the president of the bank. Subsequently the bank failed, and the president conveyed all his property to a trustee, to be applied by him to "such purposes and uses as he may deem best for our joint and several interests." By fraudulent representations that the stock and collateral held by the stockbrokers were worthless, the trustee induced them to pay to him $200,000, in consideration of his promise to pay all their outstanding notes, which promise he performed. *Held*, that the fraudulent representations by the trustee gave the stockbrokers only a personal right of action against him, and that they could not charge the trust estate in his hands for such sum, since they were not creditors of the bank president, who created the trust.

2. A cause of action for fraud is not taken out of the operation of the statute of limitations by Code Civ. Proc. § 338, subd. 4, which provides that the statute does not begin to run until discovery of the fraud, where it appears that the slightest examination of the public records would have put plaintiffs in possession of the facts, and that they acquired their information on which the action was based by inquiry of their friends and acquaintances,—a course open to them before the statute had run.

3. Equity will not entertain a cause of action seeking relief from an alleged fraud, where complainants could have informed themselves of the facts by the exercise of reasonable diligence, but delayed bringing suit for over 10 years, and until after the death of all the participants in the transactions.

In bank. Appeal from superior court, city and county of San Francisco; Walter H. Levy, Judge.

Action by Leonide H. Burling and others against Frank G. Newlands and Frederick

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[1] Rehearing granted.

W. Sharon to compel defendants to account as successors of William Sharon, trustee of the property of William C. Ralston, deceased. From a judgment sustaining a demurrer to the complaint, plaintiffs appeal. Affirmed.

Joseph M. Nougues, for appellants. Wm. F. Herrin, J. M. Allen, and H. L. Gear, for respondents.

McFARLAND, J. This action was brought to obtain an accounting of the alleged trust estate and property of William C. Ralston, deceased, which is averred to have been conveyed by him in his lifetime to William Sharon, also now deceased, and by said Sharon to the defendants herein, and for a decree that there be paid to plaintiffs, out of said property, the sum of $200,000 and interest. The plaintiffs are the executrix and executor of William Burling, deceased, and the assignee in insolvency of James W. Burling, an insolvent; and the defendants are Frank G. Newlands and Frederick W. Sharon, to whom the said William Sharon during his lifetime conveyed all his property in trust. Defendants demurred to the complaint on general and on several special grounds. Their demurrer was sustained by the court below, and judgment was rendered for defendants; and plaintiffs appeal from the judgment.

The amended complaint occupies 426 pages of the printed transcript; and we will not undertake to give here even a synopsis of such a lengthy document. We will state only such facts as will present a distinct view of the main epochs in the long historical narrative. William C. Ralston was cashier of the Bank of California from 1868 to 1873, and its president from 1873 to the time of his death, which occurred August 27, 1875. From 1869 to 1872 he employed William Burling, a stockbroker, to negotiate loans; Burling giving his individual notes for the loans, and Ralston furnishing shares of the stock of the bank, and other collaterals, as securities for the money borrowed. In 1872, William Burling formed a partnership with James W. Burling under the firm name of Burling & Bro.; and thereafter, until Ralston's death, loans were negotiated in like manner through the agency of said firm. On August 26, 1875, the said bank failed; and on the next day Ralston died by drowning. At that time there were outstanding notes of said William Burling for loans negotiated as aforesaid in the amount of about $155,000; and there were notes of Burling & Bro. given for loans so negotiated in the amount of about $1,613,000. Before his death, and on the day of his death, Ralston executed a conveyance of all his property to said William Sharon, "in trust to collect and receive the rents, issues, incomes, and profits thereof, and every part thereof, and to sell and dispose of the same on such terms and prices as he deems best, and to apply the same and the proceeds thereof, and of all the property hereby conveyed, to such purposes and uses as the said William Sharon may, in his judgment, deem best for our joint and several interests." On December 24, 1875, William Burling and Burling & Bro. made a contract with said William Sharon, under which they paid to Sharon $200,000, and assigned to him all claims against the estate of said Ralston upon said outstanding notes; and said Sharon, by said contract, undertook to assume all indebtedness upon said notes, and relieve said Burling and Burling & Bro. from all liability arising upon the same, which said undertaking by said Sharon he fully performed. The said Burlings and the said Sharon had been negotiating about said contract nearly four months before its consummation. It is averred that the Burlings were induced to pay said $200,000 to said William Sharon by representations of the latter to them that the shares of bank stock held by them as security for their said notes were illegally overissued stock, and worthless; that the other collaterals held by them were owned by strangers to these transactions, and had been surreptitiously taken from the bank; that Ralston's estate was insolvent; that they (the Burlings) would be holden for the whole amount of said outstanding notes without recourse to any security; that D. O. Mills and all the other officers and employés of said bank confirmed the truth of said representations; and that they, having no sufficient information on the subject, relied on said representations of Sharon, and were thus led to enter into said contract and pay said $200,000. And it is further averred that all these representations were false, and were by said Sharon "willfully, designedly, and fraudulently made for the purpose of cheating and defrauding them, said Burlings, as aforesaid, out of said sum of $200,000." A certain proportionate part of the $200,000 was paid by said William Burling, and the balance by the said Burling & Bro. William Burling died on July 15, 1877; and the partnership was wound up and settled in January, 1879. In August, 1877, the plaintiffs herein, Leonide H. Burling and Benjamin Burling, were appointed administratrix and administrator of said William Burling, deceased; and they pray that there be paid to them the proportionate part of said $200,000 and interest, which they allege to be due to his estate. In June, 1882, the said James W. Burling, formerly the other member of the said firm of Burling & Bro., became an insolvent debtor; and in June, 1886, the plaintiff Benjamin Burling was appointed his assignee in insolvency; and he prays that there be paid to him, as such assignee, the proportionate part of said $200,000 and interest which he avers to be due the estate of said insolvent. The said William Sharon, on November 4, 1885, by deed of trust, conveyed in fee all his property, of every kind, to the defendants Newlands and Frederick W. Sharon; and on November 15, 1885, the said William Sharon died. The purpose of this action is to compel the defendants, as trustees under said deed to them from said William Sharon, to account for all real and personal property, the title to which "the said Sharon received under and by virtue of said deed of trust made on the 27th day of August, A. D. 1875, by said W. C. Ralston to him, said William Sharon," and to have said property, "of the estate of said W. C. Ralston," applied to the payment of said $200,000 and interest. The action was commenced on the 25th day of October, 1886, which was about 11 months after the death of said William Sharon, and 11 years after the transaction upon which the suit is founded.

Respondents present various reasons why the judgment of the court below should be sustained, and appellants attack it from various standpoints; but, under the views which we take of the case, it is not necessary to discuss all the propositions argued by the respective counsel. In our opinion, if, upon the facts alleged, the Burlings had any cause of action at all, their remedy was a personal action against William Sharon to recover damages for deceit in procuring their payment to him of the $200,000 in the manner as alleged, or upon an assumpsit to refund the money, implied from a rescission of the contract under which it was paid, for fraud by Sharon in obtaining it. But this is not such an action. The nature of the action is stated in the first sentence of the brief of appellants, as follows: "This action is brought to obtain an accounting of the trust estate and property of the late William C. Ralston, which was conveyed to the late William Sharon in trust, and if, upon such accounting, it be ascertained that the estate of said Ralston was solvent, that there be repaid to the plaintiffs the sum of two hundred thousand ($200,000) dollars and interest thereon, being moneys paid on account of liabilities incurred for said William C. Ralston." No claim is made against the personal representatives of William Sharon, deceased, or against his estate.

The theory of the complaint is that the conveyance from Ralston to William Sharon was a deed of trust for the benefit of Ralston's creditors; that the Burlings were beneficiaries under such deed of trust; and that, as such beneficiaries, they can charge the present respondents F. W. Sharon and Newlands for the repayment of said $200,000 and interest, to the extent of the value of any property which they may have belonging to said alleged Ralston trust estate. Now, in the first place, it is doubtful if said conveyance created a trust estate of which Ralston's creditors were the beneficiaries. It is not so expressed on the face of the instrument. But, assuming that there was such a trust estate, it does not appear that at the time of its creation the Burlings were creditors of Ralston. It appears that for the convenience of certain lenders and borrowers of money who did their business mainly through the Bank of California, and who were frequently unknown to the Burlings, they (the Burlings) were in the habit of giving their promissory notes, and securing themselves by taking bank stock and other collaterals. Why the Burlings did this, or what, if any, advantage accrued to them therefrom, does not appear. During the period of these transactions Ralston was either the cashier or president of the bank, and appears to have been its principal business manager. Whether or not his request to the Burlings to make these notes upon the securities furnished them was made in his individual capacity, or as an officer of the bank, does not clearly appear. It certainly does not appear from the facts stated that he entered into any personal obligation to the Burlings on account of said notes, or made any individual promise with respect to them. It is expressly alleged in the complaint that at the times of these transactions "said Wm. C. Ralston did not give * * * to the said Wm. Burling, or to the said firm of Burling & Brother, any evidence of indebtedness from him, said W. C. Ralston." Facts are not averred showing that the Burlings were sureties for Ralston; neither is it averred that the said collateral securities were not sufficient to protect said Burlings. No charge of misconduct is made against Ralston; but, on the contrary, it is averred that all statements of William Sharon about the unlawful acts of Ralston, his insolvency, and the worthlessness of said securities, were false. Moreover, the Burlings assigned to William Sharon all claims arising upon said notes against the estate of Ralston. Therefore, whatever construction may be given to the said deed from Ralston to William Sharon, the appellants in this action have no present claim as beneficiaries thereunder. And it is very clear that they are not such beneficiaries with respect to the very thing sued for in this action, viz. the $200,000, which it is averred William Sharon fraudulently induced the Burlings to pay him four months after the death of Ralston and the execution of said deed. It is averred that Sharon used the said $200,000 in paying off certain debts of Ralston, but we do not see that any importance attaches to that averment. It could make no difference whether he so used that particular money, or any other money which he may have had. From every point of view the case presents the same aspect; namely, that if any wrong was done the Burlings, under the facts alleged, it was a wrong done by William Sharon personally, and that the only remedy was a personal action against the said Sharon.

Moreover, we think that the action is barred by the statute of limitations, and is stale from laches. Of course, the statutory period has run two or three times unless the case is saved by the clause (subdivision 4) of section 338, Code Civ. Proc., which provides that in an action based upon alleged fraud the statute does not commence to run until the discovery of the facts constituting the fraud.

This action is founded upon the contract between the Burlings and William Sharon, made on December 24, 1875, which was an executed contract; and the statute commenced to run on that day, except so far as its running was delayed by a want of knowledge of the fraud by which said contract is alleged to have been procured. But "the means of knowledge are the same thing, in effect, as knowledge itself" (Wood v. Carpenter, 101 U. S. 143); and one who makes a charge of fraud for the first time, many years after its alleged perpetration, must show that within a reasonable time he has used due diligence to discover it, has followed up circumstances which would have put a prudent man upon inquiry, and has not slept upon his rights until the lapse of time and the death of parties charged with the fraud have destroyed the means of a full, fair, and satisfactory investigation in a court of justice. Moreover, in such a case the complaint must state facts from which it will appear to the court that ordinary prudence could not have discovered the fraud within the statutory period. "The circumstances of the discovery must be fully stated and proved, and the delay which has occurred must be shown to be consistent with the requisite diligence." Wood v. Carpenter, supra. Statutes of limitation are in great part founded upon the probability that during the course of many years witnesses will die, and recollections of events long past will become indistinct in the memories of the living. In the case at bar sufficient facts are not stated to show that the alleged fraud could not, with requisite diligence, have been sooner discovered. There was great opportunity for discovering the fraud, if any such existed, before the contract between the Burlings and William Sharon was made. That contract was not made in a hurry. Sharon's representations, alleged now to have been false, were not immediately accepted as true and promptly acted upon. Negotiations were continued for four months. Ralston, as appears from the complaint, was widely known in business circles, and had been accredited with great wealth. It is averred in the complaint that he was perfectly solvent, and that he had real and personal property, which passed to Sharon under the deed, of the aggregate value of $9,000,000. It is averred, also, that he had real property of the value of $6,000,000. If that was the fact, and the Burlings really had a legal claim against Ralston, it is almost beyond comprehension why they did not discover it, if not before the $200,000 contract, at least before the death of William Burling, or before the lapse of the statutory period of limitation. The slightest examination of public records would have put them on the trail of the fact. It does not appear that they demanded an examination of the books, papers, etc., of Ralston. But no discovery was made, and it does not appear that any reasonable efforts were made for a discovery, of the alleged facts upon which this action rests until 10 years after the date of the contract, and until after the death of said William Sharon. And it is averred that then "the means by which they obtained any information was by inquiring among their friends and acquaintances whether they (said persons) had any information relating to the dealings of said Sharon with said trust estate, and whether they had any information regarding the property which was conveyed by said Ralston to said Sharon in trust, as aforesaid." But such means were always within the power of appellants and the Burlings; and there are no sufficient facts alleged to show that the delay is "consistent with the required diligence." See Ang. Lim. §§ 187, 190; Hecht v. Slaney, 72 Cal. 363, 14 Pac. 88; Moore v. Boyd, 74 Cal. 167, 15 Pac. 670.

Moreover, apart from the question of strict statutory limitation, the claim of appellants is too stale to be enforced in a court of equity. "No rule of law is better settled than that a court of equity will not aid a party whose application is destitute of conscience, good faith, and reasonable diligence, but will discourage stale demands, for the peace of society, by refusing to interfere when there has been gross laches in prosecuting rights, or where long acquiescence in the assertion of adverse rights has accrued. The rule is peculiarly applicable where the difficulty of doing entire justice arises through the death of the principal participants in the transactions complained of, or of the witness or witnesses, or by reason of the original transaction having become so obscured by time as to render the ascertainment of the exact facts impossible." Hammond v. Hopkins, 143 U. S. 250, 12 Sup. Ct. 418. In speaking of this rule, this court, in Bell v. Hudson, 73 Cal. 288, 14 Pac. 791, said: "It is a material circumstance that the claim was not made until after the death of those who could have explained the transaction." In the case at bar, William Burling and William Sharon, "the principal participants in the transactions complained of," were both dead before the commencement of the action. It is quite apparent that no court could do "entire justice" in the premises without the testimony of William Sharon. Of course, if the suit had been commenced within a reasonable time, and William Sharon had died before his testimony could have been taken, the want of his testimony would simply have been one of those natural misfortunes which sometimes come to litigants. But William Sharon lived for 10 years after the transaction complained of. William Burling died two years after the transaction, fully satisfied, as is averred, that it was a fair one. James W. Burling did business for several years afterwards, and, until he became an insolvent, was also satisfied with the fairness of the transaction. There was perfect acquiescence by all parties for 10 years, and while Sharon lived. It was not until he died, and his testimony was forever beyond human reach, that the claim of appellants grew up and took the form of a suit against his successors. It is a claim which equity should not now entertain.

Under the foregoing views, we need not discuss the many other points made by respondents in support of the judgment. Judgment affirmed.

We concur: GAROUTTE, J.; VAN FLEET, J.

HARRISON and FITZGERALD, JJ. We concur in the judgment, upon the grounds last presented in the opinion of Mr. Justice McFARLAND.

(106 Cal. 32)

## PEOPLE v. CLARK. (No. 21,164.)[1]

(Supreme Court of California. Jan. 29, 1895.)

PROSECUTION FOR ROBBERY—EVIDENCE—IDENTITY OF DEFENDANT—HARMLESS ERROR.

1. The refusal of the court to certify, on the stenographer's transcript of certain oral instructions, that they were given, so as to make them a part of the record, is not ground for reversal, where such instructions are made a part of the record by bill of exceptions.

2. Where the prosecuting witness at the time of the robbery identified defendant as a person with whom he had had a conversation in the presence of a third person, the substance of the conversation is admissible to enable such third person to identify defendant as the person with whom the conversation was had.

3. Where, in such a case, the prosecuting witness positively identified defendant as one of the active participants in the robbery, the fact that the witness was allowed to state defendant's name, as given him subsequently by the person in whose presence the conversation was had, is not ground for reversal.

4. Where, in answer to the question, "Could you understand from the way defendants moved their revolvers and pointed their hands that they wanted you to leave the room?" the witness replied, "Yes, sir; they pointed their revolvers at us, and pointed towards the door,"—any error in the form of the question was immaterial, as the answer gave the facts on which the witness' "understanding" was based.

5. The state may show why a person who was present at a robbery had gone away, as otherwise he should have been called as a witness.

6. On a prosecution for robbery, evidence that other white persons were aware that the persons robbed, who were Chinamen, owed a large amount for rent which was past due, is inadmissible against defendant, such knowledge not being brought home to him, though defendant claimed that such fact was only known to Chinamen, and that the whole story of the robbery was fabricated, as an excuse for the nonpayment of the rent.

7. Error in admitting such evidence is not ground for reversal, where it appears that the state acknowledged that such information was not communicated to defendant, and the evidence, unless defendant's alibi was believed, clearly showed that he was guilty.

8. When defendant, in accounting, as a witness, for his time on the night of the robbery, stated that he went to a certain part of the town, he could be properly cross-examined, as to what he and his companion were doing there.

9. On a prosecution for robbery, the fact that the property alleged to have been stolen did not in its entirety belong to the person named in the indictment as owner is not such a variance as to prevent a conviction.

10. A sentence of imprisonment for 20 years for robbing Chinamen, in their house and at night, of $175, will not be disturbed as unusual.

Commissioners' decision. In bank.

Appeal from superior court, Tulare county Wheaton A. Gray, Judge.

R. P. Clark was convicted of robbery, and appeals. Affirmed.

Lamberson & Middlecoff and C. L. Russell for appellant. The Attorney General, for the People.

HAYNES, C. Appellant was convicted of the crime of robbery, and was sentenced to imprisonment in the state's prison for the term of 20 years; and this appeal is from the judgment, and from an order denying defendant's motion for a new trial, and also from an order made after judgment. This latter order will be first noticed.

Several instructions were requested to be given to the jury by the prosecution and the defendant, respectively, upon each of which the action of the court, whether given refused, or modified, was duly indorsed. In addition, the court gave several oral instructions of its own motion, and these were taken down by the reporter, and afterwards written out, but the fact that they were given was not certified thereon by the court, so as to make them a part of the record. People v January, 77 Cal. 179, 19 Pac. 258; People v Ah Lee Doon, 97 Cal. 171, 31 Pac. 933; Pen. Code, § 1176. Afterwards the defendant moved the court to certify these oral instructions so as to make them part of the record and the order denying this motion is the order above mentioned, from which an appeal is taken. The record does not disclose any ground for the refusal of the court to indorse upon such instructions the fact that they were given to the jury, nor can we conceive of any sufficient ground for such refusal But, conceding that defendant's motion in that behalf should have been granted, it is not perceived that the defendant was prejudiced, or lost any substantial right. It is said by counsel for appellant that if the motion had been granted, and these instructions thus made part of the record, an appeal could have been taken upon the judgment roll without a statement or bill of exceptions. It does not appear that he desired to appeal upon the judgment roll or record without a bill of exceptions. He had made a motion for a new trial, and more than three months before had given notice of appeal from the order denying a new trial. In any event, the instructions in question are now in the record by bill of exceptions, and are as available to the defendant as though his motion had been granted.

The question put to the witness Ah Jip, as to what the defendant said to him some days before the robbery, was proper for the purpose of identification. At the time of the robbery the witness identified one of the robbers as a man with whom he had had a conversation at a certain place in presence of another, but he did not know the name of the man that he thus identified. Jauchius, in whose presence the conversation was had, was thus enabled to say that the defendant was the person referred to by Ah Jip. The next morning after the robbery Ah Jip went to Jauchius to learn the name of the person he identified as one of the robbers, and was permitted to state the conversation had with him, which was, in substance, that Ah Jip asked the name of the man he had talked with, and was told that it was R. P. Clark. It is contended that this conversation, not in the presence of the defendant, was hearsay and inadmissible. Appellant cites a very large number of cases in support of the general proposition that statements made by third persons after the commission of the offense, and not in the presence or hearing of the defendant, are inadmissible. These cases principally discuss the admissibility of declarations as part of the res gestae. But here no statement or declaration touching the commission of the offense was made; and, if it be conceded that it was immaterial how or from whom Ah Jip obtained the name of the defendant, the error was harmless, and could not possibly justify a reversal of the judgment. If Ah Jip had detailed the circumstance of the commission of the offense, and Jauchius had testified to these statements, it is obvious that a different question would be involved, and in such case the authorities cited by appellant would apply. Or, had the statement been used or designed to be used to fix the identity of defendant as the perpetrator of the crime, the injury of the ruling would have been manifest. But it served no such purpose, since Ah Jip positively identified the defendant at the trial as one of the active participants in the robbery.

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[1] Rehearing denied.

Ah Kong, a Chinaman who was present at the time of the robbery, and who did not understand what was said on that occasion in English, was asked the following question: "Could you understand by the way the men moved their revolvers and the way they pointed with their hands that they wanted you to go out?" The objection was that it called for the understanding of the witness. The witness was permitted to answer, and said: "Yes, sir; they pointed their revolvers at us, and pointed towards the door." The witness not only gave his understanding, but the facts upon which it was based. The question was not skillfully framed, but the answer was unobjectionable.

It is also contended that the court erred in permitting Ah Leon to testify as to why Ah Wi went to San Francisco. Ah Wi was present at the time of the robbery, and was not present at the trial. It was competent to show where he was and why he was absent, as otherwise he should have been called as a witness. Whether the question put to Dung Chung was leading or not need not be considered, as the answer was favorable to the defendant.

The robbery was committed on the night of September 8, 1893, at a house occupied by 11 Chinamen, who were partners and tenants cultivating land belonging to Joseph La Marche, who lived about half a mile from the house occupied by the Chinamen. On the morning of the 8th, Mr. Faust and another man called at the house of La Marche, and Mrs. La Marche was called by the prosecution, and stated that she had a conversation with Faust and his companion in relation to the garden cultivated by the Chinamen. She was then asked to state the conversation, and to this the defendant objected. In a colloquy between counsel for the people and the court, which is incorporated in the bill of exceptions, it appears the defense had been permitted to show upon cross-examination that these Chinamen owed rent at the time of the robbery amounting to $300 or $400, and that the suggestion had been made that the pretended robbery was a job put up with other Chinamen so that they could represent to La Marche that they had been robbed and could not pay the rent. The testimony of the Chinamen who were robbed also showed that four men were concerned in the robbery, three of whom came into the house, the fourth staying outside at some little distance, and who was not distinctly seen. The defendant, one of the three who came in, was not masked. The other two were masked, and as to them several of the Chinamen testified they could not tell whether they were Chinamen or negroes or white men. It was expressly stated by counsel for the prosecution that they had no testimony which would bring the conversation of these men with Mrs. La Marche to the defendant; that his object was to meet the argument that only the Chinamen knew there was rent due and unpaid, "and let it go to the jury as to who these other white men were"; that the court had ruled that the circumstance that these Chinamen were owing a large sum of money for rent should be shown, and that he desired to show that white men also knew the fact. The objection of defendant was thereupon overruled, and the witness said that, after informing them that Mr. La Marche had gone to Tulare with a load of wheat, they said they came to see about making a bargain to rent the orchard; that she told them it was rented for three or four years; that they inquired how many acres were in vegetables, to which she replied she did not know, that they could tell better by going to see it. They then wanted to know how much rent was paid, and she told them $900 a year; "that one payment had been made, but before anybody got that orchard the other payment would have to be paid either by the Chinese or the one that bought them out;" and, after telling them where they could find her husband in Tulare, they asked when the last payment became due, and she told them it would be due the 1st of October. They then left. Mr. Faust and Mr. Lazenby, who was with him at the time of the conversation with Mrs. La Marche, above stated, were called by the defendant, and explained their visit to the house of Mr. La Marche by saying that Lazenby desired to secure the land then occupied by the Chinamen for the purpose of cultivation, but, finding the rent to be high, concluded to make no further effort to obtain it, and they both testified that they did not mention the visit, or anything in connection with it, to the defendant or any one until after the arrest of defendant. I think it immaterial what others than the defendant had learned, or how they learned, that a payment of rent was about to become due from the Chinamen, unless such knowledge was brought home to the defendant prior to the robbery, and for that reason the testimony should have been excluded; and the question now to be determined is whether its admission was such an error as requires a reversal of the judgment and a new trial. Section 1258 of the Penal Code is as follows: "After hearing the appeal, the court must give judgment without regard to technical errors or defects, or to exceptions, which do not affect the substantial rights of the parties." In People v. Brotherton, 47 Cal. 388, 404, it was said: "That a technical error has intervened at the trial is therefore not of itself enough to warrant a reversal. The prisoners must go further, and affirmatively show in some way that their substantial rights have been injuriously affected by the error complained of. The burden is upon them to do so." This case was cited approvingly in People v. Nelson, 56 Cal., at page 82, and in People v. Barnhart, 59 Cal., at page 384. In the Brotherton Case, supra, the defendant offered in evidence the testimony of one Howard taken upon a former trial, and it was excluded. The record did not set out the testimony offered, nor state its substance, nor was its materiality shown, and the language used by the court must be read in the light of those facts. In People v. Nelson and People v. Barnhart, supra, the questions arose upon instructions to the jury, and in the case last mentioned the error was favorable to the defendant. Here, however, the evidence was admitted against the defendant's objection, and was heard by the jury, and is set out in the record. The defendant could not show that he was prejudiced otherwise than by the record, and that is before the court. The visit of Faust and Lazenby to the ranch was upon the same day the robbery occurred. If the facts thus learned had been communicated to the defendant that day, the testimony would have tended to strengthen the case against him; and, if it had been left doubtful whether said facts were or were not communicated to the defendant, we should not hesitate to say that the error was prejudicial. But the counsel for the people not only disclaimed in advance any effort to connect the defendant with the offered testimony, but Faust and Lazenby, whose credibility is not attacked, both testified that they did not communicate anything they learned to the defendant, nor to any one, until after the robbery. That a robbery was committed at the time and place charged in the information is clear beyond question. Whether the defendant was one of the robbers was the real question in controversy, and upon that point his identification was conclusively shown. If the evidence objected to had been excluded, we do not see how the jury could have entertained a doubt of the fact of the robbery, or of the identity of the defendant as one of the robbers, unless they believed the testimony given to prove an alibi; and that testimony they did not believe, else the defendant would have been acquitted. We think the judgment should not be reversed for the erroneous reception of this evidence.

The objection to the question put to the defendant upon cross-examination, viz., "What were you and that man Keeler doing down there in Chinatown?" was properly overruled. The defendant had offered himself as a witness in his own behalf, and in accounting for his whereabouts on the night the robbery was committed, said that he had, after leaving a certain other place, gone to Chinatown. The question was proper cross-examination, and was material.

The question as to his talk with Mr. Murray at the time of his arrest was proper, as it related to the same matter; that is, as to where he had been the night of the robbery. The court erred in receiving in evidence the letter written by C. Lazenby, secretary of the "Tulare White Labor Union," to Mr. La Marche, August 28, 1893, notifying him to discharge all Chinese in his employ who had not a certificate of registration. Lazenby was called by defendant, and testified in chief that he was a member of said organization, and stated the purposes of the union. All this was immaterial, but was received without objection. The letter was offered as part of the cross-examination, but the objection that it was irrelevant and immaterial should have been sustained. The error, however, did not affect any substantial right of the defendant. These remarks apply also to the testimony of Mr. La Marche in rebuttal. The evidence sought to be contradicted was immaterial.

The testimony of Bachelder in relation to a conversation with the defendant just after his arrest, as to where the defendant was the night of the robbery, was competent to rebut the testimony of defendant upon the same point. The question put to the same witness by the defendant, upon cross-examination, as to what La Marche told him the night before the arrest, was properly excluded. The information charged the defendant with having robbed the Wing Hing Company of $210. The evidence showed that sum was taken, but that only $175 belonged to the company. The court properly refused to instruct the jury that such variance entitled the defendant to an acquittal; nor did the court err in charging the jury that it was not necessary that the property alleged to have been taken was, in its entirety, the property of that company. I see no ground upon which it can be said that the verdict is against law, or not justified by the evidence, nor any upon which it can be held that the punishment imposed by the court is unusual. I advise that the judgment and orders appealed from be affirmed.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and orders appealed from are affirmed.

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105 Cal. 680

## LAMB v. HARBAUGH et al. (No. 19,351.)

(Supreme Court of California. Jan. 28, 1895.)

MISJOINDER OF CAUSES OF ACTION — TRESPASS — MARRIED WOMAN — ACTION FOR PERSONAL INJURIES—JOINDER OF HUSBAND—TRIAL BY COURT —STATEMENT OF LEGAL PROPOSITIONS.

1. Under Code Civ. Proc. § 427, authorizing the joinder of several causes of action in the same complaint when they all arise out of "(5) injuries to character; (6) injuries to person; (7) injuries to property"; and providing "that the causes of action so united must all belong to one of these classes, and must affect all the parties to the action," a complaint is bad which alleges that defendants forcibly entered on plaintiff's premises near midnight, broke her gates, broke and entered her dwelling, and maltreated and intimidated her and her daughters, and that her property was thereby damaged; her health permanently impaired, and her character injured, all to her damage in a specified sum.

2. Even if it be considered a complaint for trespass on real property under such circumstances of aggravation as to entitle plaintiff to exemplary damages, it is bad for uncertainty, as not averring the actual damage to the property.

3. Code Civ. Proc. § 370, provides that, when a married woman is a party, her husband must be joined with her, except when the action concerns her separate property, or she is living separate from her husband by reason of his desertion or written agreement between them. Civ. Code, §§ 162, 164, declare the separate property of the wife to be "all property owned by her before her marriage, and that acquired afterwards by gift, bequest, devise, or descent"; and that "all other property acquired after marriage" by her is community property. *Held*, that a married woman who is simply living separate from her husband, without such written agreement, and who has not been deserted by him, cannot alone sue for personal injuries received during coverture.

4. Where a case is tried before the court without a jury, there is no statute authorizing the court to declare certain propositions to be the legal principles applicable to the facts of the case, and to render its decision in accordance therewith.

5. In an action by a married woman for trespass on her premises, though she alleged that she was put in fear thereby for the lives of herself and children, it is error to admit evidence that, shortly after the trespass, plaintiff left her house, and went elsewhere to reside.

6. In such case it appeared that plaintiff's son had been arrested for some offense, and defendants claimed they went to her house to notify the son to leave the place. *Held*, that it was error not to permit defendants to show that plaintiff and one of her daughters had discussed the matter of the son's arrest, to show her state of mind at the time of the trespass and the cause of her fright.

7. It was error, in such case, to exclude evidence offered by defendants tending to show their motives in going to plaintiff's house and doing what they did.

8. In such case, it was error to admit evidence offered by plaintiff of statements made after the occurrence by one or more of defendants, in the absence of the others, tending to show their purpose or intention.

In bank. Appeal from superior court, San Diego county; George Puterbaugh, Judge.

Action by H. A. Lamb against H. A. Harbaugh and others. From a judgment for plaintiff, and from an order denying a motion for a new trial, defendants appeal. Reversed.

Haines & Ward, Wellborn, Stevens & Wellborn, and E. W. Britt, for appellants. J. L. Copeland and Works & Works, for respondent.

HARRISON, J. The complaint in this action is against 17 defendants, and is in the following language: "First. That on the 24th day of August, 1892, the plaintiff was, and had been for many years, a resident of the city of National City, in the county of San Diego, state of California. Second. That on the night of the 23d and 24th day of August, 1892, she was residing in said city, in her dwelling house, with her daughters, Cora E. Lamb and Grace Lamb, and her son, Charles Lamb, and was the owner and in the peaceable and quiet possession of said dwelling house and the lot upon which the same was situated. Third. That on the night aforesaid, soon after midnight, the defendants, forcibly, unlawfully, and without the consent of the plaintiff, entered upon her said premises, and forcibly and violently broke down her gates, and broke and entered her dwelling house, and unlawfully and with great noise threatened, maltreated, and intimidated herself and her said daughters. Fourth. That, by the said unlawful and violent acts of the defendants, the property of the plaintiff was damaged, she was intimidated and put in great fear for the lives and safety of herself and her said children, to such an extent that she was compelled to abandon her home and seek shelter elsewhere, and has been injured in her good name, and disgraced and humiliated, from which she has suffered great mental anguish and distress, and that her health has been seriously and permanently impaired by said wrongful and unlawful acts. Fifth. That, by reason of said wrongful acts, she has been damaged in the sum of fifty thousand dollars, wherefore the plaintiff demands judgment for fifty thousand dollars." To this complaint the defendants demurred, upon the grounds, among others: (1) That there is a misjoinder of causes of action in the said complaint, to wit, a cause of action for injuries to property, with a cause of action for injuries to the person of plaintiff, and a cause of action for injuries to the person of her daughters, and a cause of action for injuries to the character of the plaintiff; and that the said several causes of action are improperly united in the said complaint. (2) That the complaint is uncertain, in that it cannot be determined in what amount the plaintiff was damaged by the injury to her property, or in what amount she was damaged by the injury to her person, or in what amount she was damaged by the injury to her character, or in what amount she was damaged by the injury done to her daughters. (3) That it is ambiguous in the particulars above stated. The demurrer was overruled, and the defendants answered jointly. Upon the trial, judgment was rendered in favor of the plaintiff, and against the appellants, in the sum of $4,200, from which, and from an order denying a new trial, an appeal has been taken.

1. The demurrer should have been sustained. The plaintiff alleges in her complaint that by the wrongful acts of the defendants her property was damaged, her character was injured, and that her health has been permanently impaired. Each of these acts constituted a distinct cause of action, for which she is entitled to recover damages; and in her complaint she avers that by reason of all these acts she has been damaged in the sum of $50,000, for which she asks judgment against the defendants. Section 427, Code Civ. Proc., provides that "the plaintiff may unite several causes of action in the same complaint when they all arise out of * * * (5) injuries to character; (6) injuries to person; (7) injuries to property. The causes of action so united must all belong to one only of these classes, and must affect all the parties to the action, and not require different places of trial, and must be separately stated." The complaint in the present case is in manifest disregard of this section, and the demurrer for misjoinder of causes of action should have been sustained. The complaint cannot be sustained upon the ground that the action is brought to recover damages merely for a trespass upon the real property of the plaintiff under circumstances of such aggravation as entitle her to exemplary damages. It is not in terms limited to a recovery for such trespass, but the fourth paragraph thereof contains substantive averments of the other grounds of damage above shown; and that the complaint was not so considered by the plaintiff is shown by the fact that at the trial she offered proof of the injuries to her person, and of the effect produced thereby upon her health, not merely at the time of the trespass, but continuing down to the day of the trial. Moreover, if it should be conceded that the complaint was for such a trespass, the demurrer for uncertainty should have been sustained, since there is no averment of the actual damage done to her property. This damage was capable of definite statement, and the defendants were entitled to be informed of the amount claimed therefor, for the reason, as was said in Mallory v. Thomas, 98 Cal. 645, 33 Pac. 757, that they might be willing to concede the amount of this claim, and limit their defense to the claim for punitory damages. See, also, McCarty v. Fremont, 23 Cal. 197; Grandona v. Lovdal, 70 Cal. 161, 11 Pac. 623. Razzo v. Varni, 81 Cal. 281, 22 Pac. 848, does not hold a contrary doctrine. All that was held in that case with reference to the demurrer was that the complaint was not "ambiguous" in failing to show the particular source of the damages sustained by the plaintiff. In Mallory v. Thomas, supra, it was held that when a plaintiff seeks to recover damages for a trespass by which his property has been destroyed, and in addition thereto exemplary damages by reason of the character of the trespass, and the complaint fails to set forth the value of the property destroyed, a demurrer thereto on the ground of uncertainty should be sustained. We do not mean to hold that a plaintiff may not, in an action for trespass, allege such circumstances of aggravation as will entitle him to punitory damages, but he must plead these circumstances in such a manner that there may be no ambiguity or uncertainty in determining that they are set forth solely for the purpose of establishing such claim. If they are pleaded in such a manner as would be proper in an action brought to recover damages other than those for the trespass, his complaint will for that reason be subject to a demurrer for misjoinder of the causes of action.

2. The defendants pleaded, by way of abatement, that the plaintiff is a married woman, and that her husband should have been joined as a coplaintiff, in order to entitle her to a recovery for any personal injuries. Section 370, Code Civ. Proc., provides: "When a married woman is party, her husband must be joined with her, except: (1) When the action concerns her separate property, or her right or claim to the homestead property, she may sue alone. * * * (3) When she is living separate and apart from her husband by reason of his desertion of her, or by agreement in writing entered into between them, she may sue or be sued alone." The court finds "that at all times mentioned in plaintiff's complaint, and for many years prior to the commencement of this action, the plaintiff was, and is yet, a married woman, and the wife of one David Lamb, who is not joined with the plaintiff as a party to this action; but that the plaintiff and said David Lamb had been living separate and apart from each other at the time of the commencement of this action, and for many years prior thereto;

and that the property upon which the trespass was committed by said defendants was the separate property of the plaintiff." The court did not find the cause of their living separate and apart, and, unless the plaintiff is shown to be within the exception specified in section 370, her husband is a necessary party to any action brought by her other than such as pertains to her separate property. If the plaintiff is living separate and apart from her husband by reason of her own desertion of him, she cannot by herself maintain any action for damages to her person. The separate property of the wife is declared in section 162, Civ. Code, to be "all property owned by her before marriage, and that acquired afterwards by gift, bequest, devise or descent"; and section 164, Id., declares that "all other property acquired after marriage" by the wife is community property. Whatever may be the law in other states, in this state the separate property of the wife, which is acquired by her after marriage, is limited to such as she acquires by "gift, bequest, devise and descent." As a right of action for damages for a personal injury is not acquired by either of these modes, it is a part of the "other property acquired after marriage," and is therefore community property. In any action to recover such damages, the husband is a necessary party. McFadden v. Railway Co., 87 Cal. 464, 25 Pac. 681.

3. At the close of the testimony, the defendants presented to the court certain propositions, which they requested the court to declare as legal principles applicable to the facts of the case, and to render its decision in accordance therewith; and, upon the refusal of the court so to rule, they took exceptions, and have brought the matters here by a bill of exceptions. In New York, and perhaps other states, such practice is authorized by statute (Code Civ. Proc. § 1023); but we are of the opinion that it is not authorized by the Code of Civil Procedure of this state. There is no express provision to that effect, and the provision that the decision of the court may be reviewed through exceptions taken to its rulings upon the admission of evidence during the trial, or through an exception to the decision itself, either on the ground of insufficiency of evidence or disregard of law, affords to the losing party ample opportunity for securing a proper consideration, by the trial court in the first instance upon a motion for a new trial, or by this court upon an appeal, of all the principles of law applicable to the facts of the case. If the facts found by the court do not under any principle of law sustain the judgment, this can be shown on appeal without any bill of exceptions setting forth the failure of the trial court to make application of the proper legal principles; and, if its decision upon any controverted question of fact results from a failure to properly apply the law applicable thereto, or from a consideration of evidence not entitled to be considered, this error can be reviewed through a bill of exceptions in which is specified such error of law, or that the evidence is insufficient, either by reason of its incompetency or irrelevancy, to sustain the decision. In the present case, after it had been shown that the plaintiff was a married woman, the objection to a recovery by her of any damages for injury to her person or character could have been presented upon making it to appear that evidence of such damage had been received in the case. Unless it was then made to affirmatively appear that this evidence had not been considered by the court, the award of damages to the plaintiff could be assigned as error. We are aware that in Touchard v. Crow, 20 Cal. 163, the court suggested that when a case was tried by a court without a jury, if counsel desired certain points of law to be considered as applicable to the facts established, the proper course would be to present them in the form of propositions; but it was not even suggested by the court that the refusal to entertain such propositions, or to rule upon them, could be made the subject of an exception, or afterwards incorporated into a bill of exceptions. This case was subsequently referred to in Estate of Page, 57 Cal. 238, and in Wilson v. Wilson, 64 Cal. 92, 27 Pac. 861, where some similar suggestions were made; but in neither of these cases was the question presented for decision or decided by the court. In each of them the procedure that had been adopted was held to be erroneous; and the suggestions of the court must be regarded as tentative rather than as a rule to be followed. In 1866 the legislature, by an amendment to section 180 of the practice act (St. 1866, p. 844), provided that parties to an action might request the court to make findings of fact upon designated points, and that an exception could be taken to the refusal of the court to make such findings; but this is the only approach to the practice taken in the present case that has ever been authorized in this state. This procedure ceased to be operative when the codes came into operation in 1872.

4. As the case is to be sent back for a new trial, certain errors of the court deserve to be noticed. The court should have excluded the testimony of the plaintiff and other witnesses concerning the condition of her health and strength subsequent to the date of the trespass. As we have shown above, damages for any injury to her person cannot be included with an action for damages affecting her property, and can be recovered only in an action wherein her husband is a party plaintiff. So, too, the evidence that shortly after the trespass the plaintiff left her house, and went elsewhere to reside, was improperly admitted. Upon the objection to this evidence by the defendants, the court ruled that it might be admitted "for what it is

worth." What the court meant by this expression is not clear, but, as no limitation was placed upon the evidence, it must be deemed to have been admitted generally, and to have been considered by the court in its determination of all the issues which such evidence would tend to establish. Her removal was no part of the res gestae connected with the trespass, nor does it appear that the removal was caused by reason of any injury to her house; and any personal injury sustained by her in the nature of fear or timidity would not be an element of damage done to her property. The evidence that her son left the house the next day was also immaterial. His leaving there was no part of the res gestae, nor could the plaintiff recover for any damages sustained by him. The court should also have excluded the evidence of the personal injuries sustained by her daughter Cora, even if, as suggested by the court in admitting this evidence, the defendants "were to blame for it." The plaintiff is not entitled to recover for such injuries, and it appears that the daughter herself had an action pending against the same defendants to recover for these injuries. The court should have allowed the defendants to show by the daughter Cora whether the arrest of her brother had been the subject of the discussion between herself and the plaintiff. Her answer to the question would have tended to show the plaintiff's state of mind at the time of the trespass, and this was a circumstance proper to be considered in determining the cause of her fright at the time of the trespass.

The court also erred in refusing to allow the defendants to introduce evidence for the purpose of showing their motives and purpose in going to the house of the plaintiff, and doing what was there done. When this evidence was offered, the court said: "Such evidence, if offered, I could not consider in mitigation of their damages; and I think, in justice to all parties, that they should so understand; and it should go to the higher court with a clean record, knowing that I had not taken that into consideration, so that, if I err in the matter, it is presented to the supreme court in a fairer way." In Dorsey v. Manlove, 14 Cal. 556, it is said: "When circumstances of aggravation are given in evidence for the purpose of increasing the damages, it is not only improper, but manifestly unjust, to exclude from the jury any circumstance connected with the commission of the act and explanatory of the motives and intentions of the party committing it." Such evidence would include the efforts of the defendants to obtain information of the facts connected with the offense charged against the plaintiff's son, their belief of his guilt, and the intent with which they went to her house, whether to annoy, oppress, frighten, or injure her, or whether her son was the sole object of their visit, and the reason which induced them to adopt the means which they employed for carrying out their purpose with reference to him. Within this rule the defendants should have been allowed to state the intention with which they visited the premises of the plaintiff. It is very probable that, in view of what was in fact done and said by them after they had reached the premises, a jury would not give much weight to their declaration that their purpose was innocent. If a trespass was in fact committed, the actual damage that was caused thereby would not be diminished or increased by the character of the motives which actuated the trespassers; but, for the purpose of determining whether punitory damages should be allowed, the motive or intention with which the act was done became important.

The evidence of conversations had with certain of the defendants in the absence of the others, subsequent to the occurrence, should have been excluded. This evidence, so far as it tended to show the purpose or intention of any of the defendants, other than the person making the statement, was hearsay, and was incompetent to establish such intention or purpose. If the action were against only the person making the statement, it would be admissible as an admission against himself; but, as in the present action there could be no severing of damages against the several defendants, this evidence was improperly admitted. See People v. Aleck, 61 Cal. 137; People v. Irwin, 77 Cal. 494, 20 Pac. 56.

It is claimed that the evidence fails to show any right of recovery against the appellant Warren Kimball. As a new trial is to be had, it would not be proper to comment upon the sufficiency of the evidence to establish his liability. If, in fact, he did no act to promote or encourage the trespass, and was merely a spectator while it was being committed by others, he would not be guilty of the trespass. In Cooper v. Johnson, 81 Mo. 489, the court said: "That one was present and witnessed the trespass, but neither by word, sign, nor act, nor in any other manner, signified his approval of it, does not render him liable. He is not, by his mere silence, to be held as countenancing the act." His subsequent declarations of approval do not make him liable. Cooley, Torts (2d Ed.) 146.

The judgment and order appealed from are reversed, and a new trial granted.

We concur: BEATTY, C. J.; McFARLAND, J.; VAN FLEET, J.

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105 Cal. 632

## PEOPLE v. AZOFF. (No. 21,168.)

(Supreme Court of California. Jan. 17, 1895.)

CRIMINAL LAW — MISCONDUCT OF JURORS—READING NEWSPAPERS.

1. Code Civ. Proc. § 657, subd. 2, which enacts that verdicts found by a resort to the determination of chance may be impeached by

the affidavits of jurors, negatives all other exceptions to the rule that the affidavits or statements of jurors are inadmissible to impeach their verdict. It is proper, on a motion for a new trial in a criminal case, to reject affidavits of jurors showing that they had read newspaper reports of the trial during its progress.

2. Permitting the district attorney, on a motion for a new trial, to call jurors to show that they had read nothing which influenced their verdict, is harmless error, where there is no competent evidence before the court showing them guilty of such misconduct.

In bank. Appeal from superior court, Santa Cruz county; J. H. Logan, Judge.

Anthony Azoff was convicted of murder in the first degree, and appeals. Affirmed.

W. A. McGuire, for appellant. Atty. Gen. Hart, for the People.

TEMPLE, J. The defendant was convicted of murder in the first degree, and sentenced to suffer death. The appeal is from the judgment, and from an order denying a new trial, but no part of the evidence is brought up; neither is there complaint of any ruling at the trial, nor of an instruction given or refused. The motion for a new trial was upon the ground of misconduct on the part of the jury, in that they received evidence out of court. Upon the hearing of the motion the court refused to consider the affidavit of a juror which tended to show that the jury had read a newspaper report of the trial, or to permit the jurors themselves to testify orally to the same effect, but did permit the district attorney to read an affidavit of a juror, and other jurors to testify, that nothing that they had read had influenced their verdict. The correctness of these rulings is questioned by this appeal. The question as to whether the affidavit of a juror will be received to impeach the verdict was very early considered in this state, and has been frequently passed upon, and always decided in the same way. The effect of the earlier cases cannot be better expressed than in the language of Chief Justice Sanderson in Boyce v. Stage Co., 25 Cal. 460. He says: "In respect to these points this case was decided upon the authority of Turner v. Water Co., 25 Cal. 397. We there held that, although there was some conflict of authority, * * * the affidavits of jurors could not be received for the purpose of impeaching their verdict. By so doing we did not establish the rule for the first time in this state; on the contrary, we merely affirmed a rule which was established as early as the first volume of California Reports, and has been strictly adhered to from that time to the present. In the case of People v. Baker, 1 Cal. 405, Mr. Justice Bennett said: 'We consider it a settled rule, founded upon considerations of necessary policy, that the testimony of a juryman cannot be received to defeat his own verdict.' In Amsby v. Dickhouse, 4 Cal. 103, Mr. Chief Justice Murray said: 'It is well settled that a juror cannot be allowed to impeach his own verdict. The reason of this wholesome rule of law is too obvious to require any explanation.' The same rule was declared in Castro v. Gill, 5 Cal. 42, by Mr. Justice Heydenfeldt. In Wilson v. Berryman, 5 Cal. 45, the rule was again reiterated by Mr. Chief Justice Murray. In People v. Wyman, 15 Cal. 75, the verdict was sought to be impeached upon the ground that it was not a fair expression of the opinion of the jury, and the affidavit of one of the jurors was relied upon for that purpose. The opinion of the court was delivered by Mr. Justice Cope, who said 'We have repeatedly decided that this cannot be done.' Thus the law of this question has become too firmly established in this state to be disturbed by the judiciary, and in order to effect a change it was found necessary in 1862 to resort to legislative action. This was done, and it was enacted that verdicts found by a 'resort to the determination of chance' might be impeached by the affidavits of the jurors. But it is argued that, while such is the general rule at common law, there are exceptions to it. Admitting this to be so, we answer, in the first place, that the legislature of this state has legislated in regard to those exceptions, and that such legislation has superseded the common law. By declaring in what cases verdicts may be impeached by the affidavits of jurors, the legislature, upon the maxim, 'Expressio unius, exclusio alterius est,' has declared that verdicts of a different class shall not be so impeached." The same rule was announced in People v. Gray, 61 Cal. 164; People v. Deegan, 88 Cal. 602, 26 Pac. 500; People v. Murray, 94 Cal. 212, 29 Pac. 494. Nor is there anything against this position in the late case of People v. Stokes (Cal.) 37 Pac. 207. The question was not there involved. The quotation from Woodward v. Leavitt, 107 Mass. 453, was to a different proposition. Nor is there anything in the quotation inconsistent with the rule which prevails in this state. Here affidavits of jurors, in support of the verdict, may be read as to "the existence of the disturbing influence"; and the question in the case quoted was, how far such affidavits could be used in support of the verdict. It was held in effect that such affidavits may be used to disprove or explain alleged misconduct, but cannot, admitting the misconduct, be used to show that the verdict was not influenced thereby.

In some of the states different rules prevail. All recognize the general proposition that the affidavits of jurors will not be received to impeach their verdict, but some exceptions are made. These exceptions vary greatly, hardly any two states agreeing as to what exceptions shall be made. Our statute makes one. Code Civ. Proc. § 657, subd. 2. As we have seen, it has been held in Boyce v. Stage Co., supra, that the fact that one exception is provided in the statute excludes the idea that there can be any other. Other courts do not agree upon the exceptions which should be made to the rule, and, if the question were an open one, I think the rule established here is the best. Hardships will arise under either rule; but, while it will occasionally appear that justice will miscarry unless such evidence can be regarded, the contrary rule opens the door wide to corrupt practices. The jury will be subjected to influences, after they have discharged their duty as jurors, to induce them to repent of their decision and endeavor to revoke it. They would then be liable to be tampered with. Indeed, it would be difficult to place a limit to the corruption such a practice might engender. If public policy prohibits the jury from impeaching their verdict by their affidavits, it must follow that the same policy will prevent its being done by statements made by the jurors. The affidavit of McGuire, therefore, could not be considered on that question. In permitting the district attorney to call the jurors to show that they had read nothing which influenced their verdict, the court followed intimations found in People v. Goldenson, 76 Cal. 328, 19 Pac. 161, and People v. Murray, 85 Cal. 350, 24 Pac. 666. In the late case of People v. Stokes (Cal.) 37 Pac. 207, this court said that upon that point those cases do not express the law. Since there was no competent evidence before the court, on the motion for a new trial, tending to show that the jury had taken evidence out of court, this could be productive of no harm in this case.

There was no error in refusing to permit the trial judge to be sworn, on the hearing of the motion for a new trial, to show that he had admonished the bailiff not to allow the jury to read papers relating to the case. On this motion such admonition would cut no figure, and if the fact existed it was a matter within the knowledge of the court, and might have been stated as a fact in a bill of exceptions without proof. It was also not error here, because there was no competent evidence tending to show that the jury did read any account of the trial in a newspaper. The judgment and order are affirmed.

We concur: BEATTY, C. J.; McFARLAND, J.; GAROUTTE, J.; HARRISON, J.; VAN FLEET, J.; HENSHAW, J.

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105 Cal. 447

DENNISON v. CHAPMAN. (No. 15,525.)

(Supreme Court of California. Jan. 5, 1895.)

Pleading—Waiver of Objections—Performance of Contract—Instructions.

1. All merely technical objections to a complaint are waived by failure to demur.

2. After answering to a complaint which states facts showing that plaintiff was entitled to certain corporate stock under a contract with defendant, that plaintiff had demanded it, and defendant had refused to deliver, and that plaintiff had been damaged in a certain sum by reason of such refusal, defendant cannot object that the complaint sounds in replevin, which does not lie upon an unexecuted agreement for the sale of personal property, since the facts stated entitle plaintiff to damages for breach of the contract, irrespective of the prayer of the complaint.

3. Under a contract by which defendant agreed to assign to plaintiff a one-fourth interest in any mine purchased by him within a specified time, the fact that defendant purchased a one-fourth interest in a mine, the ownership of which was evidenced, not by the legal title, but by certificates of stock showing a beneficial interest, does not enable him to evade his obligations to plaintiff, who accepts this purchase in fulfillment of the contract.

4. An allegation in the complaint that the stock was purchased in pursuance of the contract, and that plaintiff and defendant began to operate the mine as provided therein, shows that the price paid for the stock was "mutually satisfactory to the parties," as required by the contract.

5. A conflict in instructions given at the request of plaintiff and of defendant is no ground for reversal on appeal by defendant, where the error is in his favor.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; John Hunt, Judge.

Action by W. E. Dennison against E. W. Chapman for breach of contract. From a judgment for plaintiff, defendant appeals. Affirmed.

Maxwell, Dorsey & Soto and Maxwell & McEnerney, for appellant. Geo. A. Rankin, for respondent.

SEARLS, C. This is an action by W. E. Dennison, the respondent, against E. W. Chapman, the appellant, upon an alleged breach of a contract, by which the defendant agreed to purchase a mine for the joint benefit of plaintiff and defendant. Plaintiff had a verdict and judgment for $1,312.50 and costs. The appeal is from the final judgment, and from an order denying defendant's motion for a new trial.

On the 2d day of September, 1889, plaintiff and defendant entered into a written contract, by the terms of which defendant agreed (provided the purchase could be made at a price satisfactory to the parties, respectively) to purchase, within 30 days from the date of the agreement, the Rumfeldt Hydraulic Mine, situate in the county of Trinity, Cal. Upon such purchase being made, the plaintiff was to be placed in charge as superintendent for a term of one year, at a monthly salary of $150. Defendant was for the period of one year to reserve and carry for the plaintiff a one-fourth interest in the mine, and at or before the expiration of the year to give plaintiff a clear title to such one-fourth interest at cost price thereof up to the time of conveyance, the defendant to be paid such cost price out of the proceeds of the mine. Defendant was to furnish plaintiff suitable quarters for himself and family. The agreement was to be a full settlement of all accounts between the parties up to the date of its execution, and $500 paid by defendant to the plaintiff on the execution of the agreement was to be considered as an advance on account of salary. Omitting some minor provisions of the agreement, not essential to present purposes, it contains this further clause: "It is further mutually agreed by the parties herein, respectively, that should the said Rumfeldt Mine be not purchased, then this agreement shall extend and apply to any other mine or mines that may be obtained by the said party of the first part, at prices mutually satisfactory to the parties hereto, within ninety (90) days from the date of this agreement." The Rumfeldt Mine, upon examination, proved unsatisfactory, and was not purchased. There was in Eldorado county, Cal., a gold-bearing quartz mine known as the "Taylor Mine," owned by E. S. Chester and W. E. Straut, who, with defendant and some others, organized a corporation under the name of the Idlewild Gold Mining Company, to which corporation the Taylor Mine was conveyed. On the 9th day of October, 1889, said Chester and Straut, as parties of the first part, entered into an agreement with defendant and his brother, W. S. Chapman, which recited that there were 100,000 shares of the capital stock of the Idlewild Gold Mining Company, all of which were owned by the parties of the first part, of which they sold one-half, or 50,000 shares, to the Chapmans for $55,000, to be paid as follows: $5,000 within 60 days, and the residue (less one-half of the expense of building a mill or altering and adding to the capacity of a mill on the mine, and other specified improvements to be placed thereon by the said Chapmans within 90 days) in three equal installments, at 12, 15, and 18 months, respectively, etc. All the profits and dividends on the 50,000 shares of stock sold were to go to the parties of the first part until they were fully paid, and the 50,000 shares of stock was to be issued in the names of the Chapmans, and deposited in escrow to be held until payments were all made, and then delivered to the parties of the second part, the said Chapmans, of whom defendant was one. The complaint avers that the purchase by defendant of such interest in the Taylor Mine was made under and pursuant to their agreement; that plaintiff and defendant began to operate the mine; that plaintiff continued to operate and superintend the mine as per his agreement, and on his part performed all his obligations under the contract; that defendant failed to furnish any quarters for plaintiff and his family, and on the 1st day of October, 1890, defendant discharged him, and refused to deliver to him any share of the stock, etc. The answer denies that the purchase of stock in the Idewild Gold Mining Company by defendant was made under or pursuant or in fulfillment of his agreement with the plaintiff, or that plaintiff was ever superintendent of said mine, etc. The complaint averred the value of 12,500 shares of stock to which he was entitled to be $62,500. By an amendment thereto it was averred that, by reason of defendant's failure to deliver to plaintiff said shares of stock, he was damaged in the sum of $62,400. The complaint averred that W. S. Chapman was only a nominal party to the purchase of the stock; that defendant really owned the whole 50,000 shares purchased, and that plaintiff was entitled to one-fourth part thereof. This was denied by the answer, and it may be remarked here that the uncontradicted evidence showed defendant to be the owner of only one-half of the purchase, or of 25,000 shares of the stock. It followed that if plaintiff was entitled to recover it was for one-fourth part of defendant's purchase, equal to 6,250 shares. The shares were admitted by the answer to be worth $2 each.

Appellant urges certain objections to the complaint, viz.: (1) That so far as it relates to the stock it sounds in replevin, which does not lie upon an unexecuted agreement for the purchase and sale of personal property. (2) That the contract of September 2, 1889, never became operative, for the reason that no purchase of a mine ever occurred. (3) That there is no allegation in the complaint that the Idlewild stock was purchased at prices mutually satisfactory. There was no demurrer interposed to the complaint. It follows, therefore, that all merely technical objections are waived, and we have only to determine whether the complaint states facts sufficient to constitute a cause of action.

The prayer of the complaint was for judgment against defendant for the possession of the shares of stock, or their value, in the event possession cannot be had, in the sum of, etc. Where, as in this case, there is an answer to the complaint, the court may grant the plaintiff any relief consistent with the case made by the complaint and embraced within the issue. Code Civ. Proc. § 580. The complaint as amended, after setting out facts showing that he was entitled to the stock under the contract, that he had demanded it, and defendant had refused to deliver, averred in apt terms that by such refusal he was damaged in the sum of $62,400. These facts were within the issues, and entitled plaintiff to such judgment as he recovered, irrespective of the prayer of the complaint, provided always the evidence was sufficient to uphold it.

As to the contention that the contract never became operative, for the reason that no mine was ever purchased by defendant, we have only to turn to the complaint to see that it is charged that under the contract one-half of the Taylor Mine was in effect purchased, and that, the better to carry out the contract of purchase, a corporation was formed, to which the mine was conveyed, and the stock issued to the several parties in proportion to their interest, all of which appears from the contract (Exhibit A), made a part of the complaint. This was in effect, although not literally, the purchase of a mine, or of an interest therein. If done under and in pursuance of the contract, and acquiesced in by the parties, it was as binding upon them as though the fee to the mine had been conveyed directly to the defendant. If A. agrees to purchase for B. 1,000 bushels of wheat, at a given price per bushel, but only succeeds in purchasing one-half of that quantity, B. is not bound to accept it under the contract; but, if he does so, he must pay for it, and most certainly A. could not afterwards object that the contract did not bind him. In the present instance plaintiff under the contract might have insisted that an entire mine should be purchased, and that the legal title should pass to defendant; but if instead thereof defendant under the contract purchased, not the whole, but a one-fourth interest in a mine, the ownership of which was evidenced, not by the legal title, but by certificates of stock showing a beneficial interest, and plaintiff saw fit to accept and did accept it in fulfillment of the contract, it does not lie with defendant to complain, or to evade his obligation, because he has not complied more strictly with his contract.

The complaint does not in precise language aver that the stock was purchased "at prices mutually satisfactory to the parties," as expressed in the agreement. It does, however, charge "that the purchase by the defendant of said stock and said interest in said mine and mining property was made under and in pursuance of and in accordance with the agreement between the plaintiff and defendant, as set forth in paragraph one of this complaint." If made in accordance with that agreement, it must have been at a price mutually satisfactory to the parties. It further charges that in pursuance of the agreement plaintiff and defendant immediately began to operate said mine. These and other allegations indicate that the price was satisfactory to plaintiff, as the fact of purchase indicates it was to defendant, and, in the absence of a special demurrer, was sufficient.

There was evidence sufficient to support the verdict. To comment upon it at length would be productive of no good results. It was conflicting upon the vital question as to whether the purchase of the stock in the Taylor Mine was made pursuant to the contract, and for the joint benefit of plaintiff and defendant, as in the contract provided, or independent of that contract, and, unless some error of law has intervened fatal to the verdict, it must stand.

By far the most serious question involved in the case arises under the instructions of the court to the jury. The fourth and sixth instructions given to the jury at the request of plaintiff are as follows: "(4) It is admitted that the defendant, Chapman, did not purchase the whole of the Taylor Mine or of the stock of the Idlewild Gold Mining Company. It is claimed by Dennison that Chapman purchased one-half of the stock of said company, and it is admitted by Chapman that he purchased one-fourth of the stock. You are instructed that Dennison's rights or interests in any mine obtained by Chapman within ninety days from the date of the agreement did not depend upon Chapman's obtaining the whole mine. Chapman could not defeat Dennison's rights by purchasing only an interest, be it half or quarter, in a mine. If the interest, whatever amount it was, was purchased in pursuance with the agreement between Dennison and Chapman, then Dennison was entitled to one-fourth of Chapman's interest, whatever that might be." "(6) As before stated to you, Dennison claims in the complaint that Chapman bought fifty thousand shares of the capital stock of the Idlewild Gold Mining Company, and that, while twenty-five thousand shares were taken in his brother's name, his brother was but the nominal owner of it. It is admitted by the defendant, Chapman, that he bought twenty-five thousand shares. If you find from the evidence that the defendant, Chapman, entered into that mining venture, and purchased the stock in pursuance with the agreement between himself and Dennison, then you are instructed that Dennison would be entitled to at least one-fourth of twenty-five thousand shares of the stock of the said Idlewild Gold Mining Company; that is to say, he would be entitled to six thousand two hundred and fifty shares. It is admitted by Chapman that this stock is of the value of $2 per share, or $12,500 in all." The court also gave the second instruction asked by the defendant, which is as follows: "I instruct you that upon the written contract contained in this complaint the plaintiff is not entitled to recover anything for the Idlewild stock, unless there was some other and a further agreement between them by which the plaintiff would be entitled to the stock. In other words, the contract of September 2, 1889, contemplated the purchase of a mine, and does not apply to and is not applicable to the purchase of these shares of stock. Therefore, unless you are satisfied by a preponderance of evidence that there was another and different agreement entered into between the plaintiff and the defendant in addition to the contract of September 2, 1889, it will be your duty to find that the plaintiff has not been damaged in any sum or amount whatever by reason of the failure of the defendant to deliver to him shares of the Idlewild stock." It is quite apparent that there is a conflict in the instructions given on behalf of plaintiff and that given at the request of the defendant. The former instructed the jury, in substance, that if the stock or an interest in the Taylor Mine was purchased under and pursuant to the contract between the parties of September 2, 1889, plaintiff was entitled to a one-fourth interest therein; while the instruction given on behalf of defendant informed the jury that the agreement of September 2, 1889, contemplated the purchase of a mine, and is not applicable to the purchase of stock in a mine, and that, unless there was another and different agreement entered into between the parties in addition to the original contract, plaintiff could not recover on account of the nondelivery of the stock. We are of opinion the instructions on behalf of the plaintiff were correct, and that in favor of the defendant erroneous. As before stated, in substance, if the purchase of the stock was made under and pursuant to the contract, and accepted by plaintiff as such compliance, it is not perceived that any other further or additional contract was necessary. It may well be that in the event of delivery of the stock some arrangement would have been necessary to secure to defendant the dividends until he was reimbursed for his outlay on account of the interest to be transferred. So it would have been had defendant purchased the mine and conveyed a fourth interest to plaintiff at the end of one year, with a proviso that defendant was to be reimbursed from the output of such mine. These were details which under the agreement the parties could have carried out, or failing in which the law would have determined for them. The view of defendant, as detailed by plaintiff in his testimony, seems rational. He said, according to plaintiff's testimony: "Now, we will go up there and take a look at it, and if you think well of the way I put this to you, and think well of the mine, all right, and we will vary our contract to suit the case exactly, if it needs any modification; but I cannot see that it does not apply to this case. You may have to abate your demand on me. I have not got all of the mine now, and you will have to have one-fourth of what I have." Plaintiff testified that upon visiting and examining the mine he was pleased with it, and that they then proceeded to develop it, etc. The erroneous instruction was in favor of appellant, and it has been repeatedly held by this court that a conflict in instructions which could not operate injuriously to appellant is not ground of reversal. Estate of Gharky, 57 Cal., at page 280; People v. Velarde, 59 Cal., at page 464; People v. Smith, 59 Cal. 601; People v. Ah Luck, 62 Cal. 503; People v. Turcott, 65 Cal. 126, 3 Pac. 461. Again, a party cannot except to instructions given at his own request, and in this case did not attempt to do so. Mining Co. v. Baker, 70 Cal. 572, 8 Pac. 305, and 11 Pac. 654. It follows that as the instructions excepted to were proper to be given, and as the erroneous instruction was in favor of appellant, and given at his request, and could not have injured him, the judgment should not be reversed for that cause. The instructions, taken together, were as favorable to the defendant as the law would warrant.

Of the instructions asked on behalf of the defendant, and refused, it need only be said some of them were in substance embodied in instructions given, others not applicable to the issues made by the pleadings and the evidence thereunder, and still others not admissible under any state of pleadings applicable to the case. The pivotal point in the case was as to whether or not the purchase of the stock was made under and pursuant to the contract of September 2, 1889. That question determined in favor of the plaintiff, as it was by the verdict, and the recovery is as little as could reasonably be expected from the evidence. The judgment and order appealed from should be affirmed.

We concur: VANCLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

(105 Cal. 514)

## MATTINGLY v. PENNIE. (No. 14,967.)[1]

(Supreme Court of California. Jan. 5, 1895.)

Appeal—Law of Case—Brokers—Commissions.

1. On appeal by plaintiff, a decision that the evidence was sufficient, under the instructions actually given and not objected to by him, to support a verdict in his favor had one been rendered, and reversing the lower court for an erroneous instruction given at defendant's request, does not preclude defendant, on appeal from a verdict against him rendered on the second trial, from urging that the evidence, which was substantially the same as on the first trial, was insufficient to justify a verdict for plaintiff under the rules of law as they should have been given to the jury, since defendant could not, as appellee on the first appeal, assign error on the instructions given in plaintiff's favor.

2. Where no sale has been actually consummated, a broker is not entitled to his commissions, under a contract authorizing him to negotiate the sale of property at a specified price, unless he shows that he found a purchaser ready, able, and willing to buy on the terms fixed, and either that he procured from that person a valid contract binding him to purchase the property on those terms, or that he brought the vendor and the proposed purchaser together, so that the vendor might have secured such contract if he desired.

3. The refusal of the vendor to carry out

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[1] Rehearing denied.

the contract, when informed of the agent's success in finding a purchaser on the terms fixed, does not excuse the agent from procuring from the proposed purchaser a binding contract, or an offer from him directly to the vendor.

4. In an action by a stockbroker for his commissions, evidence that the principal had refused to make the sale on being handed a letter from the broker informing him that the broker had sold the stock in London at the price agreed on, is not sufficient to show a repudiation by the principal of the contract, which made the price payable in San Francisco, and not in London.

5. Where the proposed purchaser admits that he had not the ability to pay the price fixed, his testimony that he was acting in behalf of a syndicate, and that he would have been prepared, when the time arrived to complete the purchase, to find the money required, does not satisfactorily show his ability to buy.

6. Where plaintiff's case depends entirely on oral testimony as to transactions with his deceased principal, defendant's intestate, and the testimony is such as to make direct contradictions impossible, a proper occasion does not exist for charging that plaintiff's oral admissions inconsistent with his cause of action should be received with caution by the jury, within the meaning of Code Civ. Proc. § 2061, subd. 4, requiring this charge to be given on "proper occasions."

7. In an action for commissions alleged to have been earned by procuring a purchaser for certain stock, evidence that defendant placed the stock in the hands of a third person for delivery to any purchaser whom plaintiff might procure under the contract is competent, in contradiction of evidence that defendant repudiated the contract.

In bank. Appeal from superior court, city and county of San Francisco; John Hunt, Judge.

Action by S. Mattingly against James C. Pennie, administrator of Thomas Blythe, deceased, for commissions alleged to have been earned under a contract authorizing plaintiff to sell certain mining stock of the deceased. From a judgment for plaintiff, defendant appeals. Reversed.

Naphtaly, Friedenrich & Ackerman and W. H. H. Hart, for appellant. Edward J. Pringle and D. Wm. Douthitt, for respondent.

VAN FLEET, J. This is an action to recover the sum of $125,000, commissions for the sale of mining stocks. Plaintiff alleges that by a written contract with Thomas H. Blythe, defendant's intestate, he was authorized to negotiate a sale of said stocks for $300,000, and was to receive as his commission all that he could obtain for the stock above that price; that he procured a purchaser at the net price of $425,000, who was ready, willing, and able to pay that sum for the stock; and that Blythe refused to make the sale or convey the stock to the purchaser. The cause was tried before a jury, and a verdict was rendered for the defendant. Plaintiff appealed to this court, and the judgment was reversed, and the cause remanded for a new trial. Mattingly v. Roach, 84 Cal. 207, 23 Pac. 1117. A second trial was had before a jury, which resulted in a verdict for the plaintiff for the full amount claimed. The defendant appeals, and assigns error in the instructions and other rulings of the court, and insufficiency of the evidence to justify the verdict. Respondent contends that on the former appeal the question of the sufficiency of the evidence to sustain a verdict for plaintiff was decided in favor of plaintiff; that plaintiff's evidence was substantially the same on the last trial as on the first; and that the decision on that point has become the law of the case and precludes us from now considering the sufficiency of that evidence.

The facts upon which this contention is based are these: On the former appeal plaintiff (then appellant) contended that a certain instruction, given at the request of defendant, was erroneous. In reply defendant (then respondent) urged that the evidence would not have supported a verdict for plaintiff even if the instruction in question had not been given, and that, therefore, the alleged error was without prejudice to plaintiff. In response to that objection we said that, in our opinion, plaintiff had produced testimony tending to sustain his side of the case, that no motion for nonsuit had been made, and that the case was properly submitted to the jury for its determination as to the facts. The instruction in question was held erroneous, and the judgment was reversed for that reason alone.

It is settled beyond controversy that a decision of this court on appeal, as to a question of fact, does not become the law of the case. But plaintiff contends that the question thus presented of the insufficiency of the evidence to support a verdict for plaintiff was a question of law, and was the very fact in judgment on that appeal. Assuming, without deciding, that that view is correct, we are nevertheless of opinion that the point now presented is not the same as that so supposed to have been decided on the former appeal, and that we are therefore now entitled to consider it without being concluded by the former decision. We adhere to what was said on that subject in Wixson v. Devine, 80 Cal. 388, 22 Pac. 224, and will not extend the application of the doctrine of the "law of the case" beyond the cases in which it has hitherto been held to apply.

On the former appeal defendant was not entitled to dispute the correctness of the rulings of the court below, or of the theory on which the case had been submitted to the jury. The verdict being in his favor, he could not assign error; and, on plaintiff's appeal, we were bound to assume the correctness of the instructions given at plaintiff's request. Those instructions, whether correct or otherwise, were binding upon the jury; and plaintiff was entitled to a verdict in accordance with those instructions, if the evidence warranted it. Emerson v. Santa Clara, 40 Cal. 543; Aguirre v. Alexander, 58 Cal. 21, 30; Declez v. Save, 71 Cal. 552, 12 Pac. 722. On that appeal, therefore, the only question which we could possibly consider as to the sufficiency of the evidence was whether the evidence was sufficient, under the instructions actually given and not objected to by plaintiff, to have supported a verdict in his favor had one been rendered. On the present appeal defendant contends that the theory on which the case was given to the jury, which was substantially the same as at the first trial, was incorrect, and that the instructions were contrary to law; and that the evidence is insufficient to justify a verdict for plaintiff, under the rules of law as they should have been given to the jury. It is evident that no such question was or could have been considered or decided on the former appeal; and, if there are any expressions in the former opinion which at first glance might appear to refer to that question, they must be confined in their application to the question then actually before the court. In addition to these considerations, we are also of opinion that as to at least one material point—the alleged repudiation of the contract by Blythe—the evidence is, as we shall show, materially different from that on the former trial. For these reasons we think that we are at liberty to consider the points made by appellant without further reference to the former opinion.

1. At the request of the plaintiff, the court gave the jury the following instruction: "The authority given to the plaintiff by Exhibit B to sell the stock of the Blue Jacket Mining Company for a sum not less than $300,000 did not authorize the plaintiff to execute, in the name of Thomas H. Blythe, any written contract with a purchaser or to bind Blythe to a purchaser, but only to procure a purchaser, and this might be done verbally by bargain with the purchaser." It is evident that the question of the power of plaintiff to bind Blythe by a contract of sale of the stock does not arise in this case; and this instruction, therefore, means, and must have been understood by the jury to mean, that plaintiff would fully perform the conditions of his contract with Blythe, and earn his commissions by merely obtaining from a purchaser a verbal bargain to buy the stock. The court also, at the request of plaintiff, gave the following instruction: "If the jury believe that the plaintiff found a purchaser who was able, ready, and willing to purchase and pay for the stock of the Blue Jacket Mine at $500,000, or any sum above $300,000, before the 15th day of February, 1883, and informed Thomas H. Blythe of the fact in season, so that a sale could have been consummated before the 15th day of February, 1883, and the said Blythe refused to make a sale, then the plaintiff is entitled to recover." These instructions do not correctly state the law. In order to entitle a broker, under such a contract, to recover commissions where no sale has actually been consummated, it is incumbent on him to prove that he found a purchaser ready, willing, and able to buy the property on the terms fixed, and either that he procured from that person a valid contract binding him to purchase the property upon those terms, or that he brought the vendor and the proposed purchaser together, so that the vendor might have secured such contract if he desired. On no other terms can he recover. Gunn v. Bank, 99 Cal. 349, 33 Pac. 1105. The readiness and willingness of a person to purchase the property can be shown only by an offer on his part to purchase; and unless he has actually entered into a contract binding him to purchase, or has offered to the vendor, and not merely to the broker, to enter into such a contract, he cannot be considered a "purchaser." Such a contract, in this case, would be within the statute of frauds, and must be in writing (Code Civ. Proc. § 1973, subd. 4; Civ. Code, § 1739), there being no pretense that the purchaser had received any part of the stock or paid any part of the price. The court should have instructed the jury in accordance with these principles, and the above instructions were erroneous.

2. It follows, also, from these principles that the evidence did not justify the verdict. The evidence produced by plaintiff, at the most, tended only to show that plaintiff, within the time limited, found a person in London who offered verbally to purchase the stock for $425,000 net; that plaintiff communicated that fact to Blythe without in any way naming or pointing out the purchaser; and that Blythe thereupon refused to make the sale. No contract was obtained from the supposed purchaser which could bind him in any way, nor was it shown that Blythe was aware who he was or did anything to prevent plaintiff from performing the condition of the contract. Counsel for plaintiff contend that the evidence shows that Blythe unequivocally refused to perform his contract; and they claim that, under section 1512 of the Civil Code, his refusal to perform entitled plaintiff to all the benefits which he would have obtained if the contract had been performed by both parties. Such is not the law. In some cases of bilateral contracts, a refusal on the part of one party to perform the contract has been held to amount to a prevention of performance by the other party. But where, as here, the contract is unilateral, the party to whom the promise is made cannot recover without proof of performance of the condition upon which the promise depends; and in such cases a mere refusal by the promisor to perform, or even an entire repudiation by him of the contract, does not, of itself, amount to prevention. In no event could plaintiff become entitled to commissions without procuring a purchaser in the manner before pointed out. If he had procured such a purchaser, Blythe's refusal to sell would not have strengthened plaintiff's case; as he did not procure one, and was not prevented by any act of Blythe from

procuring one, the alleged refusal is immaterial.

But we do not think that the evidence tends to show that Blythe repudiated the contract, or even refused to sell the stock as he had agreed. The only testimony on this subject is that of plaintiff's witness Ledden, who testified that he took to Blythe a letter from plaintiff stating that plaintiff had sold the stock in London for $500,000, and that the money was ready in London to pay for it; that Blythe thereupon became angry, and "said he would not sell it." The witness asked "if he was going to carry out the conditions of the letter, and he said, 'No.' He said that the amount was too small, or something to that effect; that he had to divide up the amount that he was to get with several parties; and that he would not carry out the condition. He said that perhaps other arrangements could be made that would be satisfactory to him, or something to that effect." The witness remembered nothing further as to the contents of the letter, though he thought it contained something more. The only other testimony concerning the contents of the letter was that of the plaintiff and the witness Wand, neither of whom could state anything further concerning it. It is evident that that testimony, if believed, proved nothing, unless in connection with the contents of the letter referred to. If that letter contained nothing beyond the bare statement testified to by the witnesses, Blythe's language amounted to nothing, for there was nothing for him to act upon. If, on the other hand, it contained a statement of the conditions of the sale, as the witness Ledden seems to imply, then, without knowing what were the conditions so stated, it is impossible to determine whether Blythe's refusal was justified or not. It appears by the testimony of plaintiff's witness Borgen, the supposed purchaser, that the money was to be payable in London. If the letter so stated, then Blythe was justified in refusing to accept the proposition; for, under his contract, he was entitled to payment in San Francisco. It should be observed that, on the former trial, the witness Ledden testified that Blythe said that "if the money was in hand he would not accept it"; and we considered that such a statement would excuse the plaintiff from sending or tendering the money to him at San Francisco. But the witness did not so testify on the last trial, and there is now nothing in the testimony to show that Blythe in any way repudiated his contract,—certainly nothing tending to show any act on his part which could have prevented plaintiff from procuring a purchaser. The evidence is also insufficient to show that the supposed purchaser had the ability to purchase the stock at the price named. The only evidence on that point is his own testimony. He did not claim that he himself had any property or means adequate for that purpose; but he said that he made the purchase on behalf of a "syndicate," and expected to obtain the necessary funds from that syndicate. His testimony, taken most favorably for plaintiff, was that he had never had the money in his hands, that no persons had ever actually subscribed the money, but that, through that syndicate, he "would have been prepared" when the time arrived "to complete the purchase,"—"to find the money required." That testimony amounted to nothing more than a statement of his belief that persons not bound by contract to do so would have advanced the money; and it is clearly not such evidence as, under section 1835, Code Civ. Proc., would justify the jury in finding that he had the ability to pay. Moreover, he testified that he was unable to remember the name of a single one of the persons forming the syndicate, and that, since the commencement of this action, he had destroyed all memoranda by which he could have refreshed his memory on the subject. Under these circumstances, his testimony was clearly not "satisfactory," within the meaning of section 1835, and should not have been submitted to the jury. There are many other serious objections urged against the evidence given for plaintiff, which it is not necessary to consider, as those already mentioned are sufficient for the purposes of this appeal. It is enough to say that the evidence was not sufficient to support plaintiff's case on any material issue.

3. The court, at the request of plaintiff, instructed the jury that "evidence of the oral admissions of a party ought to be received with caution by the jury." This instruction was evidently predicated upon certain testimony introduced by defendant, tending to prove oral admissions by plaintiff that he had never found a purchaser for the stock. It is in the precise language of subdivision 4, § 2061, Code Civ. Proc., which authorizes the court to give it "on all proper occasions." Counsel for defendant contend that, under the decision in Kauffman v. Maier, 94 Cal. 269, 282, 29 Pac. 481, it was a charge with respect to a matter of fact, and therefore forbidden by the constitution. It is not necessary to consider that question in this case, for we are of opinion that this was not a "proper occasion," within the meaning of that section, for the giving of such an instruction. The plaintiff's case depended entirely upon oral testimony as to transactions with the deceased Blythe. That testimony was of such a nature as to make direct contradiction absolutely impossible. No documents of any kind were produced to substantiate it, nor was it corroborated by any independent fact. Plaintiff's claim was never heard of until more than a year after the appointment of an administrator on Blythe's estate, not even by parties who were jointly interested in the al-

leged commissions. Under such circumstances, the only kind of evidence which defendant could possibly obtain was testimony of the kind referred to in this instruction. That testimony was of at least as high a character as that produced by plaintiff. Indeed, plaintiff's whole case rested upon the unsupported testimony of a single witness as to a conversation between Blythe and himself when they were alone. No weaker kind of testimony could be produced; and it was clearly not a proper occasion for the court, under such circumstances, to give to the jury an instruction in disparagement of the testimony by which alone defendant could meet the testimony adduced by plaintiff.

4. The court erred in sustaining plaintiff's objections to the questions propounded by defendant to the witness Hart. It was competent for defendant to show that the stock was kept in the hands of a third person for delivery to any purchaser whom plaintiff might procure under the contract. That would be a circumstance tending to contradict the claim that Blythe had repudiated his contract. While it is true that defendant could not be permitted to prove the mere declarations of the deceased in his own favor, he was certainly entitled to prove his acts under the contract, and any declaration made at the time, and characterizing those acts as a part of the res gestae. Some other points are urged by appellant, some of which are sufficiently covered by what has been said, and others will not probably arise on another trial. The appeal from the judgment, having been taken more than one year after the entry of judgment, is dismissed. The order denying a new trial is reversed, and the cause remanded for new trial.

We concur: McFARLAND, J.; FITZGERALD, J.

GAROUTTE, J. (concurring). The evidence in the record is wholly insufficient to support plaintiff's complaint. Of the many elements of the case absolutely necessary to be proven in order to establish a cause of action, hardly one is sufficiently made out. Yet plaintiff has recovered a judgment for more than $100,000 upon this evidence, and insists that the validity of such judgment be ratified by this court. To obviate the results which would necessarily flow from this dearth of evidence, to wit, a reversal of the judgment, the principle of the law of the case is invoked, and a former decision of this court relied upon, wherein it is said that "the plaintiff produced testimony tending to prove his side of the case." Citing the testimony, Mattingly v. Roach, 84 Cal. 207, 23 Pac. 1117. Conceding the evidence to be the same upon both appeals, still I do not think this declaration of the court should be held equivalent to a declaration that plaintiff by the evidence established a prima facie case for a recovery. At that time the matter under consideration was the validity of an instruction, and the sufficiency of the evidence only incidentally arose upon the discussion of that question. While in a certain sense the language of the court is not obiter, still it is closely allied to it. The sufficiency of the evidence was not the direct question with which the court was dealing, and it is entirely apparent from the context that the court, in making the statement quoted, never intended to so pass upon the sufficiency of plaintiff's evidence as to forever foreclose a trial court, or this court, from declaring it insufficient to establish a prima facie case. If the court did not intend to make any law of that kind for the case, to hold that such law was made would be treating the doctrine here invoked most kindly and liberally, while, upon the contrary, it has been recognized always and everywhere as a harsh doctrine, and one which has nothing to commend it to the favor of courts. I concur in the judgment.

BEATTY, C. J., and HARRISON, J., being disqualified, took no part in the decision of the foregoing cause.

106 Cal. 48

## PEOPLE v. SCHMITT. (No. 21,173.)

(Supreme Court of California. Jan. 31, 1895.)

HOMICIDE—INSANITY—PRESUMPTION OF CONTINUANCE—EVIDENCE.

1. On a prosecution for murder, the defense did not claim that defendant was insane at the trial, and objected to a statement by the prosecution that the jury must find that defendant "is insane," in order to acquit. The court instructed that the jury should consider all defendant's acts "at the time of, before, and subsequent to the alleged commission of the offense," but should consider him as sane at the time of the trial. *Held,* that such instruction was not error, as taking from the jury the power to consider the question of his insanity at the time of the trial as bearing on his sanity at the time the offense was committed.

2. A statement by the prosecuting attorney that the court will instruct that, to acquit, the jury must find that defendant "is insane," is not ground for reversal, where, on objection being taken, the court, in its charge, stated that the issue was as to defendant's sanity at the time of the commission of the offense.

3. Where a witness has testified that before the homicide he considered defendant insane, it is not error to refuse to permit him to testify that he had told deceased that defendant was insane.

4. Statements by deceased that she considered defendant insane, being merely hearsay, are inadmissible.

5. A ruling of the trial court that a witness was qualified to express his opinion as to defendant's sanity will not be *held* erroneous, unless it clearly appears that the decision was wrong.

6. An instruction that, if the jury find that defendant was insane at a period before the homicide, such insanity is presumed to have continued up to the time of the homicide, provided the exciting cause of such insanity also continued, is properly refused.

7. In an instruction, the use of the word "delusion" is not ground for reversal, where the

evidence, and the connection in which it was used, show clearly that by it was intended insanity on a particular subject.

8. When the court has once clearly instructed as to the degrees of the crime charged, it is not necessary to repeat such instruction in every connection in which reference is made to the degrees of crime.

9. The appellate court cannot consider the insanity of defendant, disclosed subsequent to the trial, as ground for reversing the judgment.

Commissioners' decision. In bank. Appeal from superior court, Sutter county; E. A. Davis, Judge.

Peter Schmitt was convicted of murder, and appeals. Affirmed.

E. A. Forbes and W. H. Carlin, for appellant. The Attorney General, for the People.

HAYNES, C. Appellant was charged with the murder of Mrs. Charlotte Gardemeyer, alleged to have been committed November 17, 1893, and was found guilty by the jury of murder in the first degree, with the penalty of imprisonment for life. The fact that defendant committed the homicide was not controverted, the defense being that he was insane; and this appeal is from the judgment, and from an order denying a new trial. The motion for a new trial is based upon alleged errors in the admission and exclusion of evidence, and upon instructions given and refused, and upon a statement of law made to the jury by the district attorney during his argument. The errors specified in the record are very numerous. Appellant's brief discusses only a few of them, and these we shall first notice:

1. That the court erred in giving instruction No. 26, the material part of which is as follows: "And, as I am about to conclude my instructions to you, it may aid you if I give a brief summary of the principal matters you must consider and decide. You are not to consider whether or not the defendant is insane at the present time, but you are to consider him as now sane. A person charged with crime cannot be legally tried for such crime unless he be sane at the time of the trial. The defendant has presented the issue to you that, at the very time of the alleged commission of the homicide, he was insane. As I have already told you, the burden of proving his insanity at that time rests upon him, because the law presumes he was then sane. * * *." Appellant contends that this instruction invaded the province of the jury, and was equivalent to a finding of the fact that the defendant was then sane, and took from the jury the power to consider the question of the insanity of the defendant at that time as evidence tending to show that he was insane when he committed the homicide. I think the instruction could not have been so understood. No suggestion was made during the trial that he was then insane, nor any witnesses examined as to his sanity at that time. The court had before that instructed the jury that they were to consider "all his acts and conduct at the time of, before, and subsequent to the alleged commission of the offense, as shown by the evidence." No issue as to his sanity at the time of the trial had been submitted to the jury under section 1368 of the Penal Code; and hence, for the purposes of the trial, he was to be considered sane, the issue being whether he was sane at the time he committed the homicide. This instruction was given by the court of its own motion, and though no suggestion had been made on behalf of the defendant that he was then insane, or that it was improper to proceed with the trial for that reason, it was proper, in view of a statement made to the jury by the district attorney in the course of his argument to the jury, and which is also specified as one of the errors for which a reversal is sought. The language used by the district attorney was this: "You will be instructed by the court that you must find by a preponderance of the testimony that the defendant is insane before you can acquit him." Counsel for defendant at once objected and excepted to the statement, and asked the court to instruct the jury then that the statement was not law, to which the court replied that he would instruct the jury at the proper time. The mistake of the district attorney was thus corrected by the court; and, in view of the correction, it cannot be held that the jury were misled by his error.

B. W. H. Harstromberg, a brother of the deceased, was called by the defendant, and testified to his acquaintance with the defendant; the change in his demeanor from the time he first knew him; that the last time he saw him was about two years prior to the homicide; and that he (the witness) then considered the defendant insane. The witness was then asked by counsel for defendant whether he ever had any talk with Mrs. Gardemeyer regarding the sanity or insanity of the defendant. He answered that he had, and was asked to state what it was. He commenced to answer, and was stopped by the court. Counsel for defendant then offered to prove by the witness "that at different times he went to Mrs. Gardemeyer, and told her to look out for Peter Schmitt; that he was crazy, and liable to become violent, and to look out for him,—and that she answered that she knew he was crazy, but she could handle him." An objection to the offer was sustained, and defendant excepted. I see no error in the ruling. The witness had already testified what his opinion was. If he had been permitted to testify that he had expressed that opinion to his sister two years before the homicide, it could not strengthen his testimony, since whether he entertained such opinion at that time, or had expressed it, must each have stood upon his testimony alone; and, as to what his sister said, it was mere hearsay, and besides, not being accompanied by a statement of the facts upon which she based that opinion, the opinion itself could not be received. What has here been said also disposes of the errors assigned upon the questions put to Swan Segerstrand, viz.: "Do you know whether or not Mrs. Gardemeyer knew that defendant was crazy?" and "Did Mrs. Gardemeyer ever tell you that the old fool was crazy, but that she could handle him?"

Ellington, a witness called by the prosecution in rebuttal, was permitted, against defendant's objection, to testify that in his opinion the defendant was sane. Whether the witness had such acquaintance with the defendant, and opportunity of observing him, as to qualify him to express an opinion as to defendant's sanity, was a question necessarily to be determined by the trial court, in the first instance; and, while this court has the unquestioned right to review the ruling in that regard, it will not be held erroneous upon a mere difference of opinion, but it must clearly appear that his decision upon the point was wrong. Something must be conceded to the intelligence of the witness, and his habits of observation, and of these qualifications the trial court can better judge. People v. Pico, 62 Cal. 50. Upon the facts stated by the witness, his opinion was entitled to some consideration, as it tended in some measure to show the mental condition of the defendant down to a time shortly before the homicide, the weight to be given it by the jury being controlled by the facts upon which his opinion was based.

It is also contended that the court erred in refusing to give the following instruction requested by the defendant: "I further instruct you that, if you find from the evidence in this case that the defendant was insane at a period before the homicide in question, then and in that case his insanity is presumed to have continued up to the time of the homicide, provided the exciting cause of such insanity also existed up to and at the time of the homicide." This instruction was properly refused. In People v. Francis, 38 Cal. 183, there is an instruction identical with the one under consideration, if the latter clause, commencing with the word "provided," had been omitted. The court there said: "If the term 'insanity,' as employed in these instructions, is to be construed as referring to a general unsoundness of the mind, and not to an aberration of a temporary nature, proceeding from some transient cause, then the instructions correctly stated the law. If it be shown that the intellectual faculties were so impaired as to produce a general, habitual derangement of them, not traceable to some temporary cause, the law would presume the mind to have continued in the same condition until the contrary was shown. In Whart. Cr. Law, § 55, the rule is thus stated: 'When habitual insanity is proved to have existed prior to the commission of an act, it will be presumed to have continued, unless the contrary be proved, down to the specific time. It is otherwise, however, when the proof is of temporary or spasmodic mania.'" The language used by the court, above quoted, is subject to criticism so far as it refers to insanity "produced by a temporary cause" or "transient cause," since permanent or long-continued insanity may result from a transient or temporary cause, while a continuing cause may produce only temporary insanity. The point of the opinion, however, is right. To establish the basis of a presumption that insanity, once shown to have existed, continues to exist, it must appear to have been of such duration and character as to indicate the probability of its continuance, and not simply the possibility or even probability of its recurrence, as would be the case if its existence appeared to be temporary. Because the request was not qualified as above indicated, it was properly refused. See, also, People v. Smith, 57 Cal. 130.

Exceptions were also taken to the twenty-second, twenty-third, and twenty-fourth instructions given at the request of the prosecution. These instructions introduce the word "delusion," but the connection in which it is used shows that it was intended as an equivalent expression for "partial insanity." The twenty-second instruction starts with the expression, "When partial insanity is relied upon," etc.; the twenty-third uses the expression, "partial insanity or delusion"; and the twenty-fourth, "in cases of partial delusion." It is also clear that by "partial insanity" is there meant insanity upon a particular subject, or as to a particular matter. The twenty-third instruction explains this meaning very clearly, as follows: "In cases of partial insanity or delusion as to certain facts and matters, and the accused, as to other facts and matters, is sane," etc. If the defendant was insane, it was not a case of insane delusion, but the cause was an existing fact. There was evidence, however, tending to show that the defendant had "spells" when he did not appear or act as he did on other occasions; and, as appeared from the testimony of the witness Ellington, that when engaged in assisting him in repairing the pump, on the several occasions mentioned, he acted intelligently, and he considered him perfectly sane. The use of the word "delusion," while it had no proper application to the facts of the case, could not have misled the jury, since the evidence, and the connection in which the word was used, made clear the sense in which it was used.

The exception to the twenty-first instruction is not well taken. It is true this instruction did not refer to the degrees of the crime charged in the information; but the court explicitly instructed the jury upon that subject, and defined the different degrees of murder, and expressly informed them that the defendant might be convicted of either, or—if, in their judgment, the facts warranted it—of manslaughter. It is not required that the court shall repeat such instruction in every possible connection in which reference could be made to the degrees of the offense. If once clearly and expressly given, it is sufficient.

No other points are discussed in appellant's brief, though other errors are specified in the record. A careful examination of them, however, discloses none requiring a reversal of the judgment or order appealed from. The facts disclosed by the evidence must appeal strongly to the sympathies of any one who reads the record, and justify the earnestness and evident sincerity with which the learned counsel for appellant have presented his case. The statement in appellant's opening brief that the condition and mental state of the defendant is "daily nearing the hopeless shores of idiocy" is not noticed in respondent's brief; and, in appellant's closing brief, counsel say: "As matter of fact, at the very time of the trial the defendant was rapidly approaching dementia, and at the present time lies in the county jail of Sutter county, under sentence, a gibbering and demented idiot." Assuming this to be true, it is probable that the defendant was not responsible at the time of the homicide, and, if so, should have been acquitted; but it is equally true that, notwithstanding his present condition, the mental disease may not have so far progressed at that time as to relieve him from the fearful responsibility of his acts. This court, however, cannot act upon the evidence furnished by his present condition, and upon that ground reverse a judgment otherwise legal. The humanity of the law has, however, provided for such cases. A person, though adjudged to punishment, cannot be "punished for a public offense while insane." Pen. Code, § 1,367. His conviction and sentence do not exclude him from the state insane asylum, and, beyond that, executive clemency has power to relieve even where the courts cannot. I advise that the judgment and order appealed from be affirmed.

We concur: SEARLS, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

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105 Cal. 572

## McLAUGHLIN v. MENOTTI. (No. 15,299.)

(Supreme Court of California. Feb. 6, 1895.)

On application for rehearing. Denied.

For former report, see 38 Pac. 973.

PER CURIAM. The judgment herein is modified by the addition thereto of the following words: "not exceeding the amount stated in the complaint." Rehearing denied.

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## WILLIAMS v. CUNEO. (No. 15,747.)

(Supreme Court of California. Feb. 7, 1895.)

Department 1. Appeal from superior court, city and county of San Francisco; James M. Troutt, Judge.

Action by one Williams against one Cuneo. Plaintiff had judgment, and defendant appeals. Affirmed.

Horace W. Philbrook, for appellant. J. C. Bates, for respondent.

PER CURIAM. Upon the authority of Fletcher v. Prather, 102 Cal. 413, 36 Pac. 658, White v. Harris, 103 Cal. 528, 37 Pac. 502, and Byrne v. Luning Co. (Cal.) 38 Pac. 454, the judgment and order appealed from are affirmed.

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106 Cal. 89

## PEOPLE v. WEST. (No. 21,162.)

(Supreme Court of California. Feb. 12, 1895.)

PRIVILEGED COMMUNICATIONS — PHYSICIAN AND PATIENT—CRIMINAL CASES.

1. Under Code Civ. Proc. § 1881, subsec. 4, limiting the privilege of a physician to civil cases, a physician may testify as to communications by a patient in criminal cases.

2. Defendant, a physician, accused of having caused the death of a patient by procuring for her a miscarriage by unlawful means, called as a witness another physician, to prove that deceased applied to him before she did to the defendant, and what her condition was at that time. *Held* an error to exclude his testimony.

Commissioners' decision. In bank. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

Eugene F. West was charged with the murder of one Addie Regent Gilmour. From a judgment of conviction, and an order denying motion for a new trial, defendant appeals. Reversed.

J. N. E. Wilson, Myer Jacobs, and Robert Ferral, for appellant. Atty. Gen. Hart, for the People.

BELCHER, C. The defendant was charged with the murder of one Addie Regent Gilmour, and found guilty of murder in the second degree. The judgment was that he be punished by imprisonment in the state prison for the term of 25 years, from which judgment, and an order denying his motion for a new trial, he appeals. It is contended for appellant that the court committed several errors of law in its rulings as to the qualification of certain parties to sit as jurors in the case, and in the admission and exclusion of evidence, but, in view of the conclusion reached, only one of these alleged errors need be considered.

The theory of the prosecution was that the deceased, Miss Gilmour, was pregnant, and went to the defendant, who was a physician in San Francisco, to have him procure for her a miscarriage, and that defendant by some unlawful means did procure the miscarriage, and thereby cause her death, a few days later. The theory of the defense, on the other hand, was that the miscarriage was effected by some one else before the deceased went to the house of defendant, and that he, as a physician, received her there, and did all he could to relieve her sufferings and save her life. To sustain his theory, defendant called as a witness Dr. R. D. Johnson, who was a licensed physician, and was willing to testify. No objection to his testifying was interposed by the prosecution, but the court said: "If what has come to him has come purely in a professional way, the declared policy of the law would exclude it here, whether it be objected to or not. It is my duty to exclude it, if that is so." Then, addressing the witness, the court asked: "Is it so that all you know has come to your knowledge in the course of your profession, as to the physical condition of the woman, and you are called upon to tell what you found out as her physician, is that all you know?" Answer: "Yes, sir." Again the court asked: "And whatever you know about the deceased woman, is it or not the fact that whatever you know was information you obtained in attending her as your patient?" Answer: "Yes, sir." Thereupon the court excluded the evidence of the witness, and said: "You cannot be examined, doctor. You can retire." Counsel for defendant then made the following offer: "We offer to prove by Dr. R. D. Johnson that this lady called upon him. We offer to prove what her condition was at that time by a personal examination which she requested him to make. We offer to prove that he made the examination. We offer to prove what he found; and then we offer to prove that he refused to attend her, and that he told her certain things. We offer to prove all this, and what her condition was at that time, and that it was prior to the time that this lady went to Dr. West's." The court: "Very well. I rule it out." An exception was reserved, and these rulings all assigned as error.

Shortly after this case was tried, the case of People v. Lane, 101 Cal. 513, 36 Pac. 16, was before this court, and in the decision thereof it was said: "It is urged that the court erred in allowing the prosecution to cross-examine Dr. Danforth as to the nature of the complaint for which he treated the defendant. It is claimed that the testimony was irrelevant, immaterial, and incompetent, being a privileged communication between patient and physician. There is no merit in the contention. The rule as to privileged communications between patient and physician does not apply in criminal cases. The chapter on "Witnesses" in the Civil Procedure limits the rule to civil actions (section 1881, subsec. 4); and the Penal Code, which expressly preserves the rule as to husband and wife in the chapter determining who may be witnesses in criminal actions, makes no mention of physician and patient. Freel v. Railway Co., 97 Cal. 40, 31 Pac. 730. At common law the rule as to physicians was not observed in either civil or criminal cases. 3 Rice, Ev. § 209. The statutory privilege was not conferred to shield a person charged with the murder of another (People v. Harris, 136 N. Y. 448, 33 N. E. 65); and it certainly was not intended to be used as a weapon against one charged with crime." That decision was made in department 1 of the court, but a hearing in bank was afterwards asked for and denied. The decision is clearly applicable to this case, and decisive of the question in hand; and, on the authority of it, the judgment and order appealed from should be reversed, and the cause remanded for a new trial.

We concur: VANCLIEF, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, and cause remanded for a new trial.

BEATTY, C. J. I concur. Section 1321 of the Penal Code is as follows: "The rules for determining the competency of witnesses in civil actions are applicable also to criminal actions and proceedings, except as otherwise provided in this Code." What, then, are the rules for determining the competency of witnesses in civil actions? The general rule is prescribed in section 1879, Code Civ. Proc., as follows: "All persons, without exception, otherwise than is specified in the next two sections, who having organs of sense, can perceive, and perceiving can make known their perceptions to others, may be witnesses. Therefore, neither parties nor other persons who have an interest in the event of an action or proceeding are excluded; nor those who have been convicted of crime; nor persons on account of their opinions on matters of religious belief; although in every case the credibility of the witness may be drawn in question, as provided in section eighteen hundred and forty-seven." This, then, is the rule: That all persons, without exception, otherwise than is specified in the next two sections, may be witnesses. And the only question is to determine what is otherwise specified in those sections which read as follows: Section 1880: "The following persons cannot be witnesses: (1) Those who are of unsound mind at the time of their production for examination; (2) children under ten years of age, who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly; (3) parties or assignors of parties to an action or proceeding, or persons in whose behalf an action or proceeding is prosecuted, against an executor or administrator upon a claim, or demand against the estate of a deceased person, as to any matter of fact occurring before the death of such deceased person." Section 1881: "There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, a person cannot be examined as a witness in the following cases: (1) A husband cannot be examined for or against his wife, without her consent, nor a wife for or against her husband, without his consent; nor can either, during the marriage or afterwards, be, without the consent of the other, examined as to any communication made by one to the other, during the marriage; but this exception does not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other. (2) An attorney cannot, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment. (3) A clergyman or priest cannot, without the consent of the person making the confession, be examined as to any confession made to him in his professional character in the course of discipline enjoined by the church to which he belongs. (4) A licensed physician or surgeon cannot, without the consent of his patient, be examined in a civil action as to any information acquired in attending the patient which was necessary to enable him to prescribe or act for the patient. (5) A public officer cannot be examined as to any communications made to him in official confidence, when the public interests would suffer by the disclosure." Obviously, section 1880 has no bearing on the question of the admissibility of Dr. Johnson's testimony; and the only provision of the following section that bears directly upon it is that contained in subdivision 4, which by its express terms is limited to civil actions. Such, then, is the rule and such its limitation as to physicians and surgeons. Except in civil actions, they may be examined as to information acquired in attending a patient. The construction contended for by respondent would simply eliminate from the statute the words "in a civil action," which the legislature has ex industria made applicable to the privileges of a physician or surgeon, as is evident from the fact that they are omitted in the clauses relating to attorneys, clergymen or priests, public officers, and persons sustaining marital relations to the parties. This construction of the statute is not only sustained by the plainest rules of construction, but accords with the common law, and with the interests of truth and justice.

I concur: VAN FLEET, J.

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NEWMAN v. BUCKMAN. (No. 15,536.)

(Supreme Court of California. Feb. 13, 1895.)

REVIEW ON APPEAL.

Where no error appears in the record, having no bill of exceptions, on appeal from a default judgment, the judgment will be affirmed.

Department 1. Appeal from superior court, city and county of San Francisco.

Action by one Newman against one Buckman. Plaintiff had judgment, and defendant appeals. Affirmed.

Ash & Mathews, for appellant. A. J. Clunie, for respondent.

PER CURIAM. The complaint is in the ordinary form for goods sold and delivered, and the answer contains only specific denials of its allegations. The defendant failed to appear at the trial, and judgment was rendered in accordance with the prayer of the complaint. Findings were waived, and the appeal is direct from the judgment, without any bill of exceptions. We find no error in the record, and the judgment is affirmed.

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106 Cal. 56

BRADY v. TIMES-MIRROR CO. et al. (No. 19,381.)

(Supreme Court of California. Feb. 1, 1895.)

ACTION AGAINST CORPORATION—JOINDER OF RESIDENT OF ANOTHER COUNTY—VENUE—MOTION FOR CHANGE—AMENDMENT OF COMPLAINT.

1. The right given by Const. art. 12, § 16, to sue a corporation in the county of its principal place of business, or where the liability arose, is waived by the joinder as defendant of a third person, who resides in another county; the latter having, under Code Civ. Proc. § 395, a right to have the action tried in the county of his residence.

2. In an action against a corporation and a third person, a motion by the latter for a change of venue to the county of his residence must be decided before plaintiff can be allowed to dismiss the action as to such third person.

In bank. Appeal from superior court, San Diego county; E. S. Torrance, Judge.

Action by Mary Brady against the Times-Mirror Company and others. From an order denying a motion by defendants for a change of venue, they appeal. Reversed.

Henry T. Gage and Stephen M. White, for appellants. Z. Montgomery & Son, for respondent.

HARRISON, J. Appeal from an order denying a motion to change the place of trial. The plaintiff commenced this action in the county of San Diego to recover damages from the defendants for the publication of a libel against her in the Los Angeles Times, a newspaper which was circulated in the county of San Diego. The Times-Mirror Company is a corporation having its principal place of business in the county of Los Angeles, and is the proprietor and publisher of the newspaper, and the defendant Otis is the chief editor and general manager thereof, and also resides in the county of Los Angeles. The summons in the action was served on these defendants on the 20th of July, 1893; but on the 8th of August, before any appearance by them, the plaintiff filed an amended complaint. August 18th the defendants demurred to the amended complaint, and at the same time filed an affidavit of merits, and made demand in writing for a change of the place of trial to the county of Los Angeles. After the motion had been argued, and while it was under consideration, the plaintiff moved the court for leave to amend her complaint by dismissing the said action against the defendants Goodwin and Otis; and the court, after hearing counsel for defendants in opposition thereto, granted the motion, and the amendment was entered in the minutes of the court. Thereupon the court denied the motion of the defendants to change the place of trial. From this order they have appealed.

Section 395, Code Civ. Proc., gives to the defendant in any personal action other than those enumerated in the previous sections the right to have the action tried in the county of his residence; and the residence of a corporation is the county in which its principal place of business is located. Cohn v. Railroad Co., 71 Cal. 488, 12 Pac. 498; McSherry v. Mining Co., 97 Cal. 643, 32 Pac. 711. Section 16 of article 12 of the constitution provides that "a corporation or association may be sued in the county where the contract is made, or is to be performed, or where the obligation or liability arises, or the breach occurs; or in the county where the principal place of business of such corporation is situated, subject to the power of the court to change the place of trial, as in other cases." Under the provisions of this section, if the action had been brought against the Times-Mirror Company alone, the plaintiff's right to have the action tried in San Diego would be undoubted (Lewis v. Railroad Co., 66 Cal. 209, 5 Pac. 79); but, by including in the action other defendants whose residence is outside of the county of San Diego, she waived the right given by this provision of the constitution, and the motion of the defendants must be determined by the provisions of the statute. The right of a plaintiff to have an action tried in another county than that in which the defendant has his residence is exceptional, and, if the plaintiff would claim such right, he must bring himself within the terms of the exception. Section 392, Code Civ. Proc., provides that an action to recover a penalty imposed by statute shall be tried in the county where the cause of action arose; but it was held in Ah Fong v. Sternes, 79 Cal. 30, 21 Pac. 381, that if, in such an action, the complaint is so ambiguous that it might be held to include a claim for other damages, or as stating another cause of action, the defendant is entitled to have the place of trial changed to the county of his residence, the court saying: "It is the plaintiff's own doing if the complaint be so drawn. He cannot deprive the defendant of his right to a change of venue by the addition of something to his complaint. If this were not the rule, it would be very easy for a plaintiff to defeat the defendant's right in the matter. All that plaintiff would have to do would be to add another cause of action to his complaint. It need not be a genuine cause of action, and it would not matter whether the two causes of action were properly united or not, for the defendant could not compel their separation by demurrer before moving for a change of venue, because he is required to take his proceedings for such change at the time of answering or demurring." In Smith v. Smith, 88 Cal. 576, 26 Pac. 356, it was held that if, in an action affecting the title to real estate, the plaintiff also included in his complaint a personal action against the defendant, the defendant was entitled to have the action tried in the county of his residence. In Sayward v. Houghton, 82 Cal. 628, 23 Pac. 120, it was held that the plaintiff could not deprive the defendant of this right by merely joining with him, as defendants in the action, residents of the county in which the action is brought, against whom no cause of action was stated, or from whom no relief was demanded. The same rule was laid down in Machine Co. v. Cole, 62 Cal. 318; McKenzie v. Barling, 101 Cal. 461, 36 Pac. 8; Bailey v. Cox, 102 Cal. 333, 36 Pac. 650.

In the original complaint herein one Frank A. Stevens was made a codefendant with the appellants, but the only allegation with reference to him in the complaint is that he "at all times was and is a San Diego correspondent of said newspaper, residing in said county of San Diego"; and it is recited in the bill of exceptions that the amended complaint is "in the same form as the original complaint, save and except that Leonard Goodwin was substituted as a defendant in said action in place of Frank A. Stevens." It appears from the affidavit of Otis that Goodwin resides in the state of Nebraska; but whether this is to be regarded as referring merely to the date of the affidavit, as claimed by the respondent, is immaterial, since the above allegation in the complaint in no respect connects him with the plaintiff's cause of action, any more than if it had been alleged that he was a subscriber to the paper; and, as Goodwin has never been served with the summons or appeared in the action, the motion of the defendants must be tested upon other grounds than that of his having been named as a party defendant. Sayward v. Houghton, supra; McKenzie v. Barling, supra. Upon the complaint as it stood by this amendment, the motion of the defendants should therefore have been granted.

It is claimed, however, by the respondent that inasmuch as, subsequent to the making of this motion, the complaint was further amended under an order of the court by which the corporation became the sole defendant, the plaintiff has the same right, by virtue of the foregoing section of the constitution, to have the cause tried in the county of San Diego as if the action had been originally brought against the corporation alone. Whether the Times-Mirror Company would have been entitled to have the place of trial changed to Los Angeles county if the plaintiff, in amending her complaint as "of course," under section 472, Code Civ. Proc., had left out all the other defendants, need not be considered. See, however, Buell v. Dodge, 57 Cal. 645. In making that amendment, she retained both of the appellants in the case, and sought from the court an order granting leave to further amend the complaint by dismissing Otis and Gibson from the action after the appellants had made the present motion. This was a step in the proceedings which required judicial action to determine whether it should be permitted, and which could be taken only after the order of the court to that effect had been made. The motion therefor was made to the court, and, although resisted by the appellants, was granted by an order entered in its minutes. When the defendants made their motion to change the place of trial, it was the duty of the court to act upon that motion, and either grant or deny it before taking any other judicial action in the case. In Heald v. Hendy, 65 Cal. 331, 4 Pac. 27, it was held that the court could not postpone action upon the motion until after an answer was filed, and the plaintiff had an opportunity to make a cross motion for the convenience of witnesses. And in Hennessy v. Nicol (Cal.) 38 Pac. 649, where a motion for alimony had been made prior to the appearance of the defendant, and where upon his appearance a motion was made by him for a change of the place of trial, it was held that the plaintiff had no right to have the motion for alimony first heard, and that the court had no authority to postpone the hearing of the defendant's motion until after a compliance with its order for the payment of alimony. The statute requires the motion to be made "at the time" the defendant appears and answers or demurs. If he does not then make the motion, he is not entitled to make it at any subsequent stage of the proceedings, even though the condition of the case may be such that, if it could be then made, it would be granted. Machine Co. v. Cole, supra. This necessarily implies that the motion must be made and determined by the court before it can hear or determine any other motion in the case. If the defendants are entitled to have their motion granted, they are entitled to have every motion or proceeding in the case heard before the superior court of the county of their residence. After the motion for a change of the place of trial had been made, it was not competent for the court to entertain or make an order for the amendment of the complaint in the matter of parties, any more than in the matter of substantive averments. If, upon the case as it was then presented, the defendants were entitled to have their motion granted, they are entitled to have all judicial action in the cause determined in the superior court of their own county. Whether the plaintiff is desirous to amend his complaint so as to obviate the objections that have been pointed out by demurrer, or in other respects that may render it impervious to attack, if such amendment can be made only upon the leave of the court, he must wait until after the case has been transferred, and make his application to that tribunal. This motion intercepted all judicial action in the case, and suspended the power of the court to act upon any other question until it had been determined. Ah Fong v. Sternes, supra.

The action of the plaintiff was not taken in accordance with section 581, Code Civ. Proc., as suggested in the brief in behalf of the respondent. Under the first subdivision of that section, an "action" may be dismissed by the plaintiff upon the "payment of costs," if it is made "by entry in the clerk's register"; but, until a judgment of dismissal is entered, the action is still pending against the defendant. Page v. Page, 77 Cal. 83, 19 Pac. 183. None of the steps prescribed by this section were taken in the present case. Instead thereof, the court made an order directing the plaintiff to amend her complaint. The order is reversed.

We concur: McFARLAND, J.; GAROUTTE, J.; TEMPLE, J.; VAN FLEET, J.; HENSHAW, J.

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106 Cal. 43

## BANK OF ESCONDIDO v. SUPERIOR COURT OF SAN DIEGO. (No. 19,486.)

(Supreme Court of California. Jan. 31, 1895.)

APPEAL BOND—JUSTIFICATION BY SURETIES—ESTOPPEL TO OBJECT.

Where notice is given to the defendant that sureties on plaintiff's appeal bond will justify before a justice at a specified time, defendant, by not then appearing, waives the right to assert that there is no justification, though one of the sureties previously withdrew from the undertaking.

In bank.

Certiorari, upon relation of the Bank of Escondido, to review the superior court of San Diego's dismissal of an appeal, brought on the ground of its lack of jurisdiction. Dismissed.

D. L. Withington, for petitioner.

HENSHAW, J. One W. C. Smith, aggrieved at an adverse judgment of the justice's court in an action wherein he was plaintiff and the Bank of Escondido defendant, gave notice of appeal to the superior court, and in due time filed the requisite undertaking. Two days thereafter one of the sureties left with the justice a written notice of withdrawal from the appeal bond, and the justice informed Smith's attorney of the action of the surety. On February 5th, within the five days limited by law, the attorney of the bank excepted to the sufficiency of the sureties; on February 6th notice was given by Smith that the sureties would justify before the justice at 2 o'clock p. m. of February 7th. At the time appointed, Smith's attorney and the two sureties were present, as the respondent claims and as the justice seemingly understood, for the declared purpose of justifying. The Bank of Escondido was not represented. Its attorney failed to appear, and no continuance was sought. No examination of the sureties was held. The justice declared that they were satisfactory, and that he believed them sufficient. In his docket the record of the proceedings appears as follows: "Plaintiff, by his attorney, A. H. Clency, appeared at 2 p. m. Sureties present. Defendant did not appear. * * * The papers, together with transcript and bond as approved, transmitted to clerk of superior court." In the superior court the bank of Escondido moved to dismiss the appeal, upon the ground of the lack of jurisdiction of that court. The motion was denied, the court retained the action, and the bank sued out this writ of review.

Whether or not the surety Nightingale had the absolute right to withdraw from the undertaking, whether he was present in the justice's court for the purpose of justifying, as understood by the justice and claimed by the respondent, or merely because his office was in the court room of the justice, as testified to by the surety and contended by petitioner, are questions whose decision is unnecessary to this determination; for it clearly appears that petitioner, by his own laches, is estopped from asserting that there was no justification. The justification of sureties has its origin in the fear of the exceptant that the surety may not be financially able to respond upon a breach of the obligation, and its object, as was said in Stark v. Barrett, 15 Cal. 364, is to afford the adverse party an opportunity to test by personal examination the responsibility of the sureties. The justification itself is the proof by the surety of his adequate pecuniary ability. At common law, in the case of special bail, where exception was taken to the sureties, they appeared for justification either in person or by affidavit. If in person, and there was no opposition by counsel, they justified, as a matter of course, by swearing that they were housekeepers or householders, and respectively worth double the sum sworn to after all their debts and demands were paid. If by affidavit, as when they resided at a distance, their affidavits to like effect were read as their justification. 1 Tidd, Prac. (3d Ed.) p. 227. Under our practice, this showing is made before presentation of the bond by affidavit of the sureties (Code Civ. Proc. § 1057); and a prima facie justification is thus established which may be overcome at the instance and by the examination of the exceptant. But, where no counter showing is made against the sufficiency of the sureties, justification will be deemed complete. The prima facie showing by affidavit, says Mr. Abbott, "serves as justification in case no exception is taken." 1 Abb. New Prac. & Forms, p. 482. The justification, then, is a right accorded to the adverse party, which he may either waive expressly or be debarred from asserting, under the well-settled rules of estoppel. Thus, in Blair v. Hamilton, 32 Cal. 53, where the justice refused to swear the sureties in justification, saying that both he and the exceptant knew them to be good, to which the exceptant assented, saying that he only served the notice because his attorney directed him to do so, this court said: "That the facts show a waiver on the part of the defendant (exceptant) of a justification on the part of the sureties does not admit of argument. To hold otherwise would enable the defendant to take advantage of his own wrong. Nor does the capacity of the defendant to make the waiver admit of debate." But while the waiver may be express, as in Blair v. Hamilton, supra, it may also arise through laches. The rule here is thus laid down: "In case of nonappearance on the part of the exceptant, the party giving the undertaking may either rest on the default as a waiver of the exception, * * * or he may produce his sureties and take a formal approval." 1 Abb. New Prac. & Forms, 485. And in Ballard v. Ballard, 18 N. Y. 492, the court say: "The respondent or his attorney must be in attendance before the judge when the bail appear, or he must necessarily lose the benefit of his exception. * * * The presumption of waiver arises solely from the conduct of the respondent in omitting to appear before the judge."

Nor is petitioner's cause aided by his contention that the surety Nightingale had withdrawn from the undertaking, and that respondent's failure to procure a new surety rendered the appeal void. Nightingale was actually present at the time appointed for justification. Whether present for the purpose of justification or not was a fact presented to the superior court, and there determined upon conflicting evidence. That determination is not here subject to review. Buckley v. Superior Court, 96 Cal. 119, 31 Pac. 8; History Co. v. Light, 97 Cal. 56, 31 Pac. 627. Moreover, had petitioner performed his duty by attending at the time set, and making it appear that Nightingale would not or could not justify, respondent would have been entitled to provide another and sufficient surety in his place (Code Civ. Proc. § 978); and thus is presented an additional reason for the application of the rule of waiver. Wherefore the relief prayed for is denied, and the writ dismissed.

We concur: GAROUTTE, J.; VAN FLEET, J.; TEMPLE, J.; McFARLAND, J.; HARRISON, J.

106 Cal. 98

## KRUGER v. LIFE & ANNUITY ASS'N et al.

(No. 15,837.)

(Supreme Court of California. Feb. 13, 1895.)

ACTION AGAINST ENDOWMENT ASSOCIATION—STATE TREASURER AS PARTY—LIEN ON FUND DEPOSITED WITH TREASURER.

1. In an action on a coupon of an endowment association, wherein plaintiff makes the state treasurer a party defendant, and claims a lien upon the $5,000 deposited by the association with him as required by Act March 19, 1891, the defense that there are other coupons maturing at the same time, and that such fund is not sufficient to pay the coupons in full, must be set up by answer.

2. An action against an endowment association, in which plaintiff, claiming a lien on the fund deposited by the association with the state treasurer, as provided by Act March 19, 1891, makes said treasurer a party defendant, is not an action against the state.

Commissioners' decision. Department 1. Appeal from superior court, Alameda county; W. E. Green, Judge.

Action by Mary Kruger against the Life & Annuity Association and J. R. McDonald, treasurer of the state of California. From a judgment for the plaintiff, defendant McDonald appeals. Affirmed.

Atty. Gen. Hart, for appellant. Otto Tum Suden, for respondent.

BELCHER, C. The plaintiff was admitted to membership in the defendant corporation on the 26th day of February, 1886. A certificate of membership was then issued to her, by which it was stipulated and agreed that, "if the said Mary Kruger shall fully comply with the laws and regulations of said association, and shall pay to said association the annual dues, at the rate of $2 for each $1,000 benefit provided by this certificate, and shall pay within thirty days after notification each assessment made and levied by said association, in accordance with its by-laws, she shall be entitled to a benefit of ten thousand dollars, to be paid in five equal installments or endowments, at periods as follows, to wit: First endowment, April 26, 1893," etc. Attached to the certificate were endowment coupons, the first of which stated "that Mary Kruger is entitled to receive the sum of two thousand dollars as the first payment of her endowment certificate," etc., "on April 26, 1893." After the maturity of the said first coupon, plaintiff presented the same to the defendant corporation, at its office, and demanded payment of the amount due thereon, but payment was refused. She thereupon commenced this action, alleging, among other things, that she had duly kept and performed all the conditions of the said contract to be by her kept and performed; that on the 27th day of April, 1893, the said corporation had, and ever since has had, a sum of money in its beneficiary, coupon, endowment, and reserve funds fully sufficient to pay the demand and claim of the plaintiff, and that it then and ever since has had on deposit with the state treasurer of the state of California, in bonds and securities, an amount equivalent to the sum of $5,000, as required by section 2 of an act of the legislature of this state entitled "An act relative to life, health, accident and annuity or endowment insurance on the assessment plan, etc., approved March 19, 1891"; and also that, prior to the commencement of the action, plaintiff served notice in writing upon J. R. McDonald, state treasurer, of her said claim, and the denial of all liability therefor by said corporation, and that she claimed a lien upon the funds, property, or moneys deposited with said treasurer as provided by section 4 of the said act of March 19, 1891. The prayer was for judgment against the defendant corporation for the sum of $2,000, with interest and costs, and that the sum adjudged to be due be decreed to be a lien upon any funds, property, moneys, bonds, or securities belonging to said corporation, and in the hands or possession of the state treasurer, and that the said lien be foreclosed, etc. The defendant corporation demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action; and the defendant McDonald demurred to it on the same ground, and the further ground "that the court has no jurisdiction of the person of the defendant, J. R. McDonald, state treasurer." The demurrers were overruled, and thereupon the corporation answered; alleging that the plaintiff had not complied with its laws and regulations in certain specified respects, and was therefore not entitled to the payment of the sum of money claimed by her, nor of any sum whatever. The case was tried, and the court found the facts in favor of the plaintiff, and rendered judgment and decree for the sum found due, as prayed for. From this judgment and decree the defendant McDonald alone appeals, and his only contention is that the court erred in overruling his demurrer.

It is claimed for appellant that the complaint did not state facts sufficient to constitute a cause of action, because under section 2 of the act of March 19, 1891 (St. 1891, p. 126), the funds in his possession were held by him in trust for all the contract holders of the corporation defendant, and were not to be delivered by him to any one contract holder, to the exclusion of the others, but should be divided equally among them all, and that the complaint should have shown the right of the plaintiff to participate in the trust fund, and the proportionate share of the fund to which she was entitled. In support of this position, counsel cite the case of Perpoli v. Grand Lodge, 102 Cal. 592, 36 Pac. 936. In that case it was held that, in a mutual benefit society, in which a special fund is created for the benefit of members of a certain class, to whom endowment coupons have been issued, one of the holders of such coupons is not entitled to recover the entire amount of his coupon, to the exclusion of members of the same class with himself, where the fund is insufficient to pay all of the coupons maturing at the same time, but in such case the fund should be divided equally between all the holders of such maturing coupons, and the plaintiff should recover only his proportionate part of such fund, and that the fact that other beneficiaries of the same class are not parties to the action, and are not before the court, assessing in their own names their right to participate in the fund, does not affect the right of the plaintiff to recover more than his proportionate share, but that the defendant, as trustee of the fund, may assert their rights for them, and resist plaintiff's right to recover more than his proportionate share of such fund. The case cited is not in point, for the reason that here it does not appear that there were any other contract holders having coupons maturing at the same time, nor, if there were, that the trust fund was not sufficient to pay all the coupons in full. If, however, there were other claimants whose rights defendants were authorized to assert, they should have set up the facts by answer, as they were in position to know them, and the plaintiff was not. The answer filed interposes no such defense, and the appellant cannot, therefore, avail himself of it on his demurrer.

In support of the demurrer, upon the ground that the court had no jurisdiction of the person of appellant, as state treasurer, it is claimed that "the action is really against the state, and not against the state treasurer, and no authority has been given by the legislature to private parties to sue the state in such actions." This claim has no support in law or reason. The statute (Act March 19, 1891) requires that bonds or securities of the value of $5,000 shall be placed with the state treasurer, and be held by him in trust for the contract holders of the corporation, and in section 4 it provides: "Unless the contract shall have been invalidated by fraud or by breach of its conditions, the corporation shall be obligated to pay the beneficiary the amount or amounts specified in its contract at the time or times therein named, and such indebtedness shall be a lien upon all the property of such corporation." Under these provisions the appellant was simply the custodian of the securities placed in his possession, holding them in trust for the plaintiff and other claimants, if there were such, and the indebtedness to plaintiff was a lien upon them. The state had no property or interest in the said securities. But the plaintiff, having a lien upon them for the payment of the indebtedness to her, had a right to have that lien enforced, and to make the appellant, as such custodian, a party to the action. The demurrer was properly overruled, and the judgment should be affirmed.

We concur: VANCLIEF, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

106 Cal. 95

## F. A. HIHN CO. v. FLECKNER. (No. 15,-814.)

(Supreme Court of California. Feb. 13, 1895.)

EJECTMENT—SUFFICIENCY OF EVIDENCE—TITLE IN PLAINTIFF—DEFENDANT'S POSSESSION—RENTS AND PROFITS.

1. Where the complaint in ejectment alleged that the plaintiff was seised in fee of the premises, and that defendant was in the unlawful and wrongful possession thereof, and wrongfully withheld the possession from plaintiff, and defendant denied merely that his possession and withholding were wrongful and unlawful, it was proper to find for plaintiff.

2. Where the defendant in ejectment offered no evidence, it was not error for the court not to make a finding upon the character of his possession.

3. Where defendant did not deny plaintiff's allegation as to the amount of the rents and profits, and the complaint failed to allege that defendant had been in possession for any length of time before suit, it was proper to include in the damages the value of the rents and profits from the commencement of the suit to the rendition of judgment.

Department 1. Appeal from superior court, Santa Cruz county; J. H. Logan, Judge.

Ejectment by the F. A. Hihn Company against William Fleckner. Finding for plaintiff, and from an order denying a new trial defendant appeals. Affirmed.

J. H. Skirm and Z. N. Goldsby, for appellant. Charles B. Younger, for respondent.

HARRISON, J. Ejectment. Appeal from an order denying defendant's motion for a new trial.

1. The complaint alleges that the plaintiff is seised in fee simple of the demanded premises, and that the defendant is in the unlawful and wrongful possession thereof, and wrongfully withholds the possession from the plaintiff. The defendant does not deny the seisin of the plaintiff or the possession by himself, but denies that his possession and withholding are wrongful or unlawful. Upon these admissions the court correctly found, as a conclusion of law, that the plaintiff is entitled to recover the possession of the land from the defendant. Payne v. Treadwell, 16 Cal. 221. If the defendant would claim the right to retain the possession, this is an affirmative defense, which it was incumbent upon him to establish. Id. As it appears from the record that he did not offer any evidence at the trial, the failure of the court to make a

finding upon the character of his possession does not constitute error. Winslow v. Gohransen, 88 Cal. 450, 26 Pac. 504.

2. The allegation in the complaint that the rents and profits of the land are of the value of $36 per year is not denied. The action was commenced September 1, 1893; and the court rendered its judgment February 3, 1894, awarding the plaintiff $15 for damages, "estimated by the value of the rents and profits of said land during the detention and withholding from plaintiff by defendant." As there was no issue upon the value of the rents and profits, the damage to the plaintiff was determined by a computation of this value during the withholding of the land by the defendant. The denial in the answer that the plaintiff had been damaged by such withholding made no issue of fact, in view of the admission regarding the value of the rents and profits, and was only the denial of a legal conclusion. The complaint does not allege that the defendant had been in possession for any length of time prior to the commencement of the action, but the court was authorized to include in its judgment for damages the value of the rents and profits from the commencement of the action down to the time of rendering judgment. Love v. Shartzer, 31 Cal. 487.

The order is affirmed.

We concur: GAROUTTE, J.; VAN FLEET, J.

(106 Cal. 64)

### CRANE v. PACIFIC BANK. (No. 15,863.) [1]

(Supreme Court of California. Feb. 5, 1895.)

BANK COMMISSIONERS' ACT—PROCEEDINGS BY ATTORNEY GENERAL — FINDING OF INSOLVENCY — EFFECT ON ATTACHMENT PREVIOUSLY LEVIED—EVIDENCE—RECORD IN FORMER PROCEEDING.

1. The bank commissioners' act (St. 1877–78, p. 740, as amended by St. 1887, p. 90 et seq.) provides that the board of bank commissioners may examine into the solvency of any bank, and if it finds that the bank is violating its charter or the laws of the state, or is in an unsafe condition, it may order the bank to discontinue its unsafe practices, and, on its refusal, the attorney general may commence suit to enjoin the transaction of further business; and that if the court finds that the business is carried on in an unsafe manner, and that the bank is insolvent, he shall grant the injunction, and direct the commissioners to take such proceedings against the bank "as may be decided upon by its creditors." *Held*, that the act was intended for the equal benefit of all creditors, and that no attachment can be levied on the assets of a bank after the date of its insolvency, as decreed in proceedings under the act.

2. On motion to dissolve an attachment levied on the assets of a bank, the pleadings and decree in a former proceeding under the bank commissioners' act, wherein such bank was adjudged to have been insolvent at a time prior to the levy of the writ, are admissible in proof of insolvency, and the decree is conclusive for all the purposes of the act.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Action by H. R. Crane against the Pacific Bank to recover money deposited with defendant. Plaintiff sued out an attachment, and, from an order dissolving the writ, appeals. Affirmed.

A. Barnard, Thos. V. Cator, and W. H. Hutton, for appellant. Sawyer & Burnett, for respondent.

HAYNES, C. Appeal from an order dissolving an attachment. On the 10th day of August, 1893, the plaintiff brought his action in the superior court of the city and county of San Francisco to recover from the defendant, a banking corporation, a certain sum alleged to have been deposited with it as a commercial deposit, and on the same day procured a writ of attachment to issue in said action, and which was on the same day levied upon assets of said bank sufficient to cover his claim. On November 17, 1893, the defendant served upon plaintiff notice of a motion to dissolve said attachment, "upon the ground that the attachment was improperly issued and levied, and on the ground that said attachment is dissolved by operation of law, by reason of the transaction of unsafe business and the insolvency and suspension of business by said Pacific Bank, defendant, prior to the issuance of said attachment, and by reason of the judgment of said superior court, duly made and entered, that it was unsafe for said bank to continue business, and that said bank was insolvent, and enjoining said bank from transacting business." Said motion was based upon affidavits served therewith, and upon the records and papers in said superior court in the action entitled: "The People, etc., v. Pacific Bank. No. 42,863." The affidavit of A. Gerberding read in support of said motion shows, in substance, the following facts: That from January 5, 1891, he was a member of the state board of bank commissioners; that the defendant was incorporated in 1863, under an act of the legislature entitled "An act to provide for the formation of corporations for the accumulation and investment of funds and savings," approved April 11, 1862, under the name and style of the Pacific Accumulation & Loan Company, with a capital stock of $1,000,000; that in 1866 the name of said corporation was changed to that of the Pacific Bank, under an act of the legislature approved March 31, 1866, authorizing it to change its name; that said corporation closed its doors for business, and wholly suspended payment of its debts, dues, and liabilities, on the 23d day of June, 1893, and has not since resumed payment; that on said last-mentioned day said bank held in trust for persons, partnerships, and corporations an aggregate fund amounting to about $1,868,041.45; that, prior to said last-mentioned day, said bank commissioners examined said bank, and found that it had been guilty of a violation of law in conducting business contrary to its articles of incorporation in an unsafe manner, and so as to seriously jeopardize the capital, property, and business of the bank, and thereupon directed it, by an order addressed to it, to discontinue such illegal and unsafe practices, and to conform to the requirements of its charter, but that the bank refused and neglected to comply with said order; that on said 23d day of June, 1893, the indebtedness of said bank was largely in excess of the reasonable and actual value of its assets; that the entire capital stock, together with the surplus, had become completely exhausted, and that the directors and stockholders neglected and refused to pay in said depleted stock, or any part of it, and "that on said 23d day of June, 1893, said Pacific Bank was wholly insolvent and remains so insolvent"; that the commissioners reported the condition of the bank to the attorney general, as required by law; that said attorney general commenced an action in the superior court on the 14th day of October, 1893, entitled, "The People of the State of California v. The Pacific Bank, a Corporation, et al.," in which action it was decreed on November 3, 1893, that said bank was insolvent, etc., and enjoining it and its officers from transacting any further business. The complaint in said action of People v. Pacific Bank alleged substantially the facts stated in the foregoing affidavit of Mr. Gerberding, and, in addition, specified particular acts of mismanagement and of losses sustained by the bank, and its insolvency. The answer of the bank in that case denied all acts of fraud and mismanagement, admitted its insolvency, and alleged that the interest of the creditors and stockholders required that the bank should be enjoined from the transaction of any further business, and that its business and affairs should be closed under the provisions of the bank commissioners' act. This answer, it was further alleged, was duly authorized by vote of the board of directors.

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[1] Rehearing denied.

Appellant excepted to the reading of the said complaint, answer, and decree in support of said motion, upon the ground that he was not a party to said action, and was not bound by the proceedings therein. The affidavits read by appellant in opposition to the motion did not deny that the Pacific Bank was insolvent on the 23d day of June, 1893, which was prior to the issuance of the attachment, nor that said bank was incorporated under the act of 1862, providing for the formation of corporations "for the accumulation and investment of funds and savings" (St. 1862, p. 199), but alleged that it conducted the business of a commercial bank, and no other, and advertised and held itself out as "the oldest chartered commercial bank on the Pacific coast"; that the claim upon which his attachment issued was a balance due him upon an ordinary commercial deposit; and upon these facts appellant contends that the property and assets of the bank were properly subject to attachment, and that the court erred in dissolving it; while counsel for respondent contend (1) that the Pacific Bank is a savings bank; that the act of 1862, under which it was organized, declared that "the capital stock and assets of the corporation shall be a security to depositors who are not stockholders," and that such security is sufficient to prevent an attachment under section 538 of the Code of Civil Procedure; and (2) that, at the time respondent moved to dissolve the attachment, the bank was in liquidation under the bank commissioners' act, and that the judgment of the superior court in the case of People ex rel. Bank Commissioners v. Pacific Bank, rendered November 3, 1893, related back to the time the bank became insolvent, viz. June 23, 1893, which was prior to the attachment.

Whether the Pacific Bank should be held to have been a commercial bank or a savings bank is an important question, in some aspects affecting the settlement and adjustment of its affairs; but, so far as this appeal is concerned, I think it immaterial, and therefore not necessary to be considered or decided; for if it were beyond doubt or question that it not only conducted its business as a commercial bank, but was chartered as such, I think the attachment was properly dissolved. Under the act creating a board of bank commissioners, and prescribing their duties and powers (St. 1877-78, p. 740), and the amendments thereof (St. 1887, p. 90), the state not only requires all banks, including commercial as well as savings banks, to report twice each year, under oath, to said board, their financial condition, but through said board exercises the high prerogative power of visitation without notice, and of making an independent examination of its books, papers, bonds, and all securities, "to ascertain the condition of every such corporation, its solvency, its ability to fulfill all its obligations and report its condition to the attorney general as soon as practicable after such examination." St. 1887, p. 91, § 4. Section 11 of said act, as amended (St. 1887, p. 91), further prescribing the powers and duties of said board and of the attorney general, and the mode of liquidation of insolvent banking corporations, is quoted in full in People v. Superior Court of City and County of San Francisco, 100 Cal., at pages 111-114, and 34 Pac., at pages 493 and 494, and need not be inserted here. It will there be seen that if the commissioners find that the bank has been violating its charter or the law, or is conducting its business in an unsafe manner, they shall by order direct the bank to discontinue such practices; and if the bank refuses to comply with such order, and if it shall appear to the commissioners that it is unsafe for such bank to continue to transact business, they shall notify the attorney general of such fact, who, after examination, in his discretion may commence suit to enjoin and prohibit the transaction of any further business; and if the court is of opinion that it is unsafe for the parties interested, or for such corporation, to continue to transact business, and that such corporation is insolvent, he shall grant the injunction, and direct the bank commissioners to take such proceedings against such corporation as may be decided upon by its creditors. This section further fixes the time within which liquidation shall be accomplished; that the commissioners shall have a general supervisory control thereof, may extend the time for final settlement, shall designate the number of officers and employés necessary to close up the business of the corporation, and fix the salaries of the same; and imposes heavy penalties, by fine or imprisonment, or both, upon any officer or employé of any insolvent corporation mentioned in the act if they shall disregard or refuse to obey the directions of the bank commissioners given in accordance with the provisions of the act.

It needs no argument to show that the exercise of the sovereign power of the state over such corporations in the manner above indicated is intended for the protection, not only of the stockholders, but especially for the protection of depositors and all others transacting business with or through the bank. In People v. Superior Court of City and County of San Francisco, supra, certain creditors of the Pacific Bank, the respondent here, filed a petition in insolvency against said bank, under the insolvent act of 1880; and the case there was an application on relation of the bank commissioners for a writ of prohibition to prevent the superior court from proceeding under the insolvent act against the bank. After quoting said section 11 of the bank commissioners' act, the court said: "We have no doubt that this section was intended by the legislature to provide for every case involving the winding up of the business of a banking corporation, and that it necessarily supersedes the provisions of the insolvent act of 1880 so far as this class of corporations is concerned." This conclusion was approved in Long v. Superior Court, 102 Cal. 449, 36 Pac. 807. The case of People v. Superior Court of City and County of San Francisco, supra, seems to me to be conclusive of the question involved in this case. If the bank commissioners' act operates to take banks out of the operation of the insolvency act, the proceedings under which, though summary and expensive, result in the equal distribution of its assets among its creditors, it is equally clear that it was not intended that the moment a bank closed its doors its assets should be the prey of the first creditors who should secure the issuance of attachments, and thus permit its assets to be converted into money by a still more expensive process, and that the proceeds should be applied to the payment in full of these attachments, leaving other creditors, who, by reason of distance or otherwise, should not be informed of the bank's condition, or be able to secure the prompt issuance of an attachment, wholly without a right to share in its assets. The great care and supervision exercised by the state over banking corporations through the board of bank commissioners indicates a different purpose than that the commencement of proceedings by the state through the attorney general should be a mere signal to conveniently located creditors to absorb the bank's assets by means of writs of attachment, to the exclusion of equally meritorious creditors less favorably located. The direction of the statute is that if the court should be of the opinion that it is unsafe for the corporation to continue to transact such business, and that it is insolvent, an injunction shall be issued, and thereupon "said judge shall further direct said commissioners to take such proceedings against such corporation as may be decided upon by its creditors"; thus clearly showing that the creditors—all the creditors—are interested in and affected by the proceedings in liquidation, and are to be equally protected.

Appellant contends, however, that the right of attachment is a positive statutory right, and that the bank commissioners' act makes no provision for dissolving attachments levied before the machinery of the act was put in motion by the commencement of the action by the people. But, before the attachment was levied, the bank had suspended and closed its doors. The affidavits in support of the motion not only state that fact, but also that it was in fact insolvent, and these facts are not denied. Under these circumstances, the right of attachment did not exist. Section 21 of said bank commissioners' act (St. 1877–78, p. 745) declares that "all acts are hereby repealed in so far as they are inconsistent with the provisions of this act." It requires no argument to show that the right of attachment under the provisions of the Code of Civil Procedure is inconsistent with the machinery of the bank commissioners' act, as well as with its obvious purpose and intent. The state never intended that after the continued exercise of its high prerogative powers for the safety of all depositors and creditors, as well as stockholders, its purpose should be thwarted by the seizure of the assets of the bank by one or more creditors, perchance through the connivance of one of its officers or employés. In the later case of People's Home Sav. Bank v. Superior Court of City and County of San Francisco, 103 Cal. 27, 36 Pac. 1015, a case involving the construction of the bank commissioners' act, the court said: "The attorney general is authorized to proceed against the corporation alone, and for the sole purpose, in effect, of winding up its business. In other words, he represents the interests of the people in a matter of public concern."

Appellant's exceptions to the complaint, answer, and decree in the case of People v. Pacific Bank cannot be sustained. As the suit was by the people under a statute authorizing it, and for the purposes hereinbefore stated, the judgment declaring the bank insolvent is conclusive for all the purposes of the act, and binding upon appellant, so far at least as concerns his right to maintain his attachment; and the pleadings were properly read, for the purpose of showing that the judgment of insolvency was rendered in a case within the statute. If it were otherwise, since the affidavit of Mr. Gerberding that the bank was in fact insolvent on June 23d, and ever since remained so, was not controverted, the order dissolving the attachment might have been properly sustained without the evidence excepted to, and, if so, appellant was not prejudiced by its admission. As our conclusion is based upon the force and effect of the bank commissioners' act, and proceedings thereunder, a review of the numerous cases cited by appellant which do not refer to this statute could not be profitable. The order appealed from should be affirmed, but without costs to either party, the parties having so stipulated.

We concur: VANCLIEF, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed, without costs to either party.

106 Cal. xvii

## MURPHY v. PACIFIC BANK. (No. 15,867.) CATOR v. SAME. (No. 15,866.) WALDRON v. SAME. (No. 15,864.) PAYNE v. SAME. (No. 15,865.)

(Supreme Court of California. Feb. 5, 1895.)

Department 2. Appeals from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Separate actions by F. D. Murphy, Thomas V. Cator, and others against the Pacific Bank. Plaintiff in each case sued out a writ of attachment. From an order dissolving the writ in each case, the several plaintiffs appeal. Affirmed.

A. Barnard, Thos. V. Cator, and W. H. Hutton, for appellants. Sawyer & Burnett, for respondent.

PER CURIAM. The appeals in these cases are from an order dissolving an attachment, and are submitted upon the same record and briefs as the case of Crane v. Bank (No. 15,863; this day filed) 39 Pac. 215; and upon the authority of that case, the facts in each being the same, the orders appealed from are affirmed, without costs.

(106 Cal. 107)

## FIELD v. ANDRADA et al. (No. 19,461.)

(Supreme Court of California. Feb. 16, 1895.)

ACTION BY ADMINISTRATOR—SETTING ASIDE CONVEYANCE OF DECEDENT—CREDITORS.

1. An administrator cannot sue to set aside a conveyance of land made by the decedent in his lifetime, for the purpose of enforcing a trust in the lands and compelling a reconveyance of the legal title.

2. To authorize an administrator to sue under Code Civ. Proc. § 1589, to set aside a deed of his intestate as void against creditors, there must exist creditors to be paid, and there must be an insufficiency of assets to meet their demands.

3. A creditor, within section 1589, Code Civ. Proc., must be one whose claim has been allowed by the administrator or is evidenced by a judgment. Ohm v. Superior Court (Cal.) 26 Pac. 244, followed.

In bank. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Action by D. W. Field, administrator of the estate of Jose M. Andrada, deceased, plaintiff, against Manuel Andrada and Narcissa Andrada, defendants. From a judgment for plaintiff, defendants appeal. Reversed.

R. Dunnigan, for appellants. Wells, Monroe & Lee and E. A. Meserve, for respondent.

**VAN FLEET, J.** This is an appeal from the judgment upon the judgment roll. The demurrer to the complaint should have been sustained. The complaint presents something of a double aspect. The action is brought by the administrator of a deceased person to set aside a conveyance of certain real property made by the decedent in his lifetime. There are allegations which lend to the complaint the complexion of an action to enforce a trust in lands, and compel a reconveyance of the legal title; while there are other features of the complaint tending to give it the character of an action under section 1589 of the Code of Civil Procedure, to set aside a conveyance made by the intestate in fraud of his creditors. Treating it as an action of the former character, the plaintiff, administrator, had no capacity to sue, and the demurrer on that ground should have been sustained. Janes v. Throckmorton, 57 Cal. 387. In that case it was held that, while the administrator is entitled to the possession of the property of the estate, real and personal, during the administration, and can maintain an action for the recovery of the possession of all such property, he has no general power, as such, to maintain an action to enforce a trust in lands or compel a conveyance of the title to the property to himself, and that the statute does not confer upon him any such authority. That was an action brought by the heirs, and it was objected that it should have been brought in the name of the administrator. It is there said: "The present action is brought to establish a trust, and to compel defendant to convey the legal title to real estate to the heirs at law of Janes. On his death his title, then an equity, passed to the heirs, as was held in the cases last cited; and unless it can be maintained, which we think cannot be done, that the administrator is entitled under our statute to have the title to the property conveyed to him, it would seem clear that he is not the proper party to bring this action." If the action be regarded as one brought under section 1589, supra, to set aside a fraudulent conveyance and convert the property into assets of the estate, and subject it to the payment of the creditors of the deceased,—and that such is its intended character and purpose is practically conceded by respondent,—then the complaint is fatally defective for want of facts, and the demurrer should have been sustained on that ground. Section 1589 is as follows: "When there is a deficiency of assets in the hands of an executor or administrator, and when the decedent, in his lifetime, has conveyed any real estate, or any rights or interests therein, with intent to defraud his creditors, or to avoid any right, debt or duty of any person, or has so conveyed such estate that by law the deeds or conveyances are void as against creditors, the executor or administrator must commence and prosecute to final judgment any proper action for the recovery of the same; and may recover for the benefit of the creditor all such real estate so fraudulently conveyed, and may also, for the benefit of the creditors, sue and recover all goods, chattels, rights or credits which have been so conveyed by the decedent in his lifetime, whatever may have been the manner of such fraudulent conveyance." The obvious intent and meaning of this section is that two things must concur to authorize the administrator to commence an action to set aside a deed of his intestate as void against creditors: First, there must exist creditors to be paid; and, second, there must be an insufficiency of assets in the hands of the administrator to meet their demands. Both of these facts must coexist to bring the case within the limitations of the statute. Ohm v. Superior Court, 85 Cal. 545, 26 Pac. 244. If there are no creditors, or, there being creditors, the administrator has sufficient assets of the estate in his hands to meet their demands, in either case he is without power to maintain the action.

The only allegation in the complaint as to the existence of creditors of the deceased is: "That the time within which claims against the estate of the said Jose Maria Andrada, deceased, can be presented by creditors thereof has not yet expired; that as the plaintiff is informed and believes, and therefore alleges the fact to be, there are creditors of the said Jose Maria Andrada, deceased, who have claims against his estate, but which have not as yet been presented, and who are entitled to present the same, the names of which said creditors and the amounts of said claims are now here by the said plaintiff unknown, and he is unable, therefore, to allege specifically the names of said creditors, or the amounts of said indebtedness." It is held in Ohm v. Superior Court, supra, that, to constitute a "creditor," within the meaning of the statute, "he must be a creditor whose claim has been allowed by the administrator or is evidenced by a judgment,"—citing Mesmer v. Jenkins, 61 Cal. 153; McMinn v. Whelan, 27 Cal. 300. And in Michigan, under a statute similar to our own, it is held that, until the estate has been charged with claims by allowance or judgment, "there is no basis for a bill against a decedent's fraudulent conveyance in order to recover means to pay them." O'Connor v. Boylan, 49 Mich. 209, 13 N. W. 519. To the same effect are the cases of Fletcher v. Holmes, 40 Me. 364, and Estes v. Wilcox, 67 N. Y. 264. Within these principles, this averment does not bring the case within the statute. To the contrary, the matter averred shows that there did not at the commencement of the action exist, within the restricted meaning of the statute, any creditors of the deceased, since it is made affirmatively to appear that no claims had been presented against the estate. It is not an instance of the mere defective statement of a requisite fact, but a statement from which it appears that the fact essential to recovery does not exist.

Nor does it appear from the complaint that there is an insufficiency of assets in the hands of the administrator. The language of the pleading in that regard is: "That immediately upon the death of the said Jose Maria Andrada, deceased, the said defendant Manuel Andrada, and one Marco Andrada also, took possession of all the personal property belonging to the said decedent, and ever since have claimed, and now are claiming, the whole of said personal property, and are in possession thereof. And said defendant Manuel Andrada and the said Marco Andrada claim said property as their own property, and a suit for the recovery thereof is now pending between the plaintiff herein against the said defendant Manuel Andrada and Marco Andrada, in the superior court of the county of Los Angeles, being case No. 17,632 of the files of said superior court, which suit is as yet undetermined. That the said Jose Maria Andrada at the time of his death did not own or possess any other property, real or personal, whatever, or at all, other than the said real property hereinbefore described, and the said personal property aforesaid." From this averment it simply appears that the personal property of the estate has been taken by mere trespassers having no right thereto, and which it is bound to be presumed the administrator, in the performance of his duty, will recover to the estate. For the purposes of this action, therefore, it is to be regarded as in his hands. It is not made to appear what the amount or value of that property is, and non constat that it will not be amply sufficient to meet the demands of all creditors of the estate. The facts alleged are not in any essential the equivalent of the substantive fact required by the statute to sustain the action. The respondent contends, in effect, that, while the facts adverted to are perhaps defectively stated, they are sufficiently alleged to avoid a general demurrer, and to authorize the trial court to receive evidence of them. With this contention we do not agree, for the reasons stated. But, if respondent were correct in this view, his position would not be bettered. These features of the complaint were also attacked specially upon the ground of uncertainty, and the demurrer upon that ground would necessarily have to be sustained. The objection that the special demurrer is obnoxious to the doctrine of Kraner v. Halsey, 82 Cal. 209, 22 Pac. 1137, and for that reason cannot be considered, is not well taken. While there is in the demurrer a general and conjunctive assignment of ambiguity, unintelligibility, and uncertainty, the only specifications are on the ground of uncertainty; and, properly construed, we think the demurrer should be regarded only as a demurrer on the latter ground. The judgment is reversed, and the cause remanded, with directions to the lower court to sustain the demurrer.

We concur: HARRISON, J.; GAROUTTE, J.; McFARLAND, J.

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106 Cal. 104

## PEOPLE v. O'BRIEN. (No. 20,999.)

(Supreme Court of California. Feb. 15, 1895.)

CRIMINAL LAW—PRESUMPTION OF INNOCENCE—EMBEZZLEMENT.

1. The presumption of innocence does not cease upon the submission of the cause to the jury.

2. The prosecution in an action for embezzlement cannot introduce evidence in chief that the prosecuting witness has money on deposit, in order to strengthen her testimony.

3. Where defendant was an attorney at law, and the prosecuting witness was, as to some matters, his client, the relation of employer and employé existed; but where a variety of dealings extended over a number of years, and there was a long, unsettled, and disputed account between them, with no evidence that defendant attempted to steal or convert the property clandestinely and feloniously, a case of disputed mutual account is presented, for which a civil action is the appropriate remedy.

In bank. Appeal from superior court, city and county of San Francisco; F. W. Lawler, Judge.

Action by the people against O'Brien. From judgment for plaintiff, defendant appeals. Reversed.

D. J. Toohy, for appellant. Atty. Gen. Hart, for the People.

McFARLAND, J. The defendant was convicted of the crime of embezzlement, and appeals from the judgment and from an order denying his motion for a new trial. There were undoubtedly some errors of law committed at the trial. For instance, the court instructed the jury that the presumption of innocence goes with the defendant "until the case is finally submitted to you." This was error. "The presumption of innocence does not cease upon the submission of the cause to the jury." People v. McNamara, 94 Cal. 514, 29 Pac. 953. It was also error to allow the respondents, when putting in their evidence in chief, to show that the prosecuting witness had certain money on deposit, in order to strengthen or bolster her testimony in anticipation of what they supposed appellant's evidence might be. There were one or two other errors not necessary to mention. Whether any of these errors was of sufficient importance to warrant a reversal we need not determine, under the views which we take of the case.

We cannot find in the record sufficient evidence to sustain a conviction of the crime charged. Counsel for the people invoke the rule applicable to conflicting evidence, but the conflicting evidence was as to facts which, if taken as proven, do not make out a case of embezzlement. The modern statutory crime of embezzlement, which did not exist at common law, is not a substitute for imprisonment for debt, and cannot be used to punish a party for a failure to comply with an ordinary pecuniary obligation. It can be committed only when the confidential relation of employer and employé exists, and where the latter has feloniously converted money or other property of the former which come into the hands of the employé by virtue of said confidential relation. It is true that in the case at bar the appellant is an attorney at law, and the prosecuting witness (a woman) was, as to some matters, his client, and therefore there was as to those matters the relation between them above mentioned; but there was a variety of dealings between them, running through several years, and a long, unsettled, and disputed account. There was conflicting evidence as to how the account stood, each party claiming a balance due; but it is clear that there was no concealment on the part of appellant as to any of his dealings with the prosecuting witness, and we discover no evidence tending to show an intent to steal or to convert her property clandestinely and feloniously. The specific charge in the information is that appellant embezzled a certain sum of $1,000, which she had intrusted him with. Her own testimony does not support that charge, for she swears only that she left with him a certain note and mortgage for $1,000, which he had not returned to her. She did not know whether or not he had collected the amount due on the mortgage. Perhaps it appears from appellant's own testimony that he had received the amount due on the mortgage, but the facts about the mortgage, as fairly resulting from that evidence, appear to be these: Appellant had a subsequent lien on the mortgaged premises, and, desiring to prevent a foreclosure, applied to the prosecuting witness to advance sufficient money to buy the mortgage. She advanced $700, and other parties raised the balance of the $1,000, and the note and mortgage were delivered to appellant, either by her or with her consent. Appellant afterwards loaned to or paid her some money, and also invested for her $900 in certain land in Alameda county. She denies that appellant had authority to make said investment for her in Alameda, and there is a conflict of evidence as to the genuineness of a certain power of attorney from her to him, giving such authority; but it is beyond dispute, and admitted, that he took the deed of the Alameda land in her name, that he sent the deed to her, that she retained it, and that she afterwards sold the land and realized from it about $800. All this was done by appellant openly; and, indeed, in all his transactions with the prosecuting witness there was no attempt by him at concealment. He loaned her money at times; and he did considerable business for her as an attorney at law in various matters for which he seems not to have been paid, and for which he claims an indebtedness from her. All these transactions, taken together, present merely a case of disputed mutual accounts, for which a civil action is the appropriate remedy. They do not show that felonious intent which is a necessary element in the crime of embezzlement. Indeed, the prosecuting witness herself seems to have understood this prosecution to be in the nature of a civil action. She was asked, "Did you ever ask Mr. Baggett to bring suit for the recovery of this money?" and she replied: "I did. I don't know but this is a suit to recover this money." The judgment and order denying appellant's motion for a new trial are reversed.

We concur: BEATTY, C. J.; GAROUTTE, J.; VAN FLEET, J.; HARRISON, J.

106 Cal. 137

**ALLEN et al. v. ALLEN et al. (No. 15,716.)**

(Supreme Court of California. Feb. 23, 1895.)

RES JUDICATA.

A judgment in an action by a mortgagor to redeem from an absolute deed as a mortgage, in which it was adjudged that the mortgagor's equity of redemption was barred by limitations, is a bar, in ejectment by the mortgagee to recover possession of the land, to defendant's right to set up such equity.

In bank. Appeal from superior court, Humboldt county; G. W. Hunter, Judge.

Ejectment by Charles F. Allen and others against H. D. C. Allen and others. There was a judgment for plaintiffs, and defendants appeal. Affirmed.

E. W. Wilson and J. N. Gillett, for appellants. Buck & Cutler and Chamberlin & Wheeler, for respondents.

HENSHAW, J. This is an action of ejectment. The complaint is in the usual form. The answer presents a special defense in equity, averring that the defendant H. D. C. Allen, being the owner of the lands in controversy, caused a transfer and conveyance of them to be made to plaintiffs as security for a debt; that plaintiffs received the transfer and conveyance, and the land and premises thereby conveyed, and thereupon agreed to hold, and ever since have held, and now continue to hold, the same as security. The same facts are likewise pleaded by cross complaint. Defendants ask that an accounting be had, and that they be allowed to redeem the land upon payment of any amount found due. The appeal is from the judgment alone.

The facts of this precise transaction will be found in Allen v. Allen, 95 Cal. 184, 30 Pac. 213, where this defendant (there plaintiff) sought to redeem against these plaintiffs (there defendants) the same land from lien of the same mortgage. By that decision it was held that, under the transfer and conveyances to plaintiffs herein, they acquired the legal title to the property, leaving in defendants a mere equity of redemption; that the parties are deemed to have contracted in view of the rule of interpretation of such instruments expressed in Hughes v. Davis, 40 Cal. 117, and Espinosa v. Gregory, Id. 58; and that, the debt to secure which the deed was made being barred, the right to redeem was also barred. The trial court found that the judgment in Allen v. Allen, supra, was a bar to the defenses and equities pleaded in defendants' answer and cross complaints; and we think it was right in so finding. The judgment upon the former appeal is determinative of the rights of either party to this transaction, and operates as an estoppel. While the plaintiffs cannot foreclose, defendants cannot redeem. Wherever the right to possession of the land may have been before the time for redemption had expired, upon the failure of defendants to redeem within the statutory period the right vested absolutely in plaintiffs, and their title, freed from defendants' equities, became full and complete. The judgment appealed from is affirmed.

We concur: TEMPLE, J.; GAROUTTE, J.; McFARLAND, J.; HARRISON, J.; VAN FLEET, J.

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106 Cal. 113

## INGRAM v. COLGAN, Controller. (No. 18,372.)

(Supreme Court of California. Feb. 23, 1895.)

APPROPRIATION—SUFFICIENCY.

St. 1891, p. 280, providing that any person who shall kill a coyote shall be paid a bounty of five dollars out of the general fund in the state treasury, does not make an appropriation for such bounties, as it fails to provide for the amount to be used therefor.

In bank. Appeal from superior court, Sacramento county; A. P. Catlin, Judge.

Application by J. W. Ingram for writ of mandamus compelling E. P. Colgan, a state controller, to pay a bounty to petitioner for killing coyotes. The writ was granted, and defendant appeals. Reversed.

Attorney General Hart, for appellant. Freeman & Bates, for respondent.

HENSHAW, J. Upon joint petition of appellant and respondent (38 Pac. 366), this cause was ordered to be heard in bank for the determination of the single question whether or not the act under consideration ("An act fixing a bounty on coyote scalps"; St. 1891, p. 280) made appropriation for the payment of claims arising under it. The opinion heretofore rendered, filed October 30, 1894 (38 Pac. 315), stands confirmed, and what is now added is to be construed with it. The objections raised to the sufficiency of the act are (1) that no appropriation at all is made by it; (2) that, if an appropriation is made, that appropriation is void for uncertainty in amount.

It is provided by section 22, art. 4, of the constitution that "no money shall be drawn from the treasury but in consequence of appropriations made by law, and upon warrants duly drawn thereon by the controller." This inhibition is supplemented by subdivision 17, § 433, Pol. Code: "No warrant must be drawn unless authorized by law, and upon an unexhausted, specific appropriation provided by law to meet the same. Every warrant must be drawn upon the fund out of which it is payable and specify the services for which it is drawn, when the liability accrued, and the specific appropriation applicable to the payment thereof." The constitution of 1849 (article 4, § 23) provided: "No money shall be drawn from the treasury but in consequence of appropriations made by law." By act of the legislature, in 1854 the duties of the controller were expressed in terms substantially the same as those now found in subdivision 17 of section 433 of the Political Code, above quoted. St. 1854, p. 29. The laws of the state regarding appropriations have thus been uniform from a very early day, and, if any contrariety of opinion be found in the adjudicated cases, it cannot be explained upon the ground of changed provisions in the law. One of the earliest cases upon the question of appropriation is that of McCauley v. Brooks, 16 Cal. 28. The act there in question provided that the sum of $15,000 per month, or a sum less than that, in accordance with the contract to be entered into, "is hereby appropriated out of any money in the treasury not otherwise appropriated." It was claimed that no specific appropriation of funds in the treasury had been made. The opinion by Field, C. J., is an elaborate exposition of the law, and in it he says: "To an appropriation, within the meaning of the constitution, nothing more is requisite than a designation of the amount and the fund out of which it shall be paid. It is not essential to its validity that funds to meet the same should be at the time in the treasury. As a matter of fact, there have seldom been in the treasury the necessary funds to meet the several amounts appropriated under the general appropriation acts of each year. The appropriation is made in anticipation of the receipt of the yearly revenues. It constitutes, indeed, the authority of the controller to draw his warrants, and of the treasurer, when in funds, to pay the same, and that is all. When the constitution, therefore, says that no money shall be drawn from the treasury but in consequence of appropriations made by law, it only means that no moneys shall be drawn except in pursuance of law; and when the act of April 13, 1854, provides that no warrants shall be drawn except there be an unexhausted, specific appropriation to meet the same, it means only that the controller shall not draw a warrant for a specific object when he has already drawn for the full amount of the appropriation made for that object." The true test as to whether any particular language in an act is sufficient to make an appropriation is here found. "To an appropriation, within the meaning of the constitution, nothing more is requisite than a designation of the amount and the fund out of which it shall be paid." If the amount be certain, one of the reasons for the constitutional requirement is complied with, in that the people are enabled to determine how much of their money is to be devoted to the named purpose. The designation of the fund likewise enables the people to see how much of the moneys set apart to a particular fund is to be drawn from it and used for the specific end. But under our system, countenanced by the custom of years, it is not necessary in all cases that the act in terms should name the fund. The general fund itself is defined to be "the moneys received into the treasury, and not specifically appropriated to any other fund." Pol. Code, § 454. From these moneys all appropriations are paid which are not made payable out of any other especially named fund.

The language of the act here under consideration is as follows: "Any person who shall kill or destroy any coyote or coyotes shall be paid a bounty of five dollars out of the general fund in the state treasury, for each coyote so destroyed." The question remains whether, measured by the rule above given, this language constitutes an appropriation. We think not. The fund from which the bounties are to be paid is explicitly designated, but the amount of money in the general fund devoted to the payment of these bounties is not specified. The language lacks the first essential to an efficient appropriation. There is no designated amount, and consequently there is no "specific appropriation" to be exhausted, unless it can be said that the whole general fund is set aside as a specific appropriation to the end in view,—a proposition not seriously to be considered. Redding v. Bell, 4 Cal. 333. It is freely conceded that the use of technical words in a statute is not necessary to create an appropriation. But, while no set form of language is requisite, upon the other hand there are some things which plainly enough are not severally an appropriation. A promise by the government to pay money is not an appropriation. A duty on the part of the legislature to make an appropriation is not such. A promise to make an appropriation is not an appropriation. Usage of paying money in the absence of an appropriation cannot make an appropriation for future payment. Ristine v. State, 20 Ind. 333. The utmost that can be claimed for the act under consideration is that it pledges the good faith of the state to the making of an appropriation. Herein the language of the supreme court of Colorado, in Institute v. Henderson, 18 Colo. 105, 31 Pac. 714, is peculiarly apposite: "To permit the disbursement of an indefinite amount of money, as these bounty acts contemplate, is to introduce an element of uncertainty into these calculations that will seriously embarrass both the legislature and the departments in giving effect to our state constitution with relation to the levying of taxes to meet appropriations. If the legislature desires to pay bounties, it may do so for all proper purposes by making the necessary appropriations therefor. Thus the public funds of the state will be protected, and the safeguards provided by the vigilance of the framers of our fundamental law will be given a construction best calculated to prevent the evils aimed at." The conclusion thus reached is in no wise affected by such cases as San Francisco v. Dunn, 69 Cal. 73, 10 Pac. 191, and Grand Lodge v. Markham, 102 Cal. 169, 36 Pac. 423. In those cases the acts construed made contribution to the support of indigents, under section 22, art. 4, of the constitution. As to the act under consideration in Grand Lodge v. Markham, the constitution itself provides the manner of the making of the appropriation, and the act, conforming to the manner prescribed, has the constitution of the state for its direct authority. In San Francisco v. Dunn, 69 Cal. 73, 10 Pac. 191, it was held that no legislative action is required to give force to the constitutional proviso, and that upon the happening of the contingency the language of the constitution, ex proprio vigore, acted as an appropriation, and qualified the general constitutional inhibition. These cases, therefore, are not in point upon the present question.

For this reason, in addition to those heretofore given, the judgment is reversed, and the court below directed to dismiss the writ.

We concur: TEMPLE, J.; GAROUTTE, J.; HARRISON, J.; McFARLAND, J.

BEATTY, C. J., and VAN FLEET, J., did not participate in this decision.

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4 Cal. Unrep. 973

## PEOPLE v. DILLWOOD. (No. 21,121.)

(Supreme Court of California. Feb. 21, 1895.)

CRIMINAL PROSECUTION — IMPEACHMENT OF WITNESS — CONTRARY STATEMENTS BEFORE TRIAL — CROSS-EXAMINATION — PENDING CRIMINAL CHARGES—EVIDENCE.

1. Where the testimony of a witness for the prosecution is materially different on the trial from what it was on preliminary examination, the extent to which defendant is to be allowed on cross-examination to go into the present surroundings of the witness, in order to show the motives inducing him to change his testimony, is within the discretion of the court.

2. Under Code Civ. Proc. § 2052, it is proper, when the testimony of a witness on prelimi-

nary examination is sought to be used to contradict the witness, to require it to be read and shown to the witness on demand.

3. To discredit a witness for the prosecution, it may be shown that criminal charges are pending against him, as tending to show a desire to seek favor at the hands of the prosecution, by aiding in the conviction of the defendant.

4. Such charges must be proven by record if oral evidence thereof is objected to.

In bank. Appeal from superior court, Fresno county; S. A. Holmes, Judge.

Alfred M. Dillwood was convicted of burglary, and appeals. Affirmed.

S. J. Hinds, for appellant. Atty. Gen. Hart, for the People.

PER CURIAM. The appellant was convicted of burglary in the first degree, and appeals from the judgment and an order denying a new trial.

Thomas Philbin, a witness for the prosecution, admitted upon cross-examination that he had been convicted of a felony prior to June 21, 1893, and afterwards, and prior to the trial of this case, was granted a new trial. On June 21st he was a witness in behalf of Dillwood upon his examination before the justice upon the same charge of burglary here in question, and in his examination in chief in the superior court had testified to facts which, if believed by the jury, would tend strongly to convict the defendant. It was claimed by defendant that Philbin's testimony before the justice was materially different from his testimony in chief upon the trial in the superior court. If it were true that there was a material difference in the testimony of the witness on these two occasions, a very large liberty should be given the defendant to prove the motives and influences inducing the change, so as to enable the jury to determine whether his testimony given before them was prompted by a disinterested desire that justice should be done, and therefore likely to be true, or whether he was influenced by promises, or even by a hope not based upon promises or benefit to himself, and therefore likely to be untrue. All the surroundings of the witness which can reasonably be supposed to influence his testimony or affect his credibility should, under such circumstances, be permitted to be shown. The court, however, must determine, in view of the facts and circumstances as they arise, the limitations beyond which a cross-examination of this character is useless or improper. We see no abuse of discretion in this regard.

In the cross-examination of the witness Philbin, it was right to require that his testimony before the examining magistrate, which was sought to be used to contradict him, should be read to him, and, if required by the witness, be shown to him. In People v. Ching Hing Chang, 74 Cal. 392, 16 Pac. 201, and in People v. Lee Chuck, 78 Cal. 322, 20 Pac. 719, it was held that section 2052, Code Civ. Proc., applied in such cases.

Elmo Headley, a witness for the prosecution, admitted that he had "pleaded guilty to stealing the Johnson cow," and had been sent to the Whittier Reform School. He was then asked if charges were not then pending against him in that county for felonies, and which were pending before he was sentenced to the reform school. Before the enactment of section 2051, Code Civ. Proc., the conviction of a felony could only be proved by the production of the record, if objection were made. That it may now be shown by the admission of the witness upon the stand is an exception to the general rule that the record, being the best evidence, must be produced. It is competent to show the fact that other criminal charges are pending in the same court against the witness at the time he testifies, not, however, as evidence of particular wrongful acts, for as to these he is presumed to be innocent, but as a circumstance tending to show that his testimony is or may be influenced by a desire to seek the favor or leniency of the court and prosecuting officers by aiding in the conviction of the defendant. These charges should, however, be proved by the record if objection is made to oral evidence of them.

No other questions need be noticed. The judgment and order appealed from are affirmed.

106 Cal. 129

## SAN FRANCISCO & F. LAND CO. v. BANBURY, County Treasurer, et al.

(No. 19,370.)

(Supreme Court of California. Feb. 23, 1895.)

TAX SALE—PURCHASE BY STATE—NOTICE TO REDEEM—VALIDITY—PAYMENT OF FEE.

1. Where the state is the purchaser of land at tax sale, the controller and the attorney general have no authority to give notice for the state of an intention to apply for a deed. Van Fleet and Garoutte, JJ., dissenting. 37 Pac. 801, affirmed.

2. There being no statutory provision for the disposition of a fee for notice of intention to apply for a deed of land sold to the state for taxes, it must be taken as the legislative intent that no such fee should be charged. 37 Pac. 801, affirmed.

In bank. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Action by the San Francisco & Fresno Land Company against J. Banbury, as treasurer of Los Angeles county, and others, to compel the acceptance of money tendered for the redemption of land sold for taxes. Judgment was rendered for defendants, and plaintiff appeals. Reversed.

Holdridge O. Collins (James M. Allen and McAllister & Frohman, of counsel), for appellant. Spencer G. Millard and Attorney General Hart, for respondents.

PER CURIAM. When this case was decided in department, the following opinion was rendered by Mr. Justice HARRISON: "In June, 1892, the plaintiff, as the owner and successor in interest of 67 lots of land in McPherson's addition to the town of McPherson, formerly in the county of Los Angeles, but now in the county of Orange, sought to redeem them from a sale for delinquent taxes made to the state of California March 12, 1889, and for that purpose tendered to the defendant Banbury, as treasurer of the county of Los Angeles, the sum of $225.60. It is conceded that this amount of money was sufficient to effect the redemption, unless the sum of $3 for each lot, amounting to $201, for giving the notice of an intention to apply for a deed, and the affidavit therefor, fixed as a fee for giving such notice by section 3785 of the Political Code, should also have been tendered. The county auditor, in his estimate of the amount to be paid for redemption, included this item in the certificates issued by him under the provision of section 3817, Pol. Code; and the treasurer refused to accept the amount tendered, or to give to the plaintiff the certificates named in said section. The plaintiff thereupon brought this action to compel the treasurer to accept the sum tendered as above, and to give to it the triplicate receipts prescribed by the aforesaid section 3817. The cause was tried in the court below, and judgment rendered for the defendant, from which, and from an order denying a motion for a new trial, the plaintiff has appealed. Several questions are discussed in the briefs of counsel, but the conclusion which we have reached upon one of these questions renders it unnecessary to determine the others. In May, 1892, the defendant House, acting under the direction of the state controller, gave the notices referred to in section 3785, Pol. Code, and filed his affidavit thereof with the tax-collector of Los Angeles county. These several notices were signed, 'State of California, by R. F. House, Agent'; and, in the affidavit of service filed with the tax collector, House stated that he was the 'agent for the purchaser of the property described in the foregoing notice.' House also testified at the trial that prior to the date of giving the notice 'he had been appointed by the state of California, through the state controller and attorney general, and was authorized to serve notices to cause the redemption of property sold to the state for taxes.'

"The question here presented is not the right of the state to the issuance of a deed, but the right of the delinquent taxpayer to redeem the land struck off to the state under the provisions of section 3773 of the Political Code; and this right depends upon his compliance with the requirements of the statute in that behalf, the particular question here presented being whether there was a tender of a sufficient amount of money to effect the redemption. It is insisted by the defendants that the plaintiff, in addition to the amount tendered by it, should have also tendered $3 for each of the notices given by House, amounting to $201 in all; while the plaintiff insists that the notice given by House was without authority of law, and consequently that the item of $3 for giving such notice was not a part of the 'costs and expenses of the redemption.' Section 3817 of the Political Code provides that, when the state has become the purchaser of land sold for delinquent taxes, the person whose estate has been sold, or his successor in interest, may redeem the same by paying the amount of taxes due thereon at the time of the sale, with interest thereon, and any other taxes then delinquent thereon, together with a sum of money equivalent to the taxes that would have been subsequently assessed, 'and also all costs and expenses, and 25 per cent. penalty which may have accrued by reason of such delinquency and sale, and the costs and expenses of such redemption.' Unless the item of three dollars for giving the notice is a part of the 'costs and expenses' which have accrued 'by reason of the delinquency and sale,' the plaintiff was under no obligation to tender it to the treasurer in order to effect a redemption from the sale. Section 3785 makes provision for the issuance of a deed to the purchaser in case there is no redemption from the tax sale, and requires that before making application for a deed the 'purchaser' must serve upon the owner of the property purchased a written notice, containing certain statements, and that for the service of said notice, and making an affidavit thereof, the 'purchaser' shall be entitled to receive the sum of three dollars, 'which sum of three dollars shall be paid by the redemptioner at the same time and in the same manner as other costs, percentages, penalties and fees are paid.' The notice thus required is to be served by the purchaser, or by some one in his behalf, whom he has authorized to serve it. Such notice, served by a stranger, without any authority from the purchaser, would not satisfy the requirements of the statute, or entitle the purchaser to insist upon a payment or tender of the three dollars, in order that a redemption might be effected; and the rule in this respect is the same whether the state or an individual is the purchaser. The state can act only through officers or agents, and the duties of its officers or agents must be defined by statute, and the officer or agent who would give this notice must show his authority therefor under some statute. We have not been cited to any statute which confers upon either the controller or attorney general the right to appoint an agent for the purpose of giving this notice, or to take any step in reference to the issuance of a deed to the state for the property which may be struck off to it under the provisions of section 3775 of the Political Code. The duties of each of the above-named officers are defined in the Political Code—those of the controller in sections 433–444, and those of the attorney general in sections 470–475,—and in neither of these sections can there be found any authority for either of these officers to give the above notices, or for the appointment of an agent to give the notices in behalf of the state. The provision in section 433 making it the duty of the controller 'to superintend the fiscal concerns of the state only designates him as the accountant of the state's finances, and does not give to him any function regarding the same until the money over which he is to exercise a supervision or control has come into the hands of the treasurer, or some fiscal agent of the state, or has become an obligation in favor of the state, for which the state is entitled to an immediate enforcement. The duty imposed upon this officer by virtue of subdivision 16 of this section, 'to direct and superintend the collection of all moneys due the state, and institute suits in its name for all official delinquencies in relation to the assessment, collection and payment of the revenue,' arises only when the moneys thus to be collected are 'due the state,' and after there has been some official delinquency in relation to the collection or payment of the revenue. But, if the state has become the purchaser of land at a delinquent tax sale, the tax has been extinguished by the sale; and the state, instead of being a creditor of the taxpayer, or entitled to receive any money due to it for taxes, has acquired an interest in the land, which is to be divested only by some affirmative action on the part of the delinquent taxpayer. The care and direction of the state's interest in land would naturally fall to the department of the surveyor general; but whether that officer has been intrusted with any function in reference to the lands purchased at a delinquent tax sale, or whether the state has failed to make any provision in reference thereto, it is clear that neither the controller nor the attorney general has been intrusted with the duty of guarding the state's interest therein.

"It is not the policy of the state to increase the burdens of taxation beyond the necessary cost of collection, or to impose any greater burdens in a redemption from a delinquent tax sale than is necessary to secure the payment of the original tax. All matters of taxation are resolved in favor of the taxpayer, and express statutes should be found for each item of cost to be imposed upon him. There is no provision of law for the disposition of the three dollars claimed herein as a fee for giving the notice. Neither the controller nor the attorney general is entitled to it as a fee, or as a compensation for any official duty; nor, if the state is entitled to receive it, are they authorized to give it to any agent they may select for the purpose of serving the notice. Section 3816 provides that 'the original tax and the twenty-five per cent. and interest paid in redemption shall be apportioned between the state and county in the same proportion that the state tax bears to the county tax,' and then declares, 'the moneys received for delinquencies shall be paid to the county,' and makes no provision for the disposition of this item. If the legislature had intended that the state, like any other purchaser, should be entitled to charge and receive this item of three dollars, it would have made some provision that it should be paid to it out of the redemption money, and not that it should be paid to the county. We are of the opinion that the amount tendered by the plaintiff was sufficient for the purpose of redeeming the lands in question, and that the treasurer should have received the money, and issued to it the certificates authorized by the statute." 37 Pac. 801.

A re-examination of the question serves to convince the court of the soundness of the views thus expressed. The legislative enactments contemplate that the state, in procuring a deed, shall resort to the same processes made necessary for a private purchaser, the scheme of which is set forth in section 3785, Pol. Code. But in so doing the legislature—by oversight, seemingly—failed to empower any officer or agent to give the requisite notice. Certainly, it has failed to empower either the attorney general or controller. It is a simple, and not unusual, case of legislative lapse. While this court will go all reasonable lengths in interpreting the powers vested by the legislature in the ministerial officers of the state, to give effect to the laws and subserve the ends of justice, it will not, by construction, confer upon such officers authority which the legislature has seen fit to withhold. The dangers of such judicial legislation would far exceed any temporary advantage to the state which might arise from it. The judgment and order denying a new trial are reversed.

VAN FLEET, J. I dissent. Further consideration of this case on rehearing has satisfied me that the conclusion reached in department, and now adhered to in the main opinion, is wrong, as involving a too narrow construction of the statute. While it is true that no specific provision of the statute gives to the controller or attorney general the power to serve the notice required by section 3785 of the Political Code, I think that such power, as to the controller, at least, fairly and necessarily arises by implication, when the several sections of the Code bearing upon the subject are construed together. In the first place, the Code expressly provides for the state becoming the purchaser at delinquent tax sales (Pol. Code, § 3773); and there are provisions expressly contemplating the making of a deed to the state in any instance where it becomes such purchaser (Id. § 3817). At the same time the state is not exempted from the provisions of section 3785, requiring the purchaser, or some one authorized in his behalf, to give notice of his application for a deed, since it is therein provided that: "No charge must be made by the collector for the making of any such deed, where the state is the purchaser; and the acknowledgment of all such deeds * * * shall be taken by the county clerk free of charge." In fact, it is evident that the state has been put in the same category, in all respects, excepting as to the time within which property sold to it can be redeemed, as private individuals. This being so, who is to act in behalf of the state in giving the notice required by section 3785? Certainly, the legislature should not be held to have left so glaring a hiatus in the law upon a subject of so much importance to the people, if, by a reasonable construction, the apparent omission in the scheme provided can be supplied. And I think this can be done by a reference to the sections of the Code prescribing the duties of the controller. By section 433 of the Political Code, it is made the duty of the controller "to superintend the fiscal concerns of the state." He is required to direct and superintend the collection of all moneys due the state in relation to the "assessment, collection and payment of the revenue," and against persons who have become possessed of money or property of the state, which they fail to pay over, and against all debtors of the state. And he may bring suit to recover in all such cases. The powers thus conferred are very broad and comprehensive in their scope, and it is apparent that they must be necessarily held to include any incidental acts requisite to give full and complete effect to the primary functions therein enumerated. He is given power to institute suits to recover, not only the revenue, but the property, of the state. By its purchase at a tax sale the state acquires a property in the land, which it is thus made the duty of the controller to perfect and secure. This can only be done by the giving of the notice required by section 3785, and that the power of the controller to give such notice is necessarily implied is, to my mind, obvious. Having the power, and the act being merely ministerial, he can direct it to be done through the agency of another. And the existence of this power in the controller was, in my judgment, in contemplation by the legislature when they failed to make more specific provision on the subject.

I concur: GAROUTTE, J.

106 Cal. 153

## In re HOPE'S ESTATE. (No. 15,883.)

(Supreme Court of California. Feb. 28, 1895.)

EXECUTORS AND ADMINISTRATORS — PAYMENT OF INTEREST BEARING DEBTS—JURISDICTION OF PROBATE COURT.

Under Code Civ. Proc. § 1513, providing that an administrator may, at any time, on the order of the court, pay all interest bearing debts of decedent, the court cannot, on the application of a creditor, compel an advance payment.

Department 2. Appeal from superior court, city and county of San Francisco; Walter H. Levy, Judge.

Application by the holder of an interest bearing claim against the estate of John T. Hope, deceased, to compel the administratrix to pay the debt. From an order directing its payment, the administratrix appeals. Reversed.

J. D. Sullivan and Herbert Choynski, for appellant. Edward Myers, for respondent.

HENSHAW, J. The court in probate directed the immediate payment of a claim against the estate of deceased, after a showing that the claim was upon a judgment rendered against him in his lifetime; that it bore interest; that it had been allowed and approved by the administratrix and the judge about 15 months previously; that it was a preferred claim; that notice to creditors had been duly published, and the time for presentation of claims had expired; and that there were funds in the hands of the administratrix ample for its payment, and properly applicable thereto. The administratrix appeals from the order.

The only question presented by the appeal is, in the language of the appellant, has the superior court, sitting in probate, jurisdiction to make an order directing the administratrix of an estate to pay a claim against the estate under such circumstances, no inventory having been made or filed, and no account of her administration ever having been filed by her or settled by the court? The order is based upon section 1513 of the Code of Civil Procedure, which provides: "If there be any debt of the decedent bearing interest, whether presented or not, the executor or administrator may, by order of the court, pay the amount then accumulated and unpaid, or any part thereof, at any time when there are sufficient funds properly applicable thereto, whether said claim be then due or not; and interest shall thereupon cease to accrue upon the amount so paid. This section does not apply to existing debts, unless the creditor consent to accept the amount." We make no doubt but that this section contemplates the payment of the principal as well as the interest of such a debt. It was added to the Code after the passage of sections 1647, 1648, Code Civ. Proc., and is a modification of the general rule as to the time of payment of the class of claims specified in it. The section, however, is designed, not for the benefit of creditors, but for the benefit of the estate. It affords no right to the owner of such a debt to compel an advance payment of it. The order directing the administratrix to pay should be in its form not compulsory, but permissive merely. Then she may pay or not, as her discretion suggests, and as the condition of the estate warrants. If she does not pay, she cannot be compelled to do so by the creditor, but will be liable to the estate for the interest accruing thereafter, if she cannot show that her refusal was based upon sound reasons. The especial point relied upon by appellant is that she neglected to return any inventory or file any account of her administration; that because of this neglect she cannot be compelled to pay; and that the redress of the claimant is to cause her removal, and the appointment of some one who will perform the duties of the trust. Code Civ. Proc. § 1450. This contention does not commend itself, still less the attitude of the administratrix in making it. She cannot be compelled to pay, not because she has been faithless to her trust, but because a compulsory order is in excess of the jurisdiction of the court. The order here directs the immediate payment of the debt. It must be held to have been designed as imperative and mandatory. So construed, it was in excess of the jurisdiction of the court, and is therefore reversed.

We concur: TEMPLE, J.; McFARLAND, J.

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106 Cal. 173

## PEOPLE v. ROYCE. (No. 21,081.)

(Supreme Court of California. Feb. 28, 1895.)

EMBEZZLEMENT—SUFFICIENCY OF EVIDENCE.

The fact that the treasurer of an association deposits a check drawn in its favor in a bank, and has the amount credited to his personal account, does not justify a conviction, in the absence of evidence of a demand by the association, or of inability to respond to a demand.

In bank. Appeal from superior court, city and county of San Francisco, J. M. Seawell, Judge.

C. E. K. Royce was convicted of embezzlement, and appeals. Reversed.

Reddy, Campbell & Metson, for appellant. Atty. Gen. Hart, for the People.

McFARLAND, J. In the opinion delivered in department (37 Pac. 630), it is said that "the errors complained of are based upon rulings upon questions of evidence, and upon instructions to the jury"; and as to such errors and questions we are satisfied with that opinion. But a hearing in bank was ordered on account of a grave doubt whether, under any proper view of the law, there was evidence sufficient to warrant a conviction of the crime charged; and, from further consideration of the case, we are satisfied that there was not such evidence.

The facts shown by the evidence are these: On February 21, 1893, the appellant was treasurer of the Veterans' Home Association, a corporation, and on that day received a certain draft for the benefit of said association for $10,350. On the same day he deposited said draft with the Crocker-Woolworth National Bank of San Francisco, and the amount of the draft was credited to appellant's personal account. The president of the bank testified that he "did not hear him [appellant] give any direction as to whose credit it should be placed," and that "we did not place it to the credit of the association because we have not had any such account on our books." Appellant informed the bookkeeper of the association that he had received this draft, and the amount of it was entered by the bookkeeper on his ledger of the date of February 21st. On February 24th the association received from appellant $8,310.35 of this money; and the charge against appellant is the embezzlement of the balance of said draft, amounting to about $2,050. What became of this balance does not appear. Appellant may have had it ready to be produced whenever called for. The by-laws of the association required the treasurer to deposit all funds over a certain amount "in such bank as the board [of directors] may direct"; but it does not appear that the board ever made such direction, or named any bank in which the deposits should be made. The by-laws also provide that all moneys in the hands of the treasurer should be "turned over to his successor in office"; but it does not appear that appellant ever had a successor in office. It is also provided in the by-laws that the treasurer shall make reports of moneys received and expended "to the association at its annual meeting," and, also, "at each quarterly meeting of the board of directors"; but there is no evidence of any such yearly or quarterly meeting between February, 1893, and the date of the indictment, which was June 2, 1893, or that appellant failed to report said money, or made any report in which it was not mentioned. There is no evidence that any demand was ever made upon appellant for said money by the association, or by any officer or agent thereof, or by any other person. The conviction rests, therefore, solely upon the fact that the money was deposited with the bank on February 21st to the personal account of appellant, under the circumstances as above stated. This was evidently the theory upon which the indictment was based, for it is alleged that the embezzlement was committed on the 24th of February,—just three days after said deposit. It is true, as the court instructed the jury, that the crime charged might have been shown to have been committed at any time before the date of the indictment; but the deposit of the money in the bank on February 21st was the only fact proven upon which the conviction could have been based. And that fact is not sufficient to support the verdict. It does not appear that he was ever called upon to apply the money to any need of the association, or to make any particular use of it, or to put it in any special place. It is true that he drew one or two checks on the Crocker-Woolworth Bank; but it does not appear that he had not private funds there, and the testimony of the president of the bank leaves the impression that he had been keeping an account with that bank. He may have had the money all the time ready to respond to any demand of the association. In fact, there is no evidence that he did not pay it over to the association. It is clear that he did not clandestinely keep it; for he reported it to the bookkeeper. No doubt, embezzlement may be established, under certain circumstances, without proof of a demand; as where other evidence clearly shows an appropriation by an employé of his employer's funds with intent to do so fraudulently and feloniously. But there is no such evidence in the case at bar. It is sometimes held in civil cases that the deposit by a trustee of trust funds to his personal account is sufficient cause for charging him with interest; but such fact alone is not sufficient evidence to convict a man of a felony.

For the reasons above given, we are of opinion that a new trial should have been given. The judgment and order are reversed, and the cause remanded for a new trial.

We concur: BEATTY, C. J.; GAROUTTE, J.; VAN FLEET, J.

106 Cal. 139

## PEOPLE v. STANTON. (No. 21,105.)

(Supreme Court of California. Feb. 25, 1895.)

THROWING VITRIOL—ELEMENTS OF CRIME—INSTRUCTIONS.

1. An assault is a necessary element of the offense of throwing vitriol upon another with intent to injure him. Pen. Code, § 244.

2. On an information for willfully throwing vitriol upon another with intent to injure his person, where every element was proved without contradiction except the intent, the court properly refused to charge that defendant might be convicted of a simple assault.

In bank. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

Winnie Stanton was convicted of throwing vitriol, and appeals. Affirmed.

John L. Love and A. O. Cotton, for appellant. Atty. Gen. Hart, for the People.

GAROUTTE, J. Appellant was convicted of violating the provisions of section 244 of the Penal Code, which provide: "Every person who willfully and maliciously places or throws, or causes to be placed or thrown, upon the person of another, any vitriol, corrosive acid, or caustic chemical of any nature, with the intent to injure the flesh or disfigure the body of such person, is punishable by imprisonment in the state prison, not less than one nor more than fourteen years." The evidence in the case proves conclusively that the appellant intentionally threw vitriol at and upon the prosecuting witness, Stember, and that such vitriol burnt both his clothes and his person. Upon the information and evidence offered thereunder, appellant's counsel asked the court to instruct the jury that his client might be convicted of a simple assault, or of an attempt to commit the offense charged, and this the court declined to do. The court based its refusal upon the ground that an assault was not a crime included in the offense charged in the information, and that an instruction upon the question of attempt was not justified by the evidence. We are of the opinion that an assault is a necessary element of the offense declared by section 244 of the Penal Code. Wharton, in his work upon Criminal Law, in treating of assaults, at section 610 says: "There are cases of poisoning that clearly involve assaults, e. g. throwing vitriol at another, injecting poison by force. Here there can be no question." But, even conceding appellant's contention in this regard to be sound, that an assault was a necessary element of the offense charged, still we do not think the question of assault was one proper to be submitted to the jury in the present case. The facts did not justify it. Every element of the offense charged is conclusively shown by the evidence, without contradiction, save the single element of intent. The appellant willfully and maliciously threw the vitriol upon the person of the prosecuting witness. This cannot be gainsaid, and the only open question remaining is, what was her intent in doing the act? Upon such a state of facts the instruction was properly denied.

An "assault" is defined to be an unlawful attempt, coupled with a present ability, to inflict a violent injury upon the person of another, and, consequently, if the evidence in this case proved an assault, it proved more, and proved the offense charged in the information. The court rightly refused to instruct the jury that they might convict the defendant of an "attempt" to commit the offense charged in the information, for if there was an attempt to commit the offense that attempt was carried out. The defendant did all that she contemplated doing, and her attempt was in no way frustrated. Upon a charge of robbery, if the property is actually taken by the criminal, the question of an attempt to commit robbery is foreign to the issue upon trial, and not a proper subject-matter to be submitted to the jury. It also necessarily follows upon the same line of reasoning that, if the question of "attempt" to commit the offense is not one to be submitted to the jury, likewise the question of "assault" is not a proper subject of inquiry for the jury, the only difference between the two offenses being one of "present ability to inflict the injury," and that element of the case is not a material one in the present discussion. If the evidence in the case was contradictory as to whether or not the vitriol was actually thrown upon the person of the prosecuting witness, then the instructions asked should have been given, but we find no such contradiction in the record. Measured by the evidence, the only open question in the case was one of intent, and the proper solution of that question of fact could in no way cast any light upon the duty of the court in giving or rejecting the instructions asked. As supporting generally the principles here discussed, see People v. Madden, 76 Cal. 521, 18 Pac. 402; People v. Barry, 90 Cal. 41, 27 Pac. 62; People v. Wright, 93 Cal. 564, 29 Pac. 240; People v. Scott, 93 Cal. 516, 29 Pac. 123. The charge of the court, taken as a whole, is somewhat argumentative, and to that extent is objectionable. But, after a careful perusal of it, we see nothing therein so prejudicial to appellant's rights as to demand a reversal of the judgment. A judge's charge to the jury should be a plain statement of the law bearing upon the facts of the case. It should be so fair, impersonal, and well balanced that the jurors who are to be guided by it in their deliberations in the jury room will be unable to deduce therefrom the opinion of the judge as to the guilt or innocence of the accused. "A judge cannot be too cautious in a criminal trial in avoiding all interference with the conclusions of the jury upon the facts." People v. Williams, 17 Cal. 147. For the foregoing reasons the judgment and order are affirmed.

We concur: McFARLAND, J.; TEMPLE, J.; HARRISON, J.; VAN FLEET, J.

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106 Cal. 190

## GARDNER v. DENNISON et al. (No. 19,456.)[1]

(Supreme Court of California. March 2, 1895.)

ACTION FOR WAGES—EVIDENCE — INSTRUCTIONS—REVIEW ON APPEAL.

1. A verdict, in an action for services rendered, based on conflicting and sufficient evidence, will not be disturbed.

2. In an action for services rendered, the refusal of an instruction that the title and situation of a lot, the alleged balance due on which is set up by defendant by way of counterclaim, are not issues involved in the case, is not reversible error, where all questions relating to the lot arose incidentally upon conflicting proofs relating to the wages agreed to be paid plaintiff per month, and the jury were clearly instructed as to the issues to be determined by them.

3. On an issue as to the amount of wages to be paid for services rendered, testimony of a partner of defendant as to what was told him by defendant as to the amount of wages paid is inadmissible, under Code Civ. Proc. § 1832.

4. A contention that plaintiff, suing for services rendered, was confined by his pleadings to proof of the amount due for services rendered between specified dates, is not available where, so far as the record shows, plaintiff confined his proofs to such period.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; J. W. McKinley, Judge.

Action by A. N. Gardner against G. L. Dennison and others for services rendered. Verdict and judgment for plaintiff. From an order denying a new trial, defendants appeal. Affirmed.

E. C. Bower, for appellants. W. T. Williams, for respondent.

BELCHER, C. The plaintiff brought this action to recover the sum of $771, balance of account alleged to be due for work, labor, and services done and performed by him for defendants between the 5th day of August, 1889, and the 5th day of August, 1891, under an agreement by them to pay him $50 per month for such labor and services. The answer denied that defendants were indebted to the plaintiff in the sum named in the complaint, or in any sum whatever; denied that they ever agreed to pay plaintiff $50 per month, or any sum greater than $40 per month; and alleged that the plaintiff had been paid in full for all services rendered to, and all indebtedness held by him against, them, or either of them. The answer further, by way of counterclaim, alleged that, prior to the commencement of the action, plaintiff was indebted to defendants, in the sum of $412.42, for balance of a mutual and running account between them, after allowing him the full amount of his wages, at $40 per month, and that said amount was past due, and plaintiff had paid no part thereof. The case was tried before a jury, and the verdict and judgment were in favor of the plaintiff, for the sum prayed for in his complaint. The defendants moved for a new trial on a statement of the case, and after a hearing the court required the plaintiff to remit from the judgment the sum of $100, which was done. The court then denied the motion, and from that order the defendants appeal.

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[1] Rehearing denied.

The court instructed the jury, in effect, that the burden was upon the plaintiff to prove by a preponderance of the evidence that the defendants were indebted to him, but that they were not bound to decide the case in conformity with the testimony of the greater number of witnesses; that the question was, taking all the testimony of all the witnesses before them, which was entitled to the greater weight, and that they were to decide in conformity with the most credible evidence, and that which they believed entitled to the greatest weight, considering all the facts and circumstances shown. The appellants contend that the jury disobeyed the first part of this instruction, because the decided preponderance of the evidence as to the amount which was to be paid plaintiff for wages was in their favor, and hence that the verdict was not only contrary to the instructions of the court, but was not justified by the evidence. The order appealed from cannot, in our opinion, be disturbed on this ground. It is true, there was a sharp conflict in the evidence as to the wages to be paid; but that introduced by the plaintiff was direct and positive, and was sufficient, if believed, as it must have been, to meet all the requirements of the instructions, and to justify and uphold the verdict.

The plaintiff commenced working for defendants in May, 1887. At that time he agreed to purchase from G. L. Dennison a lot of land in a tract of 70 acres owned by Dennison, and to pay therefor $1,000, the lot to be selected by plaintiff when the tract should be surveyed. He paid down $200 of the purchase money, and agreed that one-half of his wages should be applied monthly in further payment thereof, until the payment should be complete. The defendants requested the court to instruct the jury that "the question of the title to the lot, or what lot has been selected by the plaintiff, is not within the issues in this case, and it is not a question for you to consider." The court refused to give the instruction, and the defendants excepted, and now assign the ruling as error. It is true, there was no issue as to the title or situation of the lot; but the refusal to give the instruction, if erroneous, was, in our opinion, harmless. The questions as to the lot all arose incidentally in the effort to show, on one side, that plaintiff was to be paid $50 per month, and, on the other, that he was to be paid only $40 per month. The jury could not, therefore, so far as we can see, have been misled by the refusal. Besides, the court very clearly and correctly told the jury what the issues were which they were to consider and pass upon.

T. C. Naramore was a witness for defendants, and testified that he was in partnership with Dennison in the business which plaintiff was employed to conduct, but that he did not make the contract with plaintiff, or know what it was, except what was told him, and that he settled his partnership account with Dennison on March 2, 1888. The witness was then asked, "At what amount of wages paid plaintiff per month did defendant account to you for?" and the question was objected to and excluded. Defendants then offered to prove by the witness that, when defendant settled with him their partnership business, he charged up wages as paid to plaintiff at $40 per month, and also offered to introduce in evidence a statement of the account showing that fact. This evidence was also objected to and excluded. It is claimed that the court erred in each of these rulings, but we fail to see how any error can be predicated upon them. The effort was to prove matters to which the plaintiff was not a party, and which occurred without his knowledge or hearing. This being so, proof of them was not admissible as indirect evidence (Section 1832, Code Civ. Proc.), or under any rule of law of which we are advised.

The complaint alleged that the plaintiff's demand was for services rendered between August 5, 1889, and August 5, 1891; and it is urged that, under the pleadings, no verdict could be found for the plaintiff, except for the balance due him for services rendered between those dates, and that before he could recover it was necessary for him to prove definitely the amount of dollars and cents the defendants owed him between those dates. It may be admitted that the rule above stated is correct, and still we fail to see how the appellants can gain any advantage from it. So far as appears, the plaintiff complied with it, and introduced evidence sufficient to justify the verdict recovered.

No other points are made for a reversal. The record discloses no prejudicial error, and the order appealed from should be affirmed.

We concur: HAYNES, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

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106 Cal. 1

SOBERANES v. SOBERANES. (No. 15,462.)

(Supreme Court of California. Feb. 28, 1895.)

For majority opinion, see 39 Pac. 39.

BEATTY, C. J. As I did not participate in the decision of this cause, I take occasion, in passing upon the petition for a rehearing, to state briefly the grounds upon which I concur in the judgment and in the order denying a rehearing.

As stated in the opinion of the court, this is not a case in which the donor herself seeks to invalidate a gift. The action is prosecuted in her name by a guardian ad litem, and against her wishes. If she had commenced the action herself, or had consented to it, or had in any way manifested a desire to set aside her conveyance, her prayer, I think, must have been granted, upon the ground that the gift was of her whole estate, without any reservation or power of revocation; that it was made upon the understanding that she should be supported and cared for by her donee, and that no provision or condition for her support was contained in the grant, or in any written agreement; and for the further reason that her donee occupied towards her a relation of special trust and confidence; and that she had no independent advice. But it appears very clearly that since she has had independent advice, and with a clear understanding of the situation in which she is placed, she desires the gift to stand. This being so, she cannot, if she is now capable of acting for herself, be compelled against her will to take it back. The question then is whether she is at present, or was at the time of the trial, capable of acting for herself. It seems to be contended by counsel that the order of the lower court appointing a guardian ad litem, as long as it stands unrevoked, is conclusive of her want of capacity. But I do not so regard it. If the proceeding and order had been for the appointment of a general guardian on the ground of her incapacity, it might have had such effect. But here the guardian was merely appointed as a step in this action, and the findings of the court made at the close of the trial, and after a full hearing,—if they amount to a finding that she had the capacity to dispose of her property,—completely do away with the effect of the findings, express or implied, upon which the order appointing the guardian ad litem was based. As I construe the findings of the court (and so construed there is, in my opinion, sufficient evidence to sustain them), they declare, in effect, that the plaintiff was at the date of her conveyance, and at all times thereafter, of sufficient capacity to make the gift. They are as follows: "On and long prior to May 24, 1890, ever since, and now, said plaintiff was, and still is, old, uneducated, and illiterate. She has never at any time been able or competent to attend to, understand, or transact the ordinary business of life, except such as related to housewifery and the management and control of the domestic affairs of her own family and household. In this last-named respect, she is, and ever has been, since her intermarriage with her husband, the head of her domestic household, and has always discharged the duties of such position with full competency, wisdom, and prudence. She has never at any time been intrusted with, nor did she ever undertake to do or transact, any affair relating to business, other than such as was exclusively incident to the ordering and government of her domestic household; and in this latter connection she never transacted any business with respect to buying or selling, or disbursing or receiving money. At the time of the execution and delivery of said conveyance of land and transfer of cattle, and long prior thereto, plaintiff was not insane, nor were her mental faculties impaired to an extent greater than what is usually expected and normally found in persons of advanced age. She was not, and is not, by reason of age, disease, weakness of mind or body, or any undue influence or control exercised over her by any one, mentally incompetent and incapable of conveying her property by deed. Nor was she then, nor at any time, unable to comprehend or understand the nature, character, and effect of the transactions named in the 13th finding. Nor was she then, nor at any time, deceived, imposed upon, or misled by the artful designs and representations of the defendant, or any person. But plaintiff was then, and is now, by reason of her ignorance, illiteracy, and want of knowledge of business affairs and methods, and her lack of experience in all kinds of business (except such as relate to inner household duties), unable, unassisted, to properly manage or take care of her property, and, by reason thereof, she was and is liable to be deceived and imposed upon by designing persons in the transaction of business respecting her property interests and rights." The plaintiff has never been able to transact or understand the ordinary business of people engaged in business pursuits. She knows nothing about trading or carrying on a ranch, but with respect to that which is and has always been to her the ordinary business of life, viz. the management and control of the domestic affairs of her family and household, she has displayed full competency, wisdom, and prudence. She is, in other words, not deficient in intellect or natural capacity, at least not in that degree that requires the appointment of a general guardian, but is merely incapable, by reason of ignorance and lack of experience, of managing a ranch, or of conducting any business in which special knowledge and experience are essential.

It is suggested by counsel for appellant that upon this view of the case the proper judgment for the superior court to have made was a mere judgment of dismissal of the action, instead of a judgment on the merits, and they ask us to direct a modification of the judgment accordingly. But, on this appeal from the order denying a new trial, we cannot order a modification of the judgment.

106 Cal. 167

## GUTIERREZ v. HEBBARD, Judge of Superior Court. (No. 15,984.)

(Supreme Court of California. Feb. 28, 1895.)

BILL OF EXCEPTIONS—REFUSAL TO SETTLE—SERVICE OF NOTICE—MANDAMUS.

1. On appeal from a final decree it is error to refuse to settle the bill of exceptions on the ground that it has not been served on all the parties to the action, as the rights of the parties not served, and the necessity of whose presence is not apparent from the record, may be protected if it appears on the hearing of the appeal that they will be affected by the proposed modification of the decree.

2. The settlement of the bill of exceptions may be compelled by mandamus.

In bank.

Application by Leota K. T. Gutierrez for a writ of mandate against J. C. B. Hebbard, judge of the superior court of the city and county of San Francisco. Granted.

T. M. Osmont, for petitioner. Edward J. Pringle, for respondent.

HARRISON, J. Application for a writ of mandate. In the action of Emeric v. Alvarado, for the partition of certain real estate, certain lands were by the interlocutory decree allotted to the petitioner herein, and upon the final decree subsequently entered a portion of the lands so allotted to her was awarded to the plaintiff. After the entry of the final decree an appeal therefrom was taken on behalf of the petitioner, and subsequently a proposed bill of exceptions was served on her behalf upon the attorney for the plaintiff, who proposed amendments thereto, and, upon the same being presented to the respondent for settlement, he refused to settle the same, upon the ground that the bill of exceptions had not been served upon all of the parties to the action. Thereupon the present application was made to this court for a writ of mandate directing him to settle the said bill. It is now urged, in opposition to the application, that, as the parties to an action in partition are all actors against each other, it was necessary that the proposed bill of exceptions should have been served upon all of them before the respondent would be authorized to settle the same. No objection was made to the form or sufficiency of the proposed bill, or to the time within which it was served, or any objection other than the want of service aforesaid. As the interlocutory decree had become final by its affirmance in this court (27 Pac. 356) the only matters that could be reviewed upon an appeal from the final decree would be such as had intervened subsequent to the rendition of the interlocutory decree, and many of the reasons which are held to render all the parties to an action in partition actors against each other have no application. It is easy to conceive of many cases in which the contest upon an appeal from a final decree in partition would affect only a portion of the parties to the action, and in such cases only those parties that might be affected by a modification of the decree would be the "adverse party" upon whom a proposed bill of exceptions should be served. See Miller v. Thomas, 71 Cal. 406, 12 Pac. 432. If, by the interlocutory decree, a specific portion of the land is awarded to one of the parties, and upon the final decree this portion is allotted to another, none of the other parties to the action would necessarily be interested in the controversy over this parcel of land, although it might be that the circumstances connected with such allotment would be such as to render their presence necessary to an adjustment of the respective rights of the contestants. Neither the notice of appeal nor the decree in the present case is before us, and we are unable to say to what extent it might be modified as between the plaintiff and the petitioner, without the presence of the other parties; nor, indeed, would it be competent upon this application to examine the decree for that purpose. Until the bill of exceptions has been settled, it cannot be known that there will be any reason for its modification. After the petitioner had taken an appeal from the decree, she was entitled to have all the errors upon which she relied for a modification thereof incorporated in a bill of exceptions; and it was the duty of the respondent to facilitate, rather than to obstruct, her in her efforts to have the errors in the decree, if there were any, corrected upon the appeal. "A court should lean in favor of giving to litigants every reasonable opportunity of presenting their cases on the merits, and rules of procedure should be made to serve their true purpose of expediting and facilitating the disposition of causes according to their merits, rather than to convert them into a means of obstruction." Flagg v. Puterbaugh, 98 Cal. 136, 32 Pac. 863. The respondent ought not to deprive the petitioner of an opportunity for correcting the decree by refusing to make the facts which would have that effect a part of the record. If the matters which she seeks to have set forth in the bill of exceptions are such as, in the opinion of the respondent, would affect other parties to the judgment than those upon whom the proposed bill was served, their rights can be readily preserved by stating in his certificate of settlement the parties upon whom the proposed bill was served, or who had participated in its settlement. If, upon the hearing of the appeal, it should appear that the matters involved therein are such that they cannot be considered by this court, either by reason of a want of service of the notice of appeal upon all who are entitled to be heard, or by reason of their having had no notice of the preparation of the record upon which the appeal is to be heard, or an opportunity to make that record correspond to the facts, their rights can then be protected. Whether these parties would, in fact, be affected by the proposed modification of the judgment, or whether a bill of exceptions, in whose settlement they had had no voice, could be considered upon the appeal of the petitioner, must be determined by the appellate court. The respondent should not make the possibility that the bill would not be considered upon an appeal a reason for refusing an appellant the right to ask the appellate court to consider it. The application for the writ is granted.

We concur: GAROUTTE, J.; McFARLAND, J.; VAN FLEET, J.

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106 Cal. 171

## GUTIERREZ v. HEBBARD, Judge of Superior Court. (No. 15,929.)

(Supreme Court of California. Feb. 28, 1895.)

MANDAMUS TO COURT—REMEDY BY APPEAL.

Mandamus will not lie, pending an appeal from a decree awarding certain lands to plaintiff in partition, to compel the setting aside of a writ of possession issued under the court's order, and to restore petitioners to the possession of the lands; the remedy being by appeal if the court erred.

In bank.

Application by Leota K. T. Gutierrez for a writ of mandate against J. C. B. Hebbard, judge of the superior court of the city and county of San Francisco. Denied.

T. M. Osmont, for petitioner. Edward J. Pringle, for respondent.

HARRISON, J. Application for a writ of mandate. By the final decree in Emeric v. Alvarado (Cal.) 27 Pac. 356, certain lands in the possession of persons claiming to be the successors in interest of the petitioner were awarded to the plaintiff, and, after its entry, a writ of possession was issued under the order of the court, by virtue of which the plaintiff was placed in possession of these lands. Subsequently an appeal from the judgment was taken on behalf of the petitioner herein, and, after the appeal had been perfected, a motion was made before the superior court, the respondent herein, on behalf of said evicted persons, to be restored to the possession of said lands. The court denied the motion, and the petitioner has applied to this court for a writ of mandate commanding the superior court to set aside the execution of the writ of possession, and to restore her and her successors in interest to the possession of said lands. The application must be denied. The writ of possession was issued under an order of the court, and, if the court committed an error therein, or in its subsequent order refusing to set aside the execution of the writ, the petitioner could appeal therefrom, and have the error corrected. Green v. Hebbard, 95 Cal. 40, 30 Pac. 202. Whether the facts shown at the hearing of the application to vacate the execution of the writ were sufficient to authorize the granting of the motion called for the exercise of judicial action, and, if error was committed in such action, it cannot be corrected by mandamus. By the terms of the decree the plaintiff was awarded the possession of the premises held by the petitioner's successors, and the act of placing him in such possession was in execution of the judgment. The petitioner could have stayed the execution of the judgment if she had appealed therefrom before it was executed; but, by failing to appeal until after it had been executed, she is not entitled to have its execution set aside by reason of such subsequent appeal, any more than a defendant against whom a money judgment has been satisfied by an execution against his property is entitled to be restored to his property upon afterwards taking an appeal from the judgment. If the judgment appealed from shall be reversed, the appellant will be entitled under the provisions of section 957, Code Civ. Proc., to full restitution of all that he may have lost by virtue of its execution. The application is denied.

We concur: GAROUTTE, J.; McFARLAND, J.; VAN FLEET, J.

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106 Cal. 163

## PEOPLE v. YEE FOOK DIN. (No. 21,174.)

(Supreme Court of California. Feb. 28, 1895.)

CRIMINAL LAW—OBJECTIONS TO EVIDENCE—ASSAULT.

1. On a prosecution for assault with a knife with intent to kill, the prosecution proved, over a general objection, that nearly a month after the assault, when arrested, defendant carried a knife and a pistol. Over the same objection, the prosecuting attorney cross-examined defendant as to both the weapons, and in his argument commented on the weapons and defendant's answers in regard to them, to which defendant objected. *Held*, that the objections were sufficient to enable defendant to take advantage of the improper introduction of said evidence.

2. The admission of evidence, on a prosecution for assault with intent to kill, that when arrested, nearly a month after the assault, defendant had deadly weapons on his person, is prejudicial error.

In bank. Appeal from superior court, city and county of San Francisco; Walter H. Levy, Judge.

Yee Fook Din was convicted of assault with intent to murder, and from the judgment, and an order denying a new trial, he appeals. Reversed.

Lyman I. Mowry, for appellant. Atty. Gen. Hart, for the People.

McFARLAND, J. The defendant was charged with the crime of assault with intent to commit murder, alleged to have been made with a dagger, and was convicted. He appeals from the judgment, and from an order denying a motion for a new trial. It is clear that improper evidence highly prejudicial to appellant was erroneously admitted, and the only question is whether or not appellant made and took proper objections and exceptions.

The assault was committed about midnight on December 4, 1893, at the corner of Pacific and Dupont streets, in the city of San Francisco, and defendant was not arrested until January 1st,—27 days afterwards. On the witness stand, the officer who made the arrest was asked by counsel for the people, "Did you find anything on him?" To this counsel for appellant objected, and the objection was overruled, and exception taken. Perhaps this question was not vulnerable to a general objection, as it might have elicited an answer that would have been relevant and proper. The answer was: "I found this pistol and knife." No motion was made by appellant to strike out this answer. He was then asked to state "On what part of his person you found this dagger." To this the appellant objected. A conversation then occurred between the court and counsel, from which it appeared that the prosecution did not propose to identify the dagger used at the time of the assault. The court finally sustained the objection, stating excellent reasons why evidence of the finding of a pistol and dagger on the person of appellant so long after the assault was not admissible. The pistol and dagger were not formally introduced in evidence, although they were evidently left in the court room, in the presence of the jury. If the matter had rested here, perhaps there would have been no error committed of which appellant could have taken advantage. But the appellant took the stand as a witness for himself. His testimony was very brief, and was, substantially, that during the entire night of the alleged assault he was from 6 o'clock in the evening at the house of his employer, at a certain point on Dupont street. The first question asked him on cross-examination by special counsel for the people was: "Where did you get that from?" (Knife shown witness.) To this appellant objected. The court overruled the objection, and appellant excepted. Counsel for the people then proceeded to examine him at length as to the knife and the pistol; making him tell how he got them, how he had them upon his person when arrested, etc. In his argument to the jury, counsel for the people commented upon the knife and pistol, and the manner in which appellant said he got them. To this point of his argument appellant objected; but the court overruled the objection, and allowed counsel to continue such comments. The above proceedings put appellant, we think, in a position to take advantage of the improper introduction of said evidence. Appellant could certainly have made his objections in better form, and could thus have brought here a record presenting his point in a clearer light; but technicalities should be liberally viewed when urged against a defendant in a criminal case. That the evidence was erroneously admitted is clear. Proof that appellant had a knife and pistol on his person nearly a month after the commission of the alleged assault was beyond doubt inadmissible. Moreover, it was elicited by cross-examination of appellant, which was entirely inexcusable. That it was prejudicial to appellant is, also, beyond doubt. In order to convince the jury that he was guilty of an assault alleged to have been committed on December 4th, it was no doubt argued to them that on January 1st he had a knife and pistol, and therefore was a bad man; that on January 1st he was guilty of another crime, viz. carrying concealed weapons; and that his account of the way he got the knife and pistol was false, and therefore he had perjured himself. But he was not on trial for either of these latter offenses. He was being tried for an assault alleged to have been committed on December 4th, and upon that issue the said evidence had no legitimate bearing.

The judgment and order appealed from are reversed, and the cause remanded for a new trial.

We concur: GAROUTTE, J.; VAN FLEET, J.; HARRISON, J.

106 Cal. 202

## BANK OF SUISUN v. STARK et al. (No. 18,322.)

(Supreme Court of California. March 6, 1895.)

DEED—CONDITION SUBSEQUENT — FORECLOSURE—PARTIES DEFENDANT.

1. A deed which reserves to the grantor the right to live on the land until his death, and provides that his minor children shall be supported out of the proceeds thereof until each shall have received a certain sum, and that the grantee shall pay to each of the minor children a certain sum on certain dates, and that, when the grantee shall have performed the conditions expressed, the legal title to the land shall vest in him absolutely, creates a condition subsequent.

2. In an action to foreclose a mortgage on community land, where both husband and wife are dead, and no administrator of the wife's estate has been appointed, and the personal representative of the husband and all the heirs at law of both husband and wife are made defendants, the wife's personal representatives need not be made defendants.

Commissioners' decision. Department 2. Appeal from superior court, Solano county; A. J. Buckles, Judge.

Action by the Bank of Suisun against William S. Stark, as administrator, and others, to foreclose a mortgage on land. Judgment was rendered for plaintiff, and defendants appeal. Affirmed.

John M. Gregory and O. P. Dobbins, for appellants. Geo. A. Lamont, for respondent.

BELCHER, C. Jeremiah V. Stark was the owner of certain land in Solano county, which was community property, and on which he with his family was residing; and on August 8, 1870, he duly executed, filed, and caused to be recorded a declaration of homestead thereon. On September 15, 1883, he and his wife, Mary Ann Stark, executed a deed of the said land to their son, the defendant William S. Stark, and on August 13, 1885, the latter reconveyed the said land to his father and mother. On August 25, 1885, Stark and his wife executed to the plaintiff a mortgage on the said land to secure payment of their promissory note of that date for $3,000; and on September 21, 1887, they executed to the plaintiff another mortgage on the same land to secure payment of their promissory note of that date for $500. Stark died July 30, 1888, and thereafter the defendant William S. Stark was duly appointed administrator of his estate. Notice to creditors to present their claims against the estate was duly given, but the plaintiff failed to present any claim for its said notes and mortgages within the time allowed by law. Mrs. Stark died July 11, 1889, but no administration on her estate was ever taken out. The plaintiff commenced this action in August, 1890, to foreclose its said mortgages, and in its complaint expressly waived all recourse against any other property of the estates of the mortgagors than that described in the mortgages. The defendants, who are all of the children and heirs at law of the mortgagors, answered, and, among other things, alleged that, by reason of the failure of the plaintiff to present its claims to the administrator of the estate of J. V. Stark within the time allowed by law, each of the causes of action set up was barred by the provisions of sections 1475, 1493, 1500, 1502, Code Civ. Proc. The case was tried, and the court found the facts very fully, and, among other things, that the causes of action were not barred by the sections of the Code pleaded in bar thereof. A decree of foreclosure was accordingly entered, from which, and from an order denying their motion for a new trial, the defendants appeal.

The principal contention of appellants is that when the mortgages were executed the mortgagors had a valid and subsisting homestead on the mortgaged premises, which was never abandoned, and that after their death it became necessary, under the requirements of the Code and the decisions of this court, that the plaintiff should present its claims to the administrator of the estate of said J. V. Stark for allowance before any proceedings for foreclosure could be taken. On the other hand, it is contended for respondent that the mortgagors abandoned their homestead when they executed the deed of September 15, 1883, to William S. Stark, and hence that the foreclosure was authorized by section 1500, Code Civ. Proc. Section 1243 of the Civil Code provides: "A homestead can be abandoned only by a declaration of abandonment, or a grant thereof, executed and acknowledged: (1) By the husband and wife, if the claimant is married; (2) by the claimant, if unmarried." And sections 1033 and 1039 declare that a "grant" is a transfer in writing, and a "transfer" is an act by which the title to property is conveyed by one living person to another. The question, then, is, was the deed referred to a "grant," and did it operate to transfer the title to the property described from the grantors to the grantees?

The material parts of the deed are as follows: "That the said parties of the first part, for and in consideration of the acceptance of this conveyance by the said party of the second part, subject to the conditions hereinafter mentioned and expressed, and for the further consideration of one dollar, * * * do by these presents grant, bargain, sell, and convey unto the said party of the second part, and to his heirs and assigns, forever [then follows a description of the land]; together with all and singular the appurtenances, tenements, and hereditaments thereunto belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof. And also all the estate, right, title, interest, homestead property, possession, claim, and demand whatsoever, as well in law as in equity, of the said parties of the first part, of, in, or to the above-described premises, and every part and parcel thereof, with the appurtenances [then follows the usual habendum clause]; provided, however, and this conveyance is made and accepted upon this express condition, that the said parties of the first part reserve to themselves the right to live in and occupy the residence now occupied by them, and situated upon the premises above described together with their three minor children Charles Stark, Oliver Stark, and John Stark, until the death of the said parties of the first part. And the said parties of the first part further reserve to themselves and their three minor children * * * the right to be supported and clothed out of the yearly proceeds of the said premises described as aforesaid, until the death of the said parties of the first part; and should the said parties of the first part die before the date of the payment to the said minors * * * of the sum of one thousand dollars each, gold coin of the United States, the date of the payment of which will more particularly appear in this indenture hereafter, then the said minors * * * are to be clothed and supported out of the yearly proceeds of the said premises described as aforesaid until the payment to each of them of the sum of one thousand dollars." It is then further stated that the conveyance is made and accepted upon the express conditions that the party of the second part shall make the following payments to the children of the parties of the first part on or before the dates named, to wit: To Mary J. Banson, $1,000, October 1, 1886; to Narcissa Barrett, $1,000, October 1, 1887; to Lucy Ann Stark, $1,000, October 1, 1888; to Charles Stark, $1,000, October 1, 1889; to Oliver Stark, $1,000, October 1, 1890; to John Stark, $1,000, October 1, 1891. And following the above is this provision: "And when said William S. Stark, the said party of the second part, or his heirs or assigns, shall have performed the conditions in this indenture hereinbefore expressed, the legal title to the premises described as aforesaid shall vest in him absolutely."

It is claimed for appellants that the conditions expressed in the deed were conditions precedent, and for respondents that they were conditions subsequent. "If land is conveyed upon a condition precedent, the title will not pass until the performance of the condition; but, if the condition is subsequent, the title passes at the time at which the deed is executed and delivered. Whether a covenant is to be deemed precedent or subsequent depends upon the intention of the parties as shown by the instrument, and not upon the use of any particular set of technical words." Devl. Deeds, § 958. The deed purports to convey the land in praesenti, and if such was the intention of the parties there can be no question that the court below rightly found that it did so, and operated as a present grant. The grantors reserved to themselves the right to live in and occupy the house on the premises, and to be supported and clothed out of the yearly proceeds of the premises so long as they should live, and there is no pretense that they were deprived of that right. In this reservation we see nothing to indicate that they intended to retain the title in themselves during their lives. On the contrary, it would seem from the language used that they intended to pass the title at once to the grantee, subject to the conditions named. In Hihn v. Peck, 30 Cal. 281, it is said, on page 290: "The provision that the grantors might remain in possession and take the rents and profits until the lawsuit should be determined does not argue that the title was to abide in the Littlejohns during the interval, but presupposes that it was not. But, however that may be, it is apparent that the words of reservation to the grantors, and the words of conveyance in praesenti to the grantee, may operate, respectively, to the full extent of the terms used, and still be in perfect consonance with each other." Before the time arrived for making any of the payments to his sisters and brothers the grantee reconveyed the land to his grantors. He was then relieved from the duty to make the payments, and it is therefore a matter of no consequence that none were made. The obligations, however, to make the payments were clearly conditions subsequent, and not precedent. The conclusion reached seems to be fully warranted by the last clause of the deed, to the effect that when the party of the second part, or his heirs or assigns, shall have performed the conditions mentioned, the legal title to the premises shall vest in him absolutely. This clearly indicates that the parties intended to have some title vest in the grantee at once which would descend to his heirs, or which he might assign, and that on performance of the conditions it should be complete. The point that there was a defect of parties defendant, because neither Mary Ann Stark nor her personal representative was made a defendant, is not well taken. Mrs. Stark died before this action was commenced, and no administration was had on her estate. The property was community property, and all the heirs at law of herself and husband were joined as defendants. This was sufficient. The decree and order appealed from should be affirmed.

We concur: HAYNES, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the decree and order appealed from are affirmed.

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106 Cal. 199

## RANDOLPH v. KRAEMER et al. (No. 19,447.)

(Supreme Court of California. March 6, 1895.)

SUPERIOR COURT—JURISDICTION—FAILURE TO SATISFY MORTGAGE—ACTION FOR PENALTY.

The superior court has jurisdiction of an action under Civ. Code, § 2941, providing that where a mortgage is paid, and the mortgagee refuses to satisfy the same of record, he shall forfeit to the mortgagor $100, where the answer puts in issue plaintiff's title to the mortgaged land.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; J. W. McKinley, Judge.

Action by W. R. Randolph against Samuel Kraemer and another to recover a penalty for refusal to satisfy a mortgage which had been paid. Judgment was rendered for plaintiff, and defendants appeal. Affirmed.

Kendrick & Kendrick and Victor Montgomery, for appellants. W. P. Hyatt, for respondent.

VANCLIEF, C. This action was brought under section 2941 of the Civil Code, of which the following is a copy:

"Sec. 2941. When any mortgage has been satisfied the mortgagee or his assignee must immediately, on the demand of the mortgagor, execute, acknowledge and deliver to him a certificate of the discharge thereof, so as to entitle it to be recorded, or he must enter satisfaction, or cause satisfaction of such mortgage to be entered of record; and any mortgagee, or assignee of such mortgagee, who refuses to execute, acknowledge and deliver to the mortgagor the certificate of discharge, or to enter satisfaction, or cause satisfaction of the mortgage to be entered, as provided in this chapter, is liable to the mortgagor, or his grantee or heirs, for all damages which he or they may sustain by reason of such refusal, and shall also forfeit to him or them the sum of one hundred dollars."

It is alleged in the complaint that one W. H. Shinn mortgaged to defendants a tract of land of 80 acres, and that afterwards plaintiff, by purchase, became and still is the owner of the land; that Shinn paid the mortgage debt, and demanded of defendants a certificate of discharge of the mortgage, or that they cause satisfaction of the mortgage to be entered of record, with which demand the defendants refused and still refuse to comply, to the damage of the plaintiff in the sum of $2,500, for which, and also for the statutory penalty of $100, the plaintiff demands judgment. By their verified answer the defendants denied, among other things, that plaintiff became or still is the owner of the land. The plaintiff had judgment for only the statutory penalty of $100, without costs. Defendants appeal from the judgment on the judgment roll containing a bill of exceptions. The bill of exceptions shows that when the cause was called for trial by the court, and before any evidence was offered, "the plaintiff, by his counsel, renounced, relinquished, and waived all claim and demand in or upon his complaint, except the sum of $100 statutory penalty for the failure to satisfy the mortgage as alleged in the complaint." Thereupon the defendants moved for judgment of nonsuit, "on the ground that the court had no jurisdiction of the action, the sum demanded being less than $300." The court denied the motion, and defendants excepted.

Appellants contend that the court erred in denying a nonsuit and in proceeding to judgment, for the reason that it had no jurisdiction of the subject-matter of the action after plaintiff abandoned and withdrew his cause of action for actual damages. A sufficient answer to this point is that the verified answer of the defendants put in issue plaintiff's title to the mortgaged land, and that this issue was material. The plaintiff could not have recovered the penalty of $100 under section 2941 of the Civil Code without proving that he had become the owner of the mortgaged land, his allegation of such ownership being denied. The superior court, therefore, had original jurisdiction of the cause of action for the penalty, though the amount of such penalty was less than $300. Hart v. Carnall-Hopkins Co., 103 Cal. 132, 37 Pac. 196; City of Santa Barbara v. Eldred, 95 Cal. 379, 30 Pac. 562. In these cited cases all possible objections to the jurisdiction of the lower court are answered, although it may be that, if the pleadings had not raised the issue of title to real property, a justice's court would have had jurisdiction of the action. Thomas v. Justice's Court, 80 Cal. 40, 22 Pac. 80. Had the same pleadings been filed in a justice's court the cause must have been removed to the superior court for trial, and, as shown by the cases above cited, it was not necessary that the question of title to real estate should originate in a justice's court in order to give the superior court jurisdiction. Appellants further contend that there is no finding on the issue as to the demand that satisfaction of the mortgage be given or entered. The finding upon this issue is "that said W. H. Shinn, mortgagor, demanded of defendants, and of each of them, that they satisfy said mortgage of record, and that they failed so to do, and that the said mortgage has never been satisfied of record by said defendants." This seems to be sufficient. I think the judgment should be affirmed.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

4 Cal. Unrep. 978

## HUNTER v. HUBERT et al. (No. 15,270.)

(Supreme Court of California. March 8, 1895.)

REVIEW UPON APPEAL.

Where part of the defendants have previously appealed, and the question has been decided adversely to them, such decision will not be disturbed upon appeal of other defendants, prosecuted on the same grounds.

Department 2. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Action by David Hunter against Charles Hubert and others. From a judgment for plaintiff, defendants appeal. Affirmed.

W. C. Burnett, for appellants. Tilden & Tilden and H. J. Tilden, for respondent.

HENSHAW, J. This is an action by plaintiff to recover from defendants the amount due him for damages to his property by the widening of Dupont street. Judgment passed for plaintiff, and from it the defendants Hubert and Humphreys prosecute this appeal. The only proposition advanced by them is that the amended complaint does not state a cause of action. This point was made by other defendants in an appeal from this judgment, and decided adversely to the contention in Hunter v. Bryant, 98 Cal. 250, 33 Pac. 51, where this court said: "Conceding, for the purposes of the case, that the original complaint was lacking in essentials, still the amended complaint is unobjectionable, and that is the pleading upon which the judgment was rendered." A review of the case presents no grounds for a modification or reversal of this decision. The judgment is affirmed, and this order directed to be entered as of date May 1, 1893.

We concur: McFARLAND, J.; TEMPLE, J.

106 Cal. 156

## LOS ANGELES LIGHTING CO. v. CITY OF LOS ANGELES et al.

(No. 19,434.)

(Supreme Court of California. Feb. 28, 1895.)

STREET IMPROVEMENTS—PROTEST—SIGNATURE OF COTENANT—CORPORATIONS—POWERS OF GENERAL MANAGER.

1. A cotenant of abutting property has implied authority to sign the protest provided for by St. 1889, p. 158, § 3, against a proposed street improvement.

2. Signature of one cotenant, written by another, in the former's presence and at his request, is sufficient for the purpose of such protest.

3. The protest is sufficient for the work objected to, though it does not include all the work enumerated in the resolution of the council.

4. The president and general manager of a corporation, who, in the latter capacity, is authorized by the by-laws to supervise the affairs of the company, may sign a protest against a street improvement for the corporation; and the fact that he signs it as president, instead of general manager, is immaterial.

In bank. Appeal from superior court, Los Angeles county; J. W. McKinley, Judge.

Suit by the Los Angeles Lighting Company against the city of Los Angeles and others for an injunction. Judgment for plaintiff, and defendants appeal. Affirmed.

C. T. H. Palmer and C. McFarland (E. W. McKinstry, of counsel), for appellants. Cheney & Cronin (John S. Chapman, of counsel), for respondent. Brewton A. Hayne, amicus curiae.

HARRISON, J. The city council of Los Angeles adopted a resolution of intention, June 5, 1893, for certain improvements on Aliso street, in said city, and at the same time, under the provisions of the act of February 27, 1893 (St. 1893, p. 33), determined that bonds should be issued to repay the cost of the improvement. Within 10 days after this resolution of intention had been published and posted, protests against the work, purporting to represent a majority of the frontage on the line of said proposed improvement, were delivered to the clerk of the city council on behalf of the plaintiff and other property owners; but, notwithstanding said protests, that body passed an order authorizing the work to be done, and invited proposals for doing the same. The Bituminous Lime Rock Paving & Improvement Company, one of the appellants herein, filed with the city clerk its proposal to do the work in accordance with the invitation therefor; and its proposal having been accepted, and the contract awarded to it, the plaintiff commenced this action to enjoin the street superintendent and the said appellants from entering into said contract. The plaintiff had judgment in the court below, and the defendants have appealed. The main issue presented at the trial was the sufficiency of the protests to bar any further action by the city council until after the expiration of six months, the appellants contending that some of the signatures thereto were unauthorized, and that the protests did not represent a majority of the frontage on the line of the improvement.

It is provided by section 3 of the street improvement act (St. 1889, p. 158) that "the owners of a majority of the frontage of the property fronting on said proposed work or improvement, where the same is for one block or more, may make a written objection to the same within ten days after the expiration of the time of the publication and posting of said notice, which objection shall be delivered to the clerk of the city council, who shall endorse thereon the date of its reception by him, and such objections so delivered and endorsed shall be a bar for six months to any further proceedings in relation to the doing of said work or making said improvement, unless the owners of the one-half or more of the frontage, as aforesaid, shall meanwhile petition for the same to be done." Section 16 of the same act declares that "the person owning the fee, or the person in whom on the day the action is commenced appears the legal title to the lots and lands by deeds duly recorded in the county recorder's office of each county, or the person in possession of lands, lots or portions of lots or buildings, under claim, or exercising acts of ownership over the same, for himself, or as the executor, administrator or guardian of the owner, shall be regarded, treated and deemed to be the 'owner' for the purpose of this law, according to the intent and meaning of that word as used in this act." St. 1885, p. 159.

1. One of the questions involved herein is the effect of the signature to the protest by one of the several cotenants of a lot of land fronting upon the proposed improvement, the appellant contending that such protest should be entirely disregarded, upon the ground that a cotenant has no implied authority to do any act affecting the interest of the other cotenants in the land. It is undoubtedly true that it is not within the power of a cotenant to create an incumbrance upon the entire estate, or to impose any burden upon the interests of his cotenants therein, nor can he by any act of his confer jurisdiction upon any other body or tribunal to impose such burden, as was held in Mulligan v. Smith, 59 Cal. 206. This rule of inability is, however, entirely inapplicable to the acts of the cotenant in a case like the present. One cotenant can at any time protect the entire estate from injury or loss without calling to his aid the assistance of the other cotenants, and his act will inure to their benefit. He can resist an intruder, or evict a trespasser, remove an incumbrance, or redeem from a burden, and, since his acts in this behalf are in the interest of and for the benefit of his cotenants, their authority therefor, if necessary, will be presumed. We hold, therefore, that a cotenant is authorized

to sign a protest against the improvement of a street by the city council under the aforesaid act. Upon any other rule a cotenant of land might be powerless to prevent an unwarranted imposition of this burden upon the land, even though he held the major interest therein. His cotenant might be an infant, or might be absent from the state, and, if the majority of the frontage of land to be assessed for the improvement was held in cotenancy, there would be no means of avoiding the unnecessary burdens of assessment by a protest, unless such protest could be made by a cotenant. Whether the entire frontage of the lands held in common, or only his proportionate share thereof, is to be counted in determining the amount of frontage represented by the protest, is not involved upon this appeal. This question might arise, if one cotenant should favor and another object to the improvement, but in the present case it does not appear that any of the cotenants signed a petition for the improvement, and the superior court, in estimating the extent of frontage represented by the protest, counted only the proportionate share of the cotenant in the land represented by him.

2. Roch Sarrail and Joseph Couget owned a lot of land having 25 feet frontage on the line of the proposed improvement, and the protest was signed, "Sarrail ni Couget." It was shown at the trial that this signature was made by Sarrail in the presence of Couget, and at his request. This was sufficient to entitle it to be considered as a protest by them against the improvement. The protests contemplated by this statute are not required to be executed with any particular formality. They do not create any burden or obligation, and are not to be executed with the ceremonies required for a transfer of real estate, or for creating a charge thereon. It is sufficient if they indicate to the city council that the proposed improvement is objected to, and that this objection is made by the owners of a majority of the frontage upon the line of the work. The statute does not require that the authority to sign the protest, if signed by an agent, shall accompany the protest, nor was it necessary that the authority of Couget to Sarrail should be in writing. When the council came to consider the sufficiency of the protest they could then require the production of the authority, if it was challenged; but, if on its face a protest purports to have been signed on behalf of the owners of a majority of the frontage, a disregard of it by the council is at the risk of their future action in ordering the improvement, being without their jurisdiction.

3. The protest on behalf of the plaintiff was signed by its president, and it is contended that it should have been disregarded, for the reason that it had not been specifically directed by the board of directors of the corporation. It was shown at the trial that the president of the corporation was also its general manager, and that the by-laws of the corporation authorized the general manager to supervise and control the affairs of the company, subject to the board of directors. We are of the opinion that under this power the president, as such general manager, had authority to do any act which in his judgment was suitable to protect the interests of the corporation, or to preserve its property, and that the signing of the protest is to be regarded as such an act. The fact that he signed it as president, rather than as general manager, is immaterial. Similar observations may be made of the protest signed by the secretary of another corporation, who was also its general manager. Objections are made to other signatures, but none of them require any special notice. The signature by the executors of the estate of Amestoy was properly held sufficient. The statute expressly designates executors as the "owner" for the purpose of the act.

4. The protest was sufficient for the work objected to, notwithstanding that it did not embrace all the work enumerated in the resolution of intention. The city council cannot, by including certain work which the property owners object to with work which they desire, compel them to accept the objectionable portion, or be deprived of that which they wish to have done. The resolution of intention is only a proposition by the council, and frequently consists of distinct classes of improvements upon designated portions of the same street or of different streets; and in such case it is competent for the council to order only one or more of these classes to be done. In either case the owner may protest against any portion of the work included in the resolution, without including in his protest all of the work embraced therein, and it is immaterial whether the different classes of work upon the same street are included in one paragraph or in different paragraphs. The right of the owner to protest is the same in each instance.

5. A brief has been filed in this case by an amicus curiae, attacking the constitutionality of that portion of the statute which authorizes the issuance of bonds, and this question has also been discussed in the briefs filed on behalf of the respective parties to the action; but, as the filing of the protest operated to deprive the city council of Los Angeles of all power to order the improvement, there could be no bonds issued, and any question regarding the validity of such bonds, or of the statute authorizing their issuance, would be purely hypothetical, and not a proper subject for determination herein. There are many other propositions which might be suggested for consideration in determining the constitutionality of these statutory provisions, aside from those presented in the briefs filed, and we must decline to pass upon this question until an issue shall be presented in which it is directly involved.

The order and judgment appealed from are affirmed.

We concur: TEMPLE, J.; McFARLAND, J.; GAROUTTE, J.; VAN FLEET, J.

106 Cal. 220

## SHAMP v. WHITE. (No. 15,701.)

(Supreme Court of California. March 8, 1895.)

REVIEW—CONFLICTING EVIDENCE—SELF-SERVING DECLARATIONS.

1. A finding of fact on conflicting evidence as to whether defendant in an unlawful detainer suit gave plaintiff notice, as required by the lease, that he intended to renew it by remaining another year, will not be disturbed on appeal.

2. On an issue as to whether a tenant sued in unlawful detainer gave oral notice of his intention to renew the term for another year, as provided in the lease, a communication, written by him to the lessor after the end of the first term, stating that the lessor is thereby notified, "as you have been informed," of the lessee's intention to remain, is inadmissible, as being a declaration of the lessee in his own interest.

Department 2. Appeal from superior court, Napa county; E. D. Ham, Judge.

Action for unlawful detainer, brought by P. K. Shamp against J. P. White. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

F. E. Johnston, for appellant. T. B. Hutchinson, for respondent.

HENSHAW, J. Action for unlawful detainer, brought under subdivision 1 of section 1161, Code Civ. Proc. The appeal is from the judgment. Exception is taken to the decision on the ground that it is not supported by the evidence. The evidence and the rulings complained of are presented by bill of exceptions. The complaint averred defendant's entry under a lease, which was pleaded not in precise words, but by its legal effect. The answer denied the making of the lease pleaded in the complaint, and affirmatively set forth in full the contract between the parties. This was sufficient to present issues for determination. Murphy v. Napa Co., 20 Cal. 497; Gilman v. Bootz, 63 Cal. 120. The findings of the court are neither inconsistent nor contradictory. They declare against the lease and the holding pleaded in the complaint and in favor of the instrument and possession set up in the answer. By the indenture plaintiff leased a farm to defendant "for the term of one year from November 16, 1892, to November 16, 1893, with the privilege of renewal of this lease for one year at the same terms, at the pleasure of the party of the second part." The contract here expressed was one for a renewal of the lease, and not one for an extension of the term, despite the language subsequently used,—"at the expiration of this lease, if not extended as heretofore mentioned, the party of the second part will quit," etc. The distinction becomes important for this reason: Being a lease with a privilege of renewal, it was incumbent upon the lessee, desiring to exercise his option, to give notice of his election before the expiration of the original term; while, if the lease had provided merely for an extension, his remaining in possession (no specific form of notice having been required) would have been sufficient notification of his decision. Renoud v. Daskam, 34 Conn. 512; Delashman v. Berry, 20 Mich. 292; 1 Tayl. Landl. & Ten. § 332; 2 Wood, Landl. & Ten. (2d Ed.) p. 947; 6 Lawson, Rights, Rem. & Prac. § 2833. The trial court treated the contract as one providing for renewal, and found that defendant notified plaintiff of his intention to remain for another year upon the 15th day of October, 1893, before the expiration of the original term. Upon this finding, as upon others attacked, the evidence is conflicting, and, under the rule, it will not be disturbed. Defendant remained in possession after November 16, 1893, and swore that he gave oral notice of his intention to plaintiff before that date. This plaintiff and her daughter strenuously denied. In support of his contention, defendant offered in evidence a communication addressed by him to plaintiff, admittedly written and delivered after the expiration of the first year's tenancy. So much of it as is pertinent to this consideration is as follows: "Mrs. P. K. Shamp: You will please take notice, and you are hereby notified, that, as you have been informed, I intend to continue possession of the property which you on the 15th day of November, 1892, leased to me, under and by virtue of the terms of said lease on that day executed, for another year." Objection was made to the introduction of the writing, upon the ground that it was a mere declaration of defendant in his own interest, after the fact, and therefore incompetent. The objection was overruled, and the document admitted by the court as "tending to show that prior to the 16th day of November, 1893, the defendant had elected to take the property for an additional term of one year, and of which the plaintiff had notice." The writing was inadmissible for any such purpose. It was simply the declaration of a party in his own interest; mere hearsay. A litigant has never been allowed to bolster his cause by such evidence. As well permit a man to establish an alibi by proving statements made by him to others after the event as to his whereabouts upon the date in question. But, as has been set forth, the matter of this notice was vital to the case. The court, upon a conflict of evidence, found upon it in favor of defendant. For the purpose of reaching that decision it considered defendant's letter as part of his evidence, and, for aught that can be told to the contrary, in view of the sharp conflict, that epistle may have been determinative of the proposition. In any event, its admission was an error prejudicial to the substantial rights of plaintiff, and for it the judgment is reversed, and the cause remanded.

We concur: McFARLAND, J.; TEMPLE, J.

106 Cal. 194

### MacDERMOT v. BARTON et al. (No. 18,400.)

(Supreme Court of California. March 6, 1895.)

FORECLOSURE OF MORTGAGE—SALE BY COMMISSIONER—CONSTITUTIONAL LAW.

1. An order appointing a commissioner in foreclosure to sell the mortgaged property, under Code Civ. Proc. § 726, as amended in 1893, will not be reversed because the prayer of the complaint follows the usual form, and asks for a sale of the mortgaged property by the sheriff.

2. Nor is it ground for reversal that the court's decree, rendered on the same day, ordered the sale to be made by the sheriff; it being a mere oversight, capable of amendment on simple motion.

3. Code Civ. Proc. § 726, conferring on the court authority to appoint commissioners to sell mortgaged property, does not violate Const. art. 11, requiring the legislature, by general laws, to provide for certain county officers, including sheriffs, and to prescribe their duties, there being no provision that foreclosure sales shall be made by sheriffs.

Commissioners' decision. Department 1. Appeal from superior court, Fresno county; J. R. Webb, Judge.

Action by Charles F. MacDermot against Ella G. Barton and others for the foreclosure of a mortgage. From an order appointing a commissioner to sell the mortgaged property, plaintiff appeals. Order affirmed.

George W. Towle, Jr., for appellant. L. L. Gory, George E. Church, and Frank H. Short, for respondents.

SEARLS, C. This is an action for the foreclosure of a mortgage. The cause was tried by the court, and written findings were signed, dated June 2, 1894, ordering a decree of foreclosure and sale of the mortgaged property. A decree of foreclosure ordering, among other things, a sale of the mortgaged property by the sheriff of the county of Fresno (the county in which the action was pending and in which the mortgaged property was situate), was signed by the judge of the court, and is dated June 2, 1894. The findings and decree were not filed until June 16, 1894, and it appears, although dated June 2d, were not in fact signed until June 16, 1894. On the 16th day of June, 1894, the findings and decree were filed, and also an order appointing J. F. Church as a commissioner to sell the mortgaged premises in the manner provided by law for a sale of like property by a sheriff upon execution, etc. The order recites as follows: "This being the day and hour set for presentment to the court of the findings and decree herein, for its examination and signature, due notice of the same having been given to all the attorneys for the defendants, the same were duly presented to the court, and, after examination, the court, being fully advised in the premises, and satisfied of the correctness thereof, and no objection being raised by any of the attorneys for the defendants, now signs and files the findings and decree herein; and it is hereby ordered," etc. Then follows the order above mentioned, appointing a commissioner. Plaintiff in the foreclosure suit appeals from the order appointing a commissioner to sell the mortgaged property. No objection is made to the form of the order appointing a commissioner. Section 726 of the Code of Civil Procedure, as amended in 1893, provides that "the court may, by its judgment, or at any time after judgment, appoint a commissioner to sell the incumbered property." The subsequent portion of the same section provides that the commissioner, when appointed, shall possess the powers and be subject to the duties of sheriffs in like cases. The next section provides the mode in which the commissioner shall qualify, and his compensation, which shall not exceed $10. The objections urged against the action of the court below by the learned counsel for the appellant are not deemed tenable. It is true the prayer of his complaint follows the usual form, and asks for a sale of the mortgaged property by the sheriff. The essence of such a prayer is an invocation of a judicial sale. The method of its consummation, so long as pursued within the power conferred upon the court, is of no moment; and, had the prayer of the complaint been silent as to the officer by whom the sale asked for was to be made, it would have been equally efficacious. So, too, the fact that the decree as entered by the court ordered the incumbered property to be sold by the sheriff, while the order made and entered on the same day appointed a commissioner to discharge the same duty, was but an oversight of the court below, not calling for an appeal, but which might have been remedied, and, as the record furnishes all the information requisite, may be at any time remedied, by a simple motion to amend and correct the decree by striking out the word "sheriff," and inserting "commissioner," wherever they occur in such decree. The fifth section of article 11 of the constitution of the state of California is not violated by section 726, Code Civ. Proc., conferring upon the court authority to appoint commissioners to sell mortgaged property. The section of the constitution cited provides that the legislature, by general and uniform laws, shall provide for the election or appointment in the several counties of certain county officers, among which a sheriff is designated, "and shall prescribe their duties and fix their terms of office." It will be observed that the constitution does not fix the duties of the sheriff, but wisely leaves to the legislature the power so to do. Section 726, Code Civ. Proc., has so modified the same section as it stood prior to 1983, and other sections defining the duties of sheriff, that he has no duty to perform in a case of sale of real property under foreclosure, where the court appoints a commissioner to make such sale. Under the former chancery practice in England and the United States, it was usual to appoint a master in chancery or commissioner to make all sales of real property, and in the federal courts it is to this day the usual practice to sell mortgaged premises under decrees of foreclosure under and by direction of the marshal of the district, or by a master appointed by the court, as the decree may direct. It is no part of the duty of a sheriff, as such, and in the absence of statutory provision, to sell property under a sale in foreclosure. In a spirit of economy, as we may suppose, the legislature has provided for the appointment of a commissioner to conduct foreclosure sales, after the manner of the former chancery practice, in those cases where the court shall deem it proper so to do. Neither the law nor the constitution is violated thereby. The case of Bruner v. Superior Court, 92 Cal. 239, 28 Pac. 341, cited by appellant, has no application here. In that case the Political Code (section 4192) provided for the appointment of an elisor in certain enumerated cases, of which the case in hand was held not to be one, and hence that the appointment was invalid. In cases of foreclosure of mortgages the court is authorized to appoint a commissioner to sell the incumbered property, in every case, at its discretion. The order appealed from should be affirmed.

We concur: BELCHER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the order appealed from is affirmed.

106 Cal. 142

## HENRY v. MERGUIRE et al. (No. 18,328.)

(Supreme Court of California. Feb. 25, 1895.)

APPEALABLE ORDERS—STATEMENT ON MOTION FOR NEW TRIAL—SETTLEMENT.

1. A settlement by the court of a statement on a motion for a new trial is not an appealable order, within Code Civ. Proc. § 939, subd. 3, providing for an appeal "from any special order made after final judgment."

2. Under Code Civ. Proc. § 659, subd. 3, prescribing the time within which a statement on a motion for a new trial, when proposed amendments by the adverse party are not adopted, must be presented to the court for settlement, a delay of three days is fatal.

Commissioners' decision. In bank. Appeal from superior court, Nevada county; John Caldwell, Judge.

Action by P. Henry against J. L. Merguire and others as executors. There was a verdict for plaintiff, and he appeals from an order granting defendants' motion for a new trial. Reversed.

Thos. S. Ford, for appellant. J. M. Walling and W. H. Chickering, for respondents.

BELCHER, C. This is an appeal by the plaintiff from an order granting the defendants' motion for a new trial. The motion was made upon a statement of the case, and was granted upon the ground that "the evidence is insufficient to justify the verdict of the jury and decision of the court."

The first point made for a reversal is that the statement was not presented for settlement within the 10 days prescribed by law, and hence it formed no legal basis to support the motion, and the order granting the motion was erroneous. Upon this point the statement shows the following facts: "The proposed statement was served on plaintiff, November 21, 1893, and on November 28th the plaintiff served his proposed amendments. Thereafter, and within five days after November 28, 1893, the defendants served notice on plaintiff that said proposed amendments were not accepted, and that said proposed statement, and the proposed amendments thereto, would be presented to the court for settlement on December 11, 1893. On said December 11th, when presented, the plaintiff objected to the settlement of said statement on the ground that presentation was not made in time, and said objection was overruled by the court, and the said statement settled, the plaintiff excepting." And the order granting the motion states that plaintiff's counsel "opposed the motion on the merits, and on the ground that the said statement was not presented for settlement within the statutory time," and excepted to the ruling of the court. Section 659, subd. 3, Code Civ. Proc., provides: "If the amendments be adopted, the statement shall be amended accordingly and then presented to the judge who tried or heard the cause for settlement, or be delivered to the clerk of the court for the judge. If not adopted, the proposed statement and amendment shall, within ten days thereafter, be presented by the moving party to the judge, upon five days' notice to the adverse party, or delivered to the clerk of the court for the judge; and thereupon the same proceedings for the settlement of the statement shall be taken by the parties, and clerk and judge, as are required for the settlement of bills of exception by section 650. * * * When settled, the statement shall be signed by the judge or referee, with his certificate to the effect that the same is allowed, and shall then be filed with the clerk." The respondents contend that the settlement of the statement was an appealable order, and that, as it was not appealed from, appellant cannot on this appeal raise the point now presented. And in support of this position section 939, subd. 3, Code Civ. Proc., and several cases, are cited. The section of the Code relied upon provides that appeals may be taken from several enumerated orders, and "from any special order made after final judgment." The settlement in question was in these words: "The foregoing engrossed statement on motion for new trial, is correct, and is hereby settled and allowed." This did not, in our opinion, constitute a special order made after final judgment. It was simply a certificate, and not an appealable order. The cases cited are not in point. In no one of them was it held that an appeal could be taken from such a certificate. The case cited which is most nearly in point is that of Stonesifer v. Kilburn, 94 Cal. 33, 29 Pac. 332. In that case it was held that an order refusing to settle a bill of exceptions was appealable, and counsel says: "Clearly the converse of the proposition must be equally law." But this does not, in our opinion, follow. When a judge refuses to settle a bill of exceptions or statement, there is no record on which the motion for new trial can be considered in the trial or appellate court, and the only remedy is by appeal or mandamus. When, however, the judge settles the bill of exceptions or statement the record is made up; and if, on its face, it shows that the statute was not followed in preparing the record, then that fact may be urged in the lower court, and on appeal in the supreme court, as a reason why the motion for new trial should be denied. There are many cases so holding, but, without reviewing the authorities, we think it sufficient to quote from Mr. Haynes' work on New Trial and Appeal (section 146, p. 409), where he very clearly and succinctly states the law as follows: "The objection when so reserved is to be urged when the statement is presented for settlement as a reason why it should not be settled. If the judge overrules the objection, and proceeds to settle the statement, the party must have his objection and the matter in its support incorporated in the statement. When so incorporated, it may be urged as a reason why the motion should be denied, both in the lower court upon the hearing of the motion, and in the supreme court upon appeal from the order granting or refusing the motion."

Respondents further contend that it does not appear from the statement that the proposed statement and amendments were not presented for settlement within the 10 days prescribed by law. This contention cannot be sustained. It appears that the plaintiff served his proposed amendments on November 28th. The law required the defendants, within 10 days thereafter, if the amendments were not adopted, to present the proposed statement and amendments for settlement, upon five days' notice to the adverse party. The notice was that the papers would be presented on December 11th, three days after the prescribed time, and on that day when presented objection was made that the presentation was not in time. The language embodied in the statement clearly imports that the papers were presented for settlement on December 11th, and not before. But if, as claimed, they were in fact presented before that day, they were presented without the required notice, and such presentation was insufficient. Besides, if they had been so presented, that fact would probably have been clearly stated, after the objection was made that they were not presented in time. The question then arises, had the court below a right to consider the statement, and upon it to grant the motion for a new trial? In Wills v. Rhen Kong, 70 Cal. 548, 11 Pac. 780, the appeal was from an order refusing a new trial. In that case the defendant, having duly served his proposed statement on motion for a new trial, to which the plaintiff had duly served amendments, presented the same to the judge for settlement 14 days after the service of the amendments. No notice was given to the plaintiff of the presentation. The judge refused to settle the statement, because it had not been presented in time, and because no notice of the presentation had been given, and the order was affirmed. In Bunnel v. Stockton, 83 Cal. 319, 23 Pac. 301, the appeal was from an order denying a new trial, upon the ground that the statement was not served and filed in time, and the order was affirmed. The court said: "The moving party must prepare and serve his statement within the time allowed by law for that purpose, or it cannot be settled, or, if settled, cannot be considered, either at the hearing of the motion or on appeal to this court." In Connor v. Road Co., 101 Cal. 429, 35 Pac. 990, the appeal was from an order denying the defendant's motion for a new trial. In that case it appeared that the proposed statement and amendments thereto were not presented to the judge for settlement until seven months after the amendments were served, and the plaintiff objected to the settlement upon the ground that the presentation was not in time. This objection was, however, overruled, and the statement settled. The court said: "The delay of seven months in presenting the statement and amendments to the judge for settlement is wholly unexplained. The settlement having been objected to on the ground that it was too late, 'it became the duty of appellant to incorporate in the bill [statement] the matter, if any, going to excuse his apparent delay; otherwise the exceptions, though settled, cannot be considered here. Higgins v. Mahoney, 50 Cal. 444.'" The court then quoted the following language from Tregambo v. Mining Co., 57 Cal. 503: "If a statute absolutely fixes the time within which an act must be done, it is peremptory. The act cannot be done at any other time, unless during the existence of the prescribed time it has been extended by an order made for that purpose under authority of law,"—and added: "This language was used in relation to the time within which a bill of exceptions might be taken under the statute, and is therefore applicable here. To hold that the statement may be settled when no steps were taken until after the expiration of the ten days, the time for doing so not having been extended, and respondent objecting thereto, would be a judicial abrogation of the statute." Here no excuse for the delay is shown, and it can make no difference whether it was for three days, or fourteen days, or seven months. Under the decisions, it must therefore be held that the court below had no right, on hearing the motion, to consider the statement, and that it cannot be considered by this court on appeal. The other points made for reversal need not be noticed. The order appealed from should be reversed.

We concur: VANCLIEF, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the order appealed from is reversed.

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4 Cal. Unrep. 976

## FOOTE v. HAYES. (No. 15,800.)

(Supreme Court of California. Feb. 27, 1895.)

ACTION ON PROMISSORY NOTE — DEFENSES—FRIVOLOUS APPEAL.

1. In an action by a transferee of a note, where defendant sets up want of consideration, but does not produce any evidence that plaintiff's transferror was a party to the fraud, or took the note with notice, or after maturity, a verdict for defendant should be set aside.

2. In view of the plain provisions of Code Civ. Proc. § 662, and numerous decisions of the supreme court, an appeal taken on the ground that trial courts have no authority to set aside verdicts is frivolous.

Department 2. Appeal from superior court, Alameda county; W. E. Green, Judge.

Action by W. D. Foote against D. D. Hayes on a promissory note. There was a verdict for defendant, and he appeals from an order setting it aside. Affirmed.

John J. Stephens (Ben Morgan, of counsel), for appellant. A. A. Moore, for respondent.

HENSHAW, J. This action is on a promissory note, and was tried with a jury. Plaintiff, by his evidence, by the admissions of the answer, and by the presumptions of law which follow the possession of a promissory note bearing a general indorsement, established a satisfactory prima facie case. A motion that the court instruct the jury to render a verdict for defendant was made, and properly denied. The ruling was not excepted to. Defendant was then called to the witness stand, and, after the court, for the benefit of his attorney, had made an elaborate and seemingly needful exposition of the elementary principles of law affecting negotiable instruments, this discussion followed: "Mr. Stephens: I propose to prove that the note was given to the Crocker-Woolworth Bank, and that they were a party to the fraud. The Court: In what respect was it a party? What did they do? Mr. Stephens: They took this note of Mr. Hayes from J. W. Girvin & Co. The Court: Took it when? Mr. Stephens: After the note was made. The Court: When? Mr. Stephens: I cannot tell you until I get the books of the bank. The Court: Before it was due, or after it was due? Mr. Stephens: After it was due." Counsel for the defendant further said that he would show that a fraud had been committed by Girvin & Co. upon Mr. Hayes, in that no consideration had been given. "The Court: If you will undertake to do that, go on." The defendant, under this engagement of his attorney, was allowed to testify and did testify to facts tending to show that, as between himself and the payee, the note was obtained by fraud. Defendant then rested his case. It was not shown, nor attempted to be shown, that the bank was a party to the fraud, or that it took the note with notice, or after maturity. No word of testimony to such import is in the record. The jury, after proper instructions, rendered a verdict for defendant. This verdict the court, of its own motion, set aside, upon the ground of prejudice. That action constituted the alleged error sought to be corrected upon this appeal.

The evidence of fraud was only admissible under the unkept engagement of counsel to connect the bank with it. It constituted no defense to the case as presented, and obviously served to awaken prejudice in the minds of the jury. Either there was the gravest misapprehension upon the part of the jury of the instructions, or it was influenced by prejudice. In either case it was the duty of the court to set the verdict aside. Code Civ. Proc. § 662. But the especial point made by appellant in a brief containing no single citation to Code or case, and likewise urged in oral argument before this court, though respondent's brief, containing the Code section above mentioned, was with him, is found in his declaration that "there is no provision in the statute granting to a court in a civil case the right or power to set aside a verdict." "Can a judge," it is asked, "set aside such a verdict, upon the ground of prejudice of the jury, in favor of a successful party?" And for reply we are told that, "Echo answers in stentorian tones, 'No';" and this, notwithstanding the plain provision of the Code and the numerous decisions of this court declaring the duty of the trial judge under such circumstances. So much has been said to show the utter frivolity of the appeal. It works a waste of the time of this court, and subjects respondent to vexatious delay and expense. The order appealed from is affirmed, and it is further adjudged that respondent have and recover from appellant damages in the sum of $200 as part of his costs.

We concur: TEMPLE, J.; McFARLAND, J.

(106 Cal. 151)

## BANCROFT CO. v. HASLETT et al. (No. 15,705.)

(Supreme Court of California. Feb. 27, 1895.)

CONVERSION—PLEADING AND PROOF OF TIME.

Plaintiff need not prove the exact date of a conversion, as alleged by him, provided he shows that the tort was committed before the commencement of the action.

Department 2. Appeal from superior court, city and county of San Francisco; J. M. Seawell, Judge.

Action by the Bancroft Company against Samuel Haslett and others for conversion. From judgment for plaintiff, defendants appeal. Affirmed.

John H. Dickinson, for appellants. George D. Collins, for respondent.

HENSHAW, J. Action for damages for conversion of a piano. Defendants pleaded that the piano was stored with them as warehousemen, and, after due notice to plaintiff, was sold to pay charges. They claimed that the sum of $10 was yet due on account of such charges, and asked judgment for that amount. The appeal is from the judgment alone.

The action was commenced upon November 14, 1892, and alleged the conversion as of July, 1892. The court found that defendants converted the piano to their own use upon February 21, 1891. The variance is immaterial, and not such as would warrant a reversal of the cause. Code Civ. Proc. §§ 470, 475. It was not necessary at common law that the proofs should be in strict conformity with the averment as to the date of the conversion. It was sufficient if, naming a certain time before the commencement of the action, the proof established that the tort was committed before the suing of the writ. 2 Saund. Pl. p. 1141; Gould, Pl. § 65; Rex v. Bishop of Chester, 2 Salk. 561; 1 Greenl. Ev. § 61 et seq. No greater strictness is required under our system. The findings are sufficient. They show that the piano came into defendants' possession against plaintiff's will; that it was not stored because of plaintiff's refusal to pay the lawful charges upon it, but was stored without authority; that plaintiff demanded its return, and was refused; and that thereafter defendants converted it to their own use. These facts sustain the judgment, and negative the claim of defendants. Additional findings would not, therefore, affect the judgment, nor afford defendants any relief. Robarts v. Haley, 65 Cal. 402, 4 Pac. 385; Malone v. County of Del Norte, 77 Cal. 217, 19 Pac. 422; Dyer v. Brogan, 70 Cal. 136, 11 Pac. 589; Diefendorff v. Hopkins, 95 Cal. 347, 28 Pac. 265, and 3 Pac. 549. The judgment is affirmed.

We concur: TEMPLE, J.; McFARLAND, J

(106 Cal. 327)

## WICKERSHAM v. CRITTENDEN et al. (No. 19,349.)[1]

(Supreme Court of California. March 9, 1895.)

CORPORATIONS—SALARY TO OFFICERS.

A salary, whether a proper one or not, voted by trustees of a bank to one of their number as president, is unlawful, and he may be compelled to account therefor in an appropriate action, where he took part in the proceedings, and his vote was essential to the adoption of the resolution.

In bank. Appeal from superior court, San Luis Obispo county; V. A. Gregg, Judge.

Action by I. G. Wickersham, a stockholder of a bank, for himself and other stockholders, against James I. Crittenden and the bank, to compel Crittenden to account for certain moneys received by him as president of the bank. From a judgment for plaintiff and an order denying a new trial, defendants appeal. Affirmed.

Graves & Graves and Jas. L. Crittenden, for appellants. Lippitt & Lippitt and Wilcoxon & Bouldin, for respondent.

PER CURIAM. This is an action brought by a stockholder of a bank for himself and other stockholders to compel the defendant Crittenden to account, as president of said bank, for certain moneys received by him for salary as such president, over and above the sum of $200 per month. Judgment went for plaintiff, and said defendant and the bank—which was made a defendant—appeal from the judgment and from an order denying a motion for a new trial.

The general nature of the action appears in the opinion of the court in Wickersham v. Crittenden, 93 Cal. 17, 28 Pac. 788 (although matters other than said salary were there involved), and need not be repeated here. There were, no doubt, errors committed by the trial court in ruling upon the admissibility of evidence. A mass of irrelevant documentary matter was admitted; but it did no harm, because it did not obscure, nor in any way affect, the main fact upon which the case turns, namely, that the increase of the salary of the president depended upon and was accomplished by his own vote as a trustee. This fact fully appears from the evidence, and is unaffected by any rulings claimed to be erroneous. As was said in Wickersham v. Crittenden, supra, the trustees cannot "vote a salary to one of their number as president, when he takes part in the proceeding, and his vote is essential to the adoption of the resolution. The right of Crittenden to withdraw the money of the bank as compensation for such services was not increased by his causing to be spread upon its records a resolution that he might receive that amount as his salary." This is conclusive of the case in favor of respondent, and it is of no consequence whether the salary was a proper one or not. Neither is it necessary to examine into the other features of the struggle between the appellant and respondent to obtain control of the management of the bank. The resolution raising the salary of appellant was invalid, and that is the only matter necessary to be considered in the case. The complaint was sufficient, because it set up the fact above stated. The case is one of those equity cases in which there is no right to a jury. The judgment and order appealed from are affirmed.

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[1] Rehearing denied.

(106 Cal. 329)

## WICKERSHAM v. CRITTENDEN et al.

(No. 19,350.)[1]

(Supreme Court of California. March 9, 1895.)

CORPORATIONS—ACTION BY STOCKHOLDERS—APPEAL.

1. An officer and stockholder of a bank will be required to account in an action by another stockholder for attorney's fees which he procured to be paid by the bank for attorney's services rendered solely for his own benefit in a litigation between himself and a third stockholder for the control of the bank.

2. A contention on appeal that there is no evidence to sustain a certain finding by the court will not be sustained where the record contains a specification affirming the existence of such fact, without any specification of want of evidence to sustain the finding.

3. Where the evidence shows, in an action by a stockholder against a bank, that a request of the directors to bring the action would have been useless, defendant cannot object that the stockholder made no such request.

In bank. Appeal from superior court, San Luis Obispo county; V. A. Gregg, Judge.

Action by I. G. Wickersham, a stockholder in the Bank of San Luis Obispo, for himself and other stockholders, against the bank and James L. Crittenden, to compel Crittenden to account for certain attorney's fees paid by the bank, on the ground that the services were rendered for his benefit alone. From a judgment for plaintiff and an order denying a new trial, defendants appeal. Affirmed.

Graves & Graves, and Jas. L. Crittenden, for appellants. Lippitt & Lippitt and Wilcoxon & Bouldin, for respondent.

PER CURIAM. In this case, as in Wickersham v. Crittenden (No. 19,349; this day decided) 39 Pac. 602, there was a mass of irrelevant evidence introduced by respondent. This evidence might be accounted for, perhaps, by a stipulation referred to in respondent's brief, which stipulation does not appear in the transcript. But, as we said in the other case, this evidence does no harm, because it does not affect the main features of the case. This action was brought by Wickersham, a stockholder in the Bank of San Luis Obispo, for himself and other stockholders, against defendant Crittenden and the bank, to compel Crittenden to account to the bank for certain attorneys' fees in certain actions paid to Graves & Graves, attorneys at law,—$1,000 at one time, and $512.50 at another time. The court below found in favor of defendants as to the $512.50, but gave judgment for plaintiff for the $1,000 and interest. Defendants appeal from the judgment, and from an order denying their motion for a new trial.

At the time the said $1,000 was paid to said attorneys, Crittenden was a stockholder, trustee, and president of the bank; and it is quite clear that the actions for the defense of which said attorneys were employed were actions in which Wickersham and Crittenden were the only real parties in interest, contesting with each other, as stockholders, for the control of the bank. The bank had no real interest in the contest. The services of the attorneys were rendered for the benefit of Crittenden alone, and the value of such services should have been paid by Crittenden, and not by the bank. The lower court, therefore, held correctly that he should account to the bank for the money which he procured it to pay out to his own attorneys.

Appellants contend that there is no evidence showing that the money was ever actually paid to said attorneys, but the court so found, and there is no specification of want of evidence to sustain such finding. On the contrary, in the ninth specification it is stated that "said board did fix and pay the compensation of Graves & Graves for their said services, and that said action of the board of directors was subsequently ratified," etc. Of course, with such a specification, respondent was not called upon to see that the statement contained evidence of such payment. It is averred in the complaint, as a reason for not making a request of the directors of the bank to bring this action, that the directors were all under the control of Crittenden, and acting in conjunction with him, and that such request would have been useless, and would have been refused; and it is contended by appellants that the court erred in refusing to allow them to ask one of said directors if he was under the control of said Crittenden. We think, however, that this ruling presents no ground for reversing the judgment, because appellants at no time offered to prove that, if such request had been made, it would have been granted. On the other hand, Crittenden and the bank (controlled, of course, by its trustees) contested the merits of the case, claimed that the alleged wrongful acts upon which the action is based were right, and tried the action upon that theory. Having thus shown that a request of the directors to bring the action would have been futile, they cannot now be heard to say that the respondent should have made the futile request. There are no other points necessary to be noticed in addition to those noticed in said case No. 19,349. The judgment and order are affirmed.

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[1] Rehearing denied.

106 Cal. 324

## GRANT v. SUPERIOR COURT OF LOS ANGELES. (No. 15,859.)

## CALIFORNIA BANK v. SAME. (No. 15,860.)

(Supreme Court of California. March 9, 1895.)

WRIT OF PROHIBITION—ORDER OF COURT FIXING RECEIVER'S COMPENSATION.

An order of court fixing a receiver's compensation, being subject to review upon appeal or certiorari, will not be arrested by a writ of prohibition.

In bank.

Separate petitions of Lewis A. Grant and the California Bank for a writ of prohibition to arrest the proceeding of the superior court of Los Angeles, granting an order fixing the compensation of Herman Silver, as receiver of the Los Angeles & Pacific Railway Company. Writ denied.

White & Munroe, for petitioner. Wellborn & Hutton, for respondent.

BEATTY, C. J. These are separate applications for writs of prohibition to arrest the same proceeding in the superior court. In an action commenced by or in the name of the California Bank against the Los Angeles & Pacific Railway Company, a corporation, and others (in which action it is claimed Lewis A. Grant was afterwards substituted as the party plaintiff), the superior court appointed Herman Silver receiver of the property of the corporation. This order appointing Silver, it is conceded, was in excess of the jurisdiction of the court, and void, as was decided here in another case, in which it was collaterally assailed. Smith v. Railway Co. (Cal.) 34 Pac. 242. The superior court has nevertheless made orders, from time to time, awarding compensation to Silver for his services as receiver, and recently, upon his petition, the California Bank and Lewis A. Grant, the petitioners in these proceedings, were cited to appear before the superior court and show cause why that court should not make a further order fixing Silver's compensation as receiver for a period of time not covered by the orders previously made. In response to this citation the petitioners appeared and objected to the proceeding upon the ground that, the original order appointing Silver receiver being void, the court had no jurisdiction to allow compensation. This objection having been overruled, these applications for the writ of prohibition were filed. We are of the opinion that, whether the proceeding which the petitioners seek to arrest is or is not without or in excess of the jurisdiction of the superior court, the writ of prohibition ought not to issue, for the reason that the petitioners have a plain, speedy, and adequate remedy by appeal from any order the court may make by which they could be injuriously affected. The only order which the court proposes to make is one fixing the amount of the compensation. Such an order cannot, by itself, injure any one; but if, in addition to the order fixing the amount, the court should order it paid out of the fund in the receiver's hands, such order, under whatever name it might be designated, would be a final judgment upon a collateral matter arising out of the action, and would be appealable by any party interested in the fund. Trustees v. Greenough, 105 U. S. 527; Thompson v. Lumber Co. (Wash.) 32 Pac. 536. Or, if the court should order either the original or substituted plaintiff to pay the compensation allowed, that would be a final judgment from which an appeal would lie. If this order should not be appealable by reason of its amount being insufficient to confer appellate jurisdiction upon this court, it could be reviewed either upon certiorari or upon an appeal from the order settling the receiver's account. Any attempt to enforce its payment could be defended upon the want of jurisdiction in the court to make the order. There is nothing in conflict with this view in anything decided in Rochat v. Gee, 91 Cal. 355, 27 Pac. 670. The order held in that case to be nonappealable was merely a partial settlement of a receiver's account, and was not, by its terms, made payable by any party, or enforceable against any party by execution, or payable out of any fund. In other words, it lacked one essential element of a final judgment. And it was conceded in that case that there might be an appeal by a party aggrieved from an order allowing the final account of a receiver before a final judgment in the action as between the original parties. If we are right in the conclusion that any party aggrieved by an order of the court directing him to pay the receiver's compensation, or directing payment out of a fund in which he is interested, has an appeal from such order as from a final judgment in an independent proceeding collateral to the main action, and that he may stay all proceedings upon such order pending his appeal by filing a proper undertaking, there can be no need of a writ of prohibition in such a case, and it will not lie. See cases referred to in Havermeyer v. Superior Court, 84 Cal. 398, 24 Pac. 121. It is suggested, however, that an order fixing the receiver's compensation in this proceeding might conclude the rights of the petitioners as to costs to be included in the final judgment, or in a separate action by Silver to recover the amount allowed. But they certainly cannot be concluded by the order in any collateral proceeding or new action if the court has no jurisdiction to make it, and if the court has jurisdiction to make the order for any purpose its proceeding cannot be arrested by prohibition. Writs denied, and proceedings dismissed.

We concur: HARRISON, J.; GAROUTTE, J.; McFARLAND, J.

106 Cal. 320

## PEOPLE v. MILLAN. (No. 21,150.)

(Supreme Court of California. March 9, 1895.)

FALSE PRETENSES—INDICTMENT.

1. Where an information charges the defendant with having obtained a specified amount of money by fraud, a verdict finding him "guilty as charged" is not defective in not stating the amount.

2. Under section 967 of the Penal Code, an information which charges one with obtaining money by fraud, but fails to allege a value to the money so taken, is good.

3. An information which charges the defendant with having obtained money under false representations, but which does not directly allege his knowledge of their falsity, though demurrable, is not fatally defective.

In bank. Appeal from superior court, Ventura county; B. T. Williams, Judge.

Juan Millan, convicted of defrauding another of money, appeals. Affirmed.

Carroll Cook, for appellant. Atty. Gen. Hart, for the People.

PER CURIAM. The appellant was charged with defrauding another of money by reason of certain false and fraudulent pretenses and representations, and upon being convicted has appealed to this court upon the judgment roll alone. Among other things the information charged that the prosecuting witness was induced to loan the defendant, Millan, $831, lawful money of the United States, upon the representations that two certain bars of metal, which the defendant produced and turned over to the prosecuting witness as security for the loan, were gold, when in fact they were but brass.

1. The jury rendered a verdict in the following form: "We, the jury, find the defendant guilty as charged in the information." It is now claimed that the verdict is substantially defective in not finding the amount of money obtained by defendant from the fraud practiced. There is nothing in the point. The defendant is charged with obtaining $831, lawful money of the United States, and he was convicted of the "offense charged." The verdict, when taken in connection with the information, becomes as certain as to the amount of money obtained as if the amount were stated in the verdict in express terms. There is no question of degree involved in the offense of which the defendant was charged and upon trial.

2. It is claimed that the information is defective in failing to allege a value to the money taken, but it is not demurrable in this regard. The provisions of section 967 of the Penal Code are broad enough to include the offense here charged, and the allegation is directly in line with the provisions of that section. Neither do we think the information fatally defective in not containing a direct allegation as to the lack of knowledge upon the part of the defendant that the representations made by him were known to be false. The information was demurrable upon this ground, but no demurrer was interposed; and, taken as a whole, we think it sufficiently charges the offense to support a verdict and judgment.

3. The remaining points of importance which are urged by appellant are opposed to the views of this court as declared in People v. Jordan, 66 Cal. 10, 4 Pac. 773, that case in principle being quite similar to the case at bar. For the foregoing reasons the judgment is affirmed.

BEATTY, C. J., did not participate.

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106 Cal. 286

## PEOPLE v. FITCHPATRICK. (No. 21,189.)

(Supreme Court of California. March 9, 1895.)

ASSAULT—INTENT TO COMMIT MURDER—SELF-DEFENSE.

1. The verdict of a jury against the defendant under a plea of self-defense, where the evidence is very close and the court has held that it is sufficient to support the verdict, will not be disturbed upon appeal.

2. The defendant's right of self-defense must be measured by the appearance presented to him by the acts of his assailant; and evidence of the latter's real intentions is immaterial.

Department 1. Appeal from superior court, Humboldt county; G. W. Hunter, Judge.

B. Fitchpatrick, convicted of an assault with a deadly weapon, appeals. Affirmed.

E. W. Wilson and Frank McGowan, for appellant. Atty. Gen. Hart, for the People.

GAROUTTE, J. The appellant was charged with the offense of an assault with intent to commit murder, and was convicted of an assault with a deadly weapon. He appeals from the judgment and order denying his motion for a new trial.

1. The defendant shot the prosecuting witness with a pistol, the party shot having an ax in his hand at the time. The trouble between these parties was occasioned by the erection of a fence by the defendant upon the land of his tenant, the other party. Both men were angry and excited at the time of the shooting, and the defendant at the trial justified under the plea of self-defense. The party assaulted claims that he had no intention of using the ax to injure the defendant, but secured it, and had it in his possession, for the purpose of cutting down the fence. After a perusal of the evidence, we believe it to be a close case upon the plea of self-defense; yet, as a jury found against the defendant upon this plea, and as the court subsequently held the evidence sufficient to support the verdict in this regard, we do not feel justified in disturbing the verdict for lack of evidence.

2. It is insisted that the court committed error in allowing the witness Campbell to testify that Pape (the party shot), when he was in his wagon, and in the road near the house, and near the defendant, but without his hearing, said he was going to "cut that fence down." It is unnecessary to say

whether or not this statement was a part of the res gestae. Conceding it was not, still the error of the court in admitting it was necessarily harmless. What Pape's intentions actually were was an immaterial matter. What he actually intended to do with the ax which he held in his right hand was likewise immaterial. The defendant was located between him and the fence, and whether he advanced with his ax to attack the fence or the defendant was not the question at issue; but the question at issue was, how did Pape's acts appear to the defendant, as a reasonable man? It was not a matter of fact, but a matter of appearance, which measured defendant's right of self-defense. For these reasons, Pape's prior statement that he was going to cut down the fence was immaterial and harmless evidence. Especially is this made plain when we consider that the law was fully and fairly stated to the jury by the court, in accordance with the principle we have just laid down.

3. Upon an examination of the record, we find the law bearing upon the charge stated in the information fully and properly given to the jury, and there appears to be nothing demanding a new trial of the case. For the foregoing reasons, it is ordered that the judgment and order be affirmed.

We concur: HARRISON, J.; VAN FLEET, J.

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(106 Cal. 208)

## SHAIN v. SULLIVAN et al. (No. 15,738.)[1]

(Supreme Court of California. March 8, 1895.)

PROMISSORY NOTE—INDORSEMENT—REVIEW ON APPEAL.

1. An indorsement may be made upon the face of the note with the same effect as upon the back.

2. The question of the genuineness of an indorsement on a note, which was introduced in evidence in the lower court without objection, cannot be raised for the first time upon appeal.

Department 1. Appeal from superior court, city and county of San Francisco; Jas. M. Troutt, Judge.

Action by Shain against Sullivan and another. From a judgment for plaintiff, and an order denying a new trial, defendants appeal. Affirmed.

Henry E. Highton, for appellants. Vincent Neale, for respondent.

HARRISON, J. Action by the plaintiff as the indorsee of a promissory note executed by the defendants. A copy of the note is set out in the complaint, and its execution is not denied by the defendants, but in their answer they deny the indorsement to the plaintiff, and in a separate answer allege certain matters impeaching the consideration of the note. The case was tried without a jury, and the court found that the note had been indorsed to the plaintiff for value prior to its maturity, and rendered judgment in his favor. The defendants moved for a new trial upon the ground that the evidence was insufficient to justify the decision, and from the order denying their motion, and also from the judgment, they have appealed. At the trial the plaintiff introduced in evidence the promissory note set forth in the complaint, upon the face of which, at the left-hand end thereof, was written the names of the payees. No objection was made to the introduction of this instrument when it was offered, and it is recited in the statement that the whole of the face of the paper was read in evidence. No other evidence was offered by either party, except the computation of the amount of interest due upon the note; and the court rendered its decision as aforesaid. The failure to deny the execution of the note rendered it unnecessary to make any proof thereof, and, as the defendants offered no evidence in support of the matters alleged in their special defense, the only issue before the court was the indorsement of the note to the plaintiff. The ordinary mode of indorsing a note is by the indorser writing his name upon the back thereof, but the indorsement may be made upon the face of the note with the same effect as if made upon the back. Bigelow, Bills & N. 135; Young v. Glover, 1 Ames, Bills & N. 228; Chitty, Bills, 227; Herring v. Woodhull, 29 Ill. 92; Partridge v. Davis, 20 Vt. 499; Haines v. Dubois, 30 N. J. Law, 259. In the case last cited the payee wrote his name under that of the maker, and it was held to be a sufficient indorsement. Section 3108 of the Civil Code declares: "One who writes his name upon a negotiable instrument, otherwise than as a maker or acceptor, and delivers it with his name thereon, to another person, is called an 'indorser,' and his act is called 'indorsement.'" The production of the instrument by the plaintiff was evidence of its delivery to him, and, upon proof of the indorsement, of his right to collect the same from the defendants. The objection that there was no proof of the genuineness of the indorsement should have been made when the instrument was offered in evidence. Poorman v. Mills, 35 Cal. 121; Burnett v. Lyford, 93 Cal. 117, 28 Pac. 855. If the objection had been made at that time, the plaintiff might have been able to meet it with sufficient proof. A party cannot allow evidence to be introduced at the trial without objection, and afterwards upon an appeal make an objection which might have been obviated if he had made it when the evidence was offered. The judgment and order are affirmed.

We concur: GAROUTTE, J.; VAN FLEET, J.

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[1] Rehearing denied.

(106 Cal. 216)

## TUCK v. BOARD OF DIRECTORS OF HOME FOR ADULT BLIND.[1]

(No. 15,767.)

(Supreme Court of California. March 8, 1895.)

BLIND ASYLUM—EXPULSION OF INMATE.

An inmate of the Home for Adult Blind may be expelled therefrom for insubordination, in the exercise of the general supervisory power vested in the directors, without giving him notice or an opportunity to be heard, in the absence of any statute or by-law on the subject prescribing the grounds, mode, and requisites for the expulsion of inmates.

Department 1. Appeal from superior court, Alameda county; F. B. Ogden, Judge.

Application for a writ of mandate to compel the directors of the Home for Adult Blind to reinstate, as an inmate thereof, the petitioner, Herbert C. Tuck, who had been expelled therefrom for insubordination. From an order denying such application, petitioner appeals. Affirmed.

Reddy, Campbell & Metson, for appellant. Atty. Gen. Hart., for respondent.

GAROUTTE, J. This is an application for a writ of mandate to compel the board of directors of the Home for Adult Blind to reinstate, as an inmate thereof, the petitioner, Herbert C. Tuck. It appears by his petition: That he was once an inmate of the home, regularly admitted, and there remained some months. That, during his sojourn at the home, he led a sober and industrious life, and obeyed all the by-laws enacted by the board of directors. That, to petitioner's knowledge, no charge of misconduct of any kind whatever was made against him, either in writing or orally; and that he was never informed of any charge against him prior to the introduction and adoption of the following resolution, which resolution deprived him of the benefit of the home: "Resolved, that Herbert Tuck be, and he is hereby, removed and expelled from this institution for insubordination and conduct prejudicial to the discipline, good order, and interest of the home." That he has asked to be reinstated, but the board of directors has denied his request. There appears to be no provision in the statute providing for the dismissal or expulsion of intractable inmates. Neither do we find any by-law of the board of directors outlining the course to be pursued by the board in ridding the home of disreputable and intractable persons. It would certainly be the more orderly and business-like way that there should be by-laws governing the course to be pursued by the board in such cases, and also governing the inmates in their conduct and behavior in the institution. Yet such is not the case. But, even in the absence of both statute and by-law, we have no doubt that the board of directors, under its general supervisory power over the institution, has a right to suspend, dismiss, or expel resident inmates who have been guilty of disorderly and disreputable conduct.

Petitioner's complaint appears to be that he was not only expelled from the home without cause, but that he was expelled without a hearing, and thus deprived of any opportunity to make a defense to whatever charges may have been brought against him; and his counsel now claim that this course cannot be pursued, and that the expulsion was illegal, inasmuch as the petitioner, Tuck, had been legally admitted to the institution, and had become thereby entitled to its valuable privileges and benefits. Counsel asserts that, by virtue of his admission in the regular course, these valuable rights had attached to him, and had been so vested and fixed that he could not be deprived of them without notice and an opportunity to defend himself. The principle of law contended for is sound, but it does not fit the case. The petitioner has no such right or interest in the home as that he cannot be deprived of its benefits without notice. The statute gives him no right to a hearing before he may be expelled, and, in the absence of such a statute or by-law, he has no such right. The various acts of the legislature bearing upon the home say but little as to who may be entitled to admission, and nothing as to who may be expelled. As to expulsion especially, the whole matter seems to be left entirely within the control and discretion of the board of directors. By order entered upon the minutes of the board, it appears that the petitioner was guilty of insubordination and misconduct, and the action of the board must be deemed final and conclusive, as far as this court is concerned. We know of no appeal from such a finding of fact. It is further argued that the board had no power to dismiss, except upon the proof of the violation of some statute or by-law pertaining to the government of the institution. We do not deem this contention sound. It appears that petitioner was expelled for insubordination, and that is a serious offense in such an institution. Rebellious conduct upon the part of inmates, if not stamped out, is fatal to the successful life of the institution; and, even in the absence of statute or by-law covering the facts of the particular case, the board of directors are amply clothed with implied powers sufficient to deal with the offender. For the foregoing reasons, the order appealed from is affirmed.

We concur: HARRISON, J.; VAN FLEET, J.

(106 Cal. 211)

## PEOPLE v. VERDEGREEN. (No. 21,187.)

(Supreme Court of California. March 8, 1895.)

ASSAULT WITH INTENT TO RAPE.

An assault upon the person of a girl under the age of consent, as fixed by the Penal Code prescribing what shall constitute rape, with the intention of having sexual intercourse with her, constitutes assault with intent to commit rape, although she may have actually consented and submitted without resistance to defendant's advances.

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[1] Rehearing denied.

Department 1. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

Prosecution against Frank Verdegreen for assault with intent to commit rape upon a girl seven years old. From a conviction and sentence to the state prison for a term of years, defendant appeals. Affirmed.

**P. A.** Bergerot, for appellant.

VAN FLEET, J. Defendant was convicted of an assault with intent to rape, and was sentenced to a term of years in the state prison. He appeals from the judgment.

The evidence disclosed that the object of the alleged assault was a girl of the age of seven years; that she went voluntarily to the room of defendant, and submitted, without resistance, to his advances. Upon this evidence, defendant requested the court to charge the jury that: "In an assault with intent to commit rape, there must not only be an intent to commit a rape, but that intent must be manifested by an assault upon the person intended to be ravished. The law requires both ingredients, and neither can be dispensed with. An assault implies force upon one side and repulsion or want of assent upon the other. An assault upon a consenting female, young or old, is a legal impossibility. Although a child under fourteen years of age is incapable of giving a legal consent, yet if she gives an actual consent there can be no assault. In a word, a child under fourteen years of age cannot legally consent to rape upon her, yet she may consent to an act with intent to commit it; and such attempt or act, if committed with her consent, is not an assault." This instruction was refused, and its refusal is assigned as error. The contention of appellant—in line with the principles announced in his requested instruction—is that there can be no such thing as an assault upon a consenting female, regardless of the fact that she may be under the age when she can legally consent to an act of sexual intercourse; that while one may be convicted of rape, or of an attempt to commit it, upon a female under the statutory age, notwithstanding her actual consent, that he cannot under like circumstances be guilty of an assault to commit rape, because the latter offense implies resistance on the part of the one assaulted. In this view of the law appellant is unquestionably sustained by very excellent authority. It is so held in State v. Pickett, 11 Nev. 255, where the same question was before the court; and a like doctrine is announced in Smith v. State, 12 Ohio St. 466, and in some English cases there cited. But such is not the view taken by this court in construing our statute upon the subject. Our Code provides: "Rape is an act of sexual intercourse accomplished with a female not the wife of the perpetrator, under either of the following circumstances: 1. Where the female is under the age of fourteen years. 2.,"—etc., enumerating a number of other circumstances under which the offense may be accomplished. Pen. Code, § 261. And it is further provided that one who assaults another with intent to commit rape is punishable as for a felony. Id. § 220. And it is held that the latter offense is included in the former. In the case of People v. Gordon, 70 Cal. 467, 11 Pac. 762, the precise question here presented arose. The defendant was convicted of assault with intent to rape, committed upon a girl under 10 years of age. The evidence did not disclose whether she consented or resisted, and the defendant contended that she must be held to have consented because she did not resist. This court said: "It is, however, a presumption of law that a girl under ten years of age is incapable of consenting to the offense of rape (Pen. Code, § 261); and as such an offense includes an attempt to commit it, accompanied by such force and violence upon the person as constitutes an assault, a girl under ten years of age is incapable in law of consenting to the assault in connection with the attempt to commit the offense. Whether the girl in fact consented or resisted was therefore immaterial. Being incapable of consenting to an act of carnal intercourse, it was criminal for the defendant to make an assault upon her to commit such an act." It is true that in that case the cases above relied on by appellant do not seem to have been called to the attention of the court, since they are neither cited by counsel nor referred to in the opinion; but we think the doctrine there announced more in accord with the evident purpose and intent of our statute, and that it should be adhered to.

It is the declared policy of our law, as expressed in the statute, that any female under the age there fixed shall be incapable of consenting to the act of sexual intercourse; and that one committing the act with a girl within that age shall be guilty of rape, notwithstanding he obtain her actual consent. The obvious purpose of this is the protection of society by protecting from violation the virtue of young and unsophisticated girls. To hold that one of this class, although incapable of consenting to sexual commerce, could nevertheless give her assent to an assault upon her person, made for the express purpose of accomplishing the sexual act, would be to largely emasculate the statute, and defeat in great part its beneficent object. It is the insidious approach and vile tampering with their persons that primarily undermines the virtue of young girls, and eventually destroys it; and the prevention of this, as much as the principal act, must undoubtedly have been the intent of the legislature. The incapacity extends to the act and all its incidents. It is true that an assault implies force and resistance by the one assaulted; and that one is not, in legal contemplation, injured by a consensual act. But these principles have no application to a case where, under the law, there can be no consent. Here the law implies incapacity to give consent, and this implication is conclusive. In such case the female is to be regarded as resisting, no matter what the actual state of her mind may be at the time. The law resists for her. These principles are in keeping with the construction given to similar statutes in other states. In Hays v. People, 1 Hill, 352, where the same question was under discussion, Judge Cowan, speaking for the court, said: "The assent of such an infant being void as to the principal crime, it is equally so in respect to the incipient advances of the offender. That the infant assented to or even aided in the prisoner's attempt cannot, therefore, as in the case of an adult, be alleged in his favor any more than if he consummated his purpose." The same construction was adopted by the supreme court of Michigan in People v. McDonald, 9 Mich. 150. We think the offered instruction was properly refused. The judgment is affirmed.

We concur: GAROUTTE, J.; HARRISON, J.

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(106 Cal. 337)

## HAWLEY v. GRAY BROS. ARTIFICIAL STONE PAVING CO. (No. 15,801.)[1]

(Supreme Court of California. March 11, 1895.)

CORPORATIONS—CONTRACTS OF PRESIDENT.

1. A resolution of a board of directors of a corporation authorizing the president "to make and sign contracts" in its name, "and do a general business for said corporation," authorizes him to lease premises for the use of the corporation, and which are necessary for carrying on its business.

2. It is within the power of the president of a corporation to furnish the lessor of premises leased by him for corporate purposes with evidence that the corporation has ratified the lease by what purports to be a certified copy of a resolution of the board of directors, and his act in doing so is binding on the corporation, which cannot repudiate it on the ground that no such resolution had ever been, in fact, passed.

Department 1. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Action by Laura L. Hawley against the Gray Bros. Artificial Stone Paving Company to recover rent under an alleged lease executed by the president of the defendant corporation. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Fisher, Ames, Jacobs & Wolfe, for appellant. Warren Olney, for respondent.

GAROUTTE, J. This action was brought to recover $500 claimed to be due to plaintiff from defendant corporation for rent under the provisions of an alleged lease. As a defense to the action it is insisted that the corporation never executed the lease, and that it surrendered the leased premises before the rent sued for became due. The facts leading up to the litigation may be stated as follows: The plaintiff executed a lease to the defendant corporation for a certain tract of land for the term of 15 years at a monthly rental. George F. Gray, as president of the corporation, signed the lease, and acknowledged it as such president. Prior to the day fixed for the entry under the lease, plaintiff notified said Gray that she had doubts as to the validity of it by reason of want of power in him to act for the corporation, and requested that the board of directors of the corporation ratify his acts in entering into the contract; whereupon said Gray forwarded to plaintiff the following duly-certified copy of the proceedings of a meeting of the board of directors of the defendant, held October 23, 1889: "At a legal meeting of the board of directors of the Gray Brothers Artificial Stone Paving Company, incorporated, held at the office of the said company, on the 23d day of October, 1889, the following resolution was adopted and a copy ordered to be sent to Mrs. Laura L. Hawley: 'Resolved, that the board of directors of the Gray Brothers Artificial Stone Paving Company hereby confirms the action of its president, G. F. Gray, in making the lease dated October 3, 1889, of the property on Berry and Channel streets, between Sixth and Seventh streets, in San Francisco, for the term of fifteen years from December 1, 1889, from Laura L. Hawley, of Oakland, California. The Gray Brothers A. S. P. Co., Incorporated, F. F. Ward, Secretary. [Corporate Seal.]'" At the time this purported certified copy of the minutes of the board was sent, and accompanying it, was a letter from Gray, directed to the plaintiff, to the effect that her previous letter had been received, and "Inclosed please find copy of resolution, which I hope is correct. Yours, respectfully, G. F. Gray." Thereafter the corporation entered into possession of the premises, paid the rent, as provided in the lease, for several years, and then vacated. At the trial, defendant offered in evidence the record of the minutes of various meetings of the board of directors, which showed no action of the board whatever in accordance with the resolution furnished by Gray to the plaintiff. The defendant also proposed to show by the parol evidence of Gray and others that no such action was ever taken by the board, but this line of evidence was rejected by the trial court. Some months prior to the date of the aforesaid lease, the board of directors of defendant adopted a resolution authorizing the president of the corporation, Mr. George F. Gray, "to make and sign contracts in the name of the corporation * * * and do a general business for said corporation."

1. We think the power given to Gray by

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[1] Rehearing denied.

the above authorization of the board of directors sufficiently broad and comprehensive to include the right to lease premises for the use of the corporation. The language of the resolution expressly gives the power to make contracts. The leasing of the premises, and the agreement to pay a certain amount of rent therefor, was but the making of a contract. Under this authorization, the president, Gray, had the power to make any contract involving any sum of money which came within the general scope of the business of the corporation. The binding force of the lease as to the defendant was but an agreement upon its part to pay a certain sum of money at certain stated times. Such an agreement Gray had the right and the power to make, if the subject-matter thereof came within the proper scope and limits of the business of the corporation. We think it apparent that the leasing of these premises came within the scope of such power. The leased premises were used by the corporation for several years in the conduct of its business. The premises were necessary to the conduct of the business; just as necessary as the materials used in carrying out its contracts. For these reasons we believe the authority given to the president, as shown by the records of the board of directors, sufficient to carry the power to make the lease.

2. The evidence discloses that the corporation entered under the lease made by its president, and occupied the premises, paying rent therefor at the times and in the amounts stated in the writing. Under such circumstances it is possible that the corporation might be held to know the contents of the lease, and to have ratified its provisions by such acts and conduct upon its part. Still, it is not necessary to an affirmance of the judgment that this court should so declare. But it is plain that under the general powers vested in Gray by the aforesaid resolution, taken in connection with his general powers as president of the corporation, it was his duty to secure suitable premises for the occupation of the defendant, and to look after the general details leading up to the making of the lease. These were duties peculiarly and essentially resting upon him, and duties which, from the evidence, it is plain he undertook and performed. In the performance of his duty in this particular line he was called upon to furnish the owner of the lot with evidence that the corporation ratified and sanctioned the lease; and, in response to that demand, he did furnish the owner with a purported certified copy of a resolution of the board of directors, ratifying and confirming his acts in making the lease. This act of Gray was within the scope of his power, and in the line of his duty as president and business manager of the corporation; and, such being the fact, his act in furnishing the resolution was the corporation's act. If the corporation had handed this resolution to the plaintiff in response to her demands, it would be bound by it, and could not impeach it. The act being done by its business manager and president, within the scope of his powers and duties, the corporation likewise is bound by it, and is estopped from denying it. We conclude, therefore, that the genuineness of the resolution furnished by Gray to plaintiff, ratifying his acts in leasing the premises, cannot be assailed, and that it was full and complete in its terms as a ratification of Gray's acts there can be no question. For the foregoing reasons, the judgment and order are affirmed.

We concur: HARRISON, J.; VAN FLEET, J.

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106 Cal. 257

## DE BAKER v. SOUTHERN CAL. RY. CO.

(No. 19,391.)

(Supreme Court of California. March 8, 1895.)

OBSTRUCTION OF WATER COURSE — OVERFLOW OF LAND—PLEADING—LIABILITY OF CITY CONTRACTOR—EVIDENCE.

1. A pleading is not demurrable for want of facts of which the court will take judicial notice.

2. A court may take judicial notice of the boundaries of an incorporated city, and of the location and course of a river frequently mentioned in the public statutes of the state.

3. A pleading containing statements relative to the "east bank" and the "west bank" of a river sufficiently indicates its course.

4. In an action for injuries caused to plaintiff's land by the obstruction of the channel of a river by defendant's levee, the location of the land with relation to such river and levee is sufficiently shown by allegations that the levee was so situated that it changed the natural course of the river, and caused it to flow over and upon the plaintiff's land.

5. In an action for damage caused by obstructing the course of a stream, it is error to strike out the special defense that such obstruction was built by the defendant as a contractor for the city, which owned the lands on which it was located, in order to protect such lands, and so as not to affect the channel except in times of flood, and not for defendant's own benefit.

6. An error in striking out portions of a pleading is not harmless because the evidence introduced under the amended pleading contradicts the matter so struck out.

7. Where a contractor constructs for a city a work which, by reason of its nature and location, causes damage to another, which might have been prevented by the exercise of reasonable prudence as to the plan and location of such work, the contractor and the city are severally liable.

8. Under a pleading setting up that a certain levee was built for the protection of defendant's railroad property, the city ordinance granting the right to locate such railroad and levee in the city is admissible to prove that they were legally so located.

9. A city which is directed and authorized by legislative act to improve a channel and banks of a river therein is not liable to one injured by an honest error of judgment on the part of the authorities in locating and planning such improvements.

10. A city ordinance passed under legislative authority, providing for an improvement of the banks of a stream, is not void because it fails to provide for compensation to one whose land is injured by a change in the channel of the stream caused by such improvement.

In bank. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Action by Amelia B. De Baker against the Southern California Railway Company (a corporation). From a judgment for the plaintiff, and an order denying a motion for a new trial, defendant appeals. Reversed.

C. N. Sterry and W. J. Hunsaker, for appellant. Wells, Monroe & Lee, for respondent.

BEATTY, C. J. The plaintiff in this action is the owner of a large tract of land lying adjacent to and partly within the charter boundaries of the city of Los Angeles. The defendant is a railway corporation, formed by the consolidation of several older corporations, whose properties it has acquired and whose obligations it has assumed. The Los Angeles river flows through the city of Los Angeles from north to south. Ordinarily it is a small stream, and within the limits of the city is confined to a narrow channel, which sometimes flows in one place and sometimes in another, over a sandy bed about a half a mile in width, which is bounded on the east by a well-defined and comparatively high natural bank, and on the west by a bank considerably lower and less plainly defined. Owing, however, to the fact that the river has its sources in the high mountains near the city, it is subject during the rainy season to sudden floods, which fill the entire bed of the stream, and frequently overflow its banks. Occasionally, at irregular intervals of from 2 to 20 years, during the last 50 years, such floods have reached an extraordinary height, carrying away dwellings and other structures erected near the banks of the stream. The city of Los Angeles, as successor to the pueblo,—the original owner of most of the lands within the charter limits,—granted to one of the predecessors of defendant a strip of land, including the west bank and a large portion of the bed of the Los Angeles river, and extending from the southern patent line of the pueblo lands (which is parallel to and about 1,200 feet north of the southern charter line of the city) northward, along the river, for a distance of several miles. This grant also included a right of way for railway tracks along and across the streets of the city; and such tracks, with the necessary sidings, turnouts, etc., have since been laid and operated by the grantees, including the defendant. The lands so granted, as well as other adjacent lands within the city, were, however, subject to overflow from the river floods, and one of the conditions of the grant was that the grantee should erect a levee for the protection of such lands along the western line of the tract granted, down to a designated point below First street. Such levee was accordingly built by the grantee down to the point designated, and more than a mile beyond said point to the southern charter line of the city. The line of the levee, down to the point designated in the ordinance and grant of the city, seems to have been located on or beyond the western bank of the river, and wholly outside of the river bed. But defendant's predecessor did not stop at the point so designated; it continued the levee in a direct line to the southern charter boundary, as stated, and in so doing extended it into and nearly across the river bed. As so constructed, this levee, which is protected on its eastern face by piling and planking, intersects the west bank of the river about a mile above the charter line at a point where the river bed curves to the west, and at its lower extremity approaches to within 300 feet of the eastern bank,—the distance between the natural banks at that point being fully 2,300 feet. This levee was commenced in 1877, and completed in 1888. In January, 1890, occurred one of those unusual floods in the Los Angeles river above referred to, and the water, being prevented by the levee from spreading out over the river bed, as it had formerly done, was directed with such force against the eastern bank a short distance south of the charter line that it cut a new and permanent channel through the lands on and adjacent thereto, including the tract owned by plaintiff. The damage sustained by plaintiff consisted in the washing away of a considerable acreage of land, the deposit of sand and bowlders on other portions, the division of the tract into two parts separated by the new and permanent channel of the river, destruction of fences, etc. This action was brought for the recovery of such damages; the plaintiff had judgment in the superior court; and the defendant appeals from the judgment and an order denying its motion for a new trial.

The foregoing statement of the case is based upon the evidence adduced at the trial, and is necessary to a proper discussion of the exceptions of the defendant to the rulings of the superior court upon objections to evidence, and in giving, refusing, and modifying instructions requested by the parties. It will also serve to illustrate some of the points involved in the assignments of error in regard to the order overruling the defendant's demurrer to the complaint, and the order striking out of the original answer the principal matter of defense therein alleged, which assignments will be first considered.

The demurrer to the complaint was general for want of facts, and the principal point urged in its support is that the facts alleged do not show that the defendant, or its predecessor, violated any duty to the plaintiff, because they do not show how her land was situated in relation to the Los Angeles river, or to the levee complained of; and, consequently, that it does not appear from the allegations of the complaint that the builders of the levee had any reason to anticipate damage to her lands from the work in which they were engaged. The complaint is certainly not as definite and specific in regard to the relative situation of the plaintiff's land to the defendant's levee as it might easily have been made; but with the aid of certain facts, of which the courts may take judicial notice, its deficiencies in this respect can be supplied. The boundaries of the city of Los Angeles are defined in the act of incorporation by reference to the public surveys of the United States, and, the lands of plaintiff being described by reference to the same surveys, we are enabled to spell out the fact that the northwestern corner of the plaintiff's lands constituted the southeastern corner of the city according to the act of incorporation, of which, as a public act of the legislature of California, we take judicial notice. In the same way we know the relative position of the entire tract to the corporate boundaries of the city. The Los Angeles river, also, is mentioned in more than one public statute, and no doubt we may properly take judicial notice of the fact that it flows from north to south through the city of Los Angeles, and near its eastern limits. But, even if we cannot take notice of these facts, the complaint alleges that said river flows down through "the city." In what direction it flows is not stated, but from the allegations that it has an east bank and a west bank, and that the obstruction of its channel and diversion of its current by a levee erected along or partly along the west bank within the city causes the river to cut through the east bank and flow across the lands of plaintiff, which, as we have seen, adjoin the city on the southeast, it may be inferred that the situation and flow of the stream are as above stated. That the words "the city," which occur several times in the complaint, mean the city of Los Angeles, appears from their use in the description of plaintiff's lands in connection with boundaries which can only belong to that particular city. As to this matter, therefore, of the relative situation of plaintiff's lands and the levee, the complaint, though lacking in directness and precision, is sufficient as against a general demurrer, and the other facts alleged make out a prima facie case of violation of rights of the plaintiff, which it was the duty of defendant's predecessors to regard. It is alleged in substance that, for the purpose of reclaiming and securing to themselves certain lands which had theretofore been inundated, they commenced and undertook to build a levee along the western side of the Los Angeles river; that they constructed said levee in a straight line down said river from First street without regard to the bed of the stream or the channel thereof, or where the water usually flowed, thereby diverting the same into a new channel; that the river flowed down through the city; that its banks were low on the west side and high on the east; that during the rainy season the river spreads over a large area of country, especially on the west side; that the channel of the river is tortuous and irregular; that the defendant and its predecessors, disregarding the current of said river and the quantity of water usually flowing down during the rainy season, and disregarding the natural channel of said river, carelessly and negligently built and constructed said levee, and have since maintained it in such a manner as to obstruct the natural channel thereof and the natural flow of the water, and have so narrowed the channel as to cause the water flowing therein to diverge from its natural course and its usual flow over and upon the lands of plaintiff, by reason whereof the water so diverted did on or about the 26th of January, 1890, begin to flow and ever since has flowed out of its natural channel, in and upon the aforesaid lands of plaintiff, and cut, destroyed, and carried away a large quantity of land, and rendered a large quantity unfit for use, covering the same with bowlders and sand, and cutting a large and deep channel through said land, where the stream continues to flow, destroying about 900 acres, etc. Certainly these facts, if true, gave plaintiff a right of action, if the situation of her land was such as to cast any duty of guarding against damage to her upon the builders of the levee, and we think that, considering its proximity to the east bank of the river, and the fact that the actual and direct consequence of the diversion of the river was to cause it to cut and flow in a new channel across her lands, a prima facie case of actionable negligence was made out. This is not like the case of Lamb v. Reclamation Dist. No. 108, 73 Cal. 125, 14 Pac. 625, and other similar cases, in which it has been held that the erection of a levee along the banks of our rivers to keep out flood waters gives no right of action to those upon whose unprotected lands the flood is thereby made to rise higher. Here, according to the allegations, the levee was built in the bed of the stream, obstructing and narrowing the channel, directing the current against the opposite bank, and causing it to cut a new channel across plaintiff's lands, where it permanently flows. These facts broadly distinguish the present case from those referred to. No natural person, or corporation organized for the profit of its stockholders, has a right to inflict damage of this character upon another; and to allege that such acts have been carelessly and negligently done is, perhaps, sufficient to show a cause of action without any showing as to the relative situation of the land and the obstruction complained of. Stephenson v. Pacific Co., 102 Cal. 146, 34 Pac. 618, and 36 Pac. 407. Here, however, the relative situation of the land and the levee is shown in the manner above stated, and sufficiently, in our opinion, to throw upon defendant the burden of alleging and proving due care.

The superior court did not err in overruling the demurrer to the complaint. The demurrer having been overruled, the defendant filed an answer admitting the construction, by itself and its predecessors, of a levee along the western side of the Los Angeles river, but denying that it was constructed for the purpose of reclaiming to itself lands theretofore inundated, and denying that it was constructed in a straight line down the Los Angeles river from First street without regard to the bed or channel of the stream, or where the water usually flowed, or that by means thereof the water of the river was diverted into a new channel. For a further answer, and as a special and additional defense to the action, the defendant set up a plea in substance as follows: That said levee was constructed and has since been maintained under the terms and conditions of a certain ordinance of the city of Los Angeles, for the uses and purposes therein expressed and not otherwise, and in the manner prescribed by the city of Los Angeles through its duly-constituted authorities, and on the line by said city declared to be the official western boundary of said river; that, after the construction of said levee, under and in pursuance of and in accordance with the terms and conditions of said ordinance, the city of Los Angeles, by its duly-constituted officers and authorities, on the 26th day of March, 1888, duly accepted said work and said levee; that, by reason of the premises aforesaid, the said city of Los Angeles is, and at all the times mentioned in the complaint was, the owner and in possession of the said levee, and the whole thereof, and this defendant maintains the same by reason of the provisions of said ordinance, and as a part of its consideration for the lands and premises conveyed to it by the city of Los Angeles, and this defendant has not now, and had not at any time since the date of said acceptance by the city, any right, title, interest, claim in, or authority over said levee, or any portion thereof, saving and excepting to keep the same in repair as required by the said ordinance, and the same is the property of the city of Los Angeles, and subject to its authority and control. In connection with these allegations, the ordinance referred to is set out in full, and also a grant of lands and rights of way from the city to defendant's predecessor, made in pursuance of the ordinance. The following is the title of the ordinance, which was duly adopted December 8, 1886: "An ordinance to provide for the construction of a levee upon the westerly side of the Los Angeles river for the protection of property of inhabitants of said city from the high waters of said river; for the sale of city lands and grant of right of way to the Riverside, Santa Ana & Los Angeles Railway Company for the construction of such levee." And in the body of the ordinance it is declared that "said levee shall be built for the public benefit of the city of Los Angeles, and is intended to confine the high waters of the Los Angeles river within the levee so to be constructed, and to prevent the property of the inhabitants of said city on the westerly side of said levee from being injured or destroyed in times of high flood by waters overflowing the banks of the river." Aside from this declaration, the substance of the ordinance is a grant to the railway company named in the title—one of defendant's predecessors—of a strip of land bounded on the east by the west line of the official bed of the Los Angeles river, and extending from the southern patent line of the pueblo lands several miles into the city, together with rights of way across and along the streets of the city for its tracks; the purpose of the grant being, as declared in the ordinance, "for the laying down, operating, and maintaining" a steam railway for the transportation of freight and passengers, and for the construction of switches, turnouts, depots, and other structures necessary for the successful conduct of its business. This grant is made upon condition (along with numerous regulations and reservations for the benefit of the city and the public) that the grantee shall construct and maintain a levee along the western line of the official bed of the river from Mission street to a designated point south of First street, for which work, when completed, the railway company is to receive $12,000 in money, in addition to the said grant of land and rights of way. The deed of grant, which is also set out in full, seems to follow strictly the terms of the ordinance. It is dated April 13, 1888, the levee having been formally accepted by the city March 26, 1888. In connection with these allegations, in regard to the building of the levee for and under contract with the city, and as a part of the same defense, the defendant repeats its denials that it recklessly or negligently built or constructed said levee in disregard of the current of said river, or the quantity of water usually flowing therein during the rainy seasons, or that it maintains said levee in such manner as to obstruct the natural channel of said river, or the natural flow of the water thereof, or that it or its predecessors have narrowed the channel in such way or manner as to cause the water flowing down said channel to diverge from its natural course or its usual flow over and upon plaintiff's lands, or that by reason of any acts or doings of the defendant said water was diverted or made to flow over the lands of plaintiff, etc. With the exception of these denials, all that portion of the answer setting up the ordinance of and contract with the city, and the defense that the levee was constructed thereunder for the city and not for the defendant, was, on motion of the plaintiff, stricken out. Subsequent to the making of this order the defendant amended its answer, as so modified, by alleging, among other things, that "said levee was constructed along the western side of said Los Angeles river, as a necessity, upon its own land, for the purpose of protecting the roadbed and roadway of the said California Central Railway Company, predecessor of this defendant, and that the same was done in a workmanlike and skillful manner, with proper care, prudence, and foresight, for the purpose of preventing its tracks and roadbed from being flooded, injured, and washed away during times of flood and high water from the river, and during the time of year commonly known as the 'rainy season' of California, and for the protection of its property, and for the safety and interest of patrons and passengers being transported over its said line." It was upon the answer so amended (including other matters of defense not material to the present discussion) that the defendant was compelled to go to trial, and the assignment of error mainly relied upon in support of the appeal is the order of the court striking from the original answer the special defense above set forth.

The correctness of this order is to be tested by reference to the state of the pleadings at the time it was made. It cannot be supported upon the ground that subsequently the defendant amended its answer by setting up the somewhat inconsistent defense that it built the levee on its own lands for the protection of its roadbed, tracks, and other property. If both these defenses had been pleaded together in the original answer, the mere fact of their partial inconsistency would not have justified the striking out of either of them. McDonald v. Railway Co., 101 Cal. 213, 35 Pac. 643, 646, and cases cited. Still less can the order be upheld upon the ground that the evidence at the trial did not support or was inconsistent with the defense stricken out. A defense which a party is not allowed to plead is not likely to find support in the evidence offered or admitted at the trial. The question, therefore, is whether the facts as pleaded would constitute a defense to the cause of action stated in the complaint.

The appellant contends that such facts would, for more than one reason, constitute a good and sufficient defense. In the first place it is claimed that the city of Los Angeles, for the protection of its inhabitants and their property (the declared object of the ordinance pleaded in the answer), had the undoubted right to build the levee in question, without incurring any liability for such indirect and consequential damages as the plaintiff alleges in her complaint; and, consequently, that the defendant, a mere contractor for the work, cannot be liable. In the second place it is claimed that, even if the city became liable to compensate the plaintiff for the resulting damage to her lands, such liability rested upon the city exclusively, and in no wise attached to the defendant or its predecessors.

In considering the various questions involved in these two propositions, it is to be borne in mind that the city of Los Angeles is not only a municipal corporation, and, as such, invested for local purposes with a large share of the police power of the state as well as the privilege of invoking the power of eminent domain; it was also shown by the allegations of the plea which was stricken out to have been, at the date of the passage of the ordinance providing for the erection of this levee, the owner and proprietor of the land upon which the line of the levee was located, as well as other lands within the city which it was one of the objects of the levee to reclaim or protect. The rights of the city in these diverse characters must not be confounded, and we will first consider its rights as owner of said lands.

It cannot be doubted that as such owner or proprietor the city had the right to protect its own lands from overflow by erecting a levee along or outside of the natural banks of the stream, without incurring any liability for the effects of a consequent increase of the flow of flood waters upon the lands of neighboring proprietors. Lamb v. Reclamation Dist. No. 108, 73 Cal. 125, 14 Pac. 625; McDaniels v. Cummings, 83 Cal. 515, 23 Pac. 795. It may be, also, that in the case of a stream such as the Los Angeles river was shown to be by the testimony, viz. a river with a sandy bed, half a mile in width, through which, except in times of flood, the water runs in a small and insignificant stream, now in one channel and again in another, a proprietor of the bed of the stream may have an equal right to reclaim a reasonable portion of such bed by means of a levee constructed within the banks; but certainly he could have no right for such purpose so to obstruct the channel or divert the current as to force the water into a new and permanent channel through the lands of other proprietors outside of the natural banks. Did the allegations stricken from the answer show a lawful structure, within this doctrine? They were, as above shown, to the effect that the levee was erected on the west line of the "official bed" of the river, i. e. upon a line which had been declared by a city ordinance to be the western bank of the river. This, so far as the court could see, might have been the natural bank or a line very widely divergent therefrom (which in point of fact it is), and the court was therefore justified in assuming, as against the pleader, that it was not the natural bank. Upon this assumption, and in the absence of any allegations as to the character of the river and its bed, or other facts justifying the construction of a reclamation levee within the natural banks, it cannot be said that this part of the answer stated a complete defense based upon the right of the city, as a proprietor, to protect its lands from overflow, unless its affirmative allegations were aided by the denials, with which they were coupled, of the allegations of the complaint to the effect that the levee was built in disregard of the natural channel of the stream, etc. We cannot, however, see why, in construing this part of the answer, such denials should be disregarded. The special defense should be taken in its entirety, and, so construed, it states in effect that the levee was built by defendant for the owner of the lands upon which it was located to reclaim and protect them, and in such manner as not to interfere with the channel of the river or to divert its waters therefrom, except in so far as it might in times of flood cause them to overflow neighboring lands not similarly protected. This was, if true, a justification of the city, and necessarily of the defendant in doing the work for the city. And since, for the purposes of the motion to strike out, the superior court was bound to assume that everything alleged in the answer could be proved, it was error to grant the motion.

It is true, as above stated, that the evidence adduced at the trial not only failed to sustain this defense, but was in direct conflict with it. It showed clearly that the levee was constructed by the defendant—apparently for purposes of its own—more than a mile beyond its southern extremity as designated in the ordinance, and it showed that this additional and unauthorized portion of the levee was the only part that encroached upon the natural bed of the stream. The maps, diagrams, and other evidence introduced by the defendant, no less than the evidence introduced by the plaintiff, all agree upon this point, and all tend strongly to show that but for this unauthorized addition to the levee as planned by the city the damage to plaintiff's lands would not have occurred. But we cannot, for this reason, hold that the order striking out was harmless error. But for the order the defendant might have introduced evidence as to these matters that would have changed the aspect of the case, and we cannot assume that, as the evidence is, the jury would have viewed it in the light in which it appears to us, if the case had been submitted to them upon the theory that the defense pleaded was a good defense. Our conclusion on this point involves a reversal of the judgment, but, since the result will be a new trial of the cause, it is necessary that we should indicate our views with reference to several other assignments of error, involving questions likely to arise in the future progress of the litigation.

We cannot sustain the proposition of the appellant that in view of the allegations of its original answer—and admitting, for the sake of the argument, that it disclosed no absolute right on the part of the city to build the levee—the only person owing any duty to the plaintiff to exercise care and skill to avoid damaging her property was the city. Conceding that the negligence complained of consisted solely in the faulty plan and location of the work, and not at all in the manner in which it was executed by the defendant, it seems to be settled by the decisions of this court that if the damage was actionable the city and the defendant would be jointly and severally liable. To place an unlawful obstruction in the bed of a stream, by which the current is directed into a new channel across another's land, makes a case clearly within the principle recently applied in Green v. Berge (No. 15,545; Cal.) 38 Pac. 539, and in the cases therein cited. If the work was such as to make the city liable, it made the defendant liable also, and the plaintiff could maintain her action against either or both. Of course, if the city exercised such care and skill in creating the plan and fixing the location of the work as to exempt it from any liability to the plaintiff, and the damage was wholly caused by such location and plan,—no negligence being attributed to the defendant in the construction of the work, nor any departure from the plan,—the defendant would be no more liable than the city. But if the work was inherently, and according to its plan and location, a dangerous obstruction to the river, such as ordinary prudence should have guarded against, not only the author of the plan to obstruct the stream, but the person placing the obstruction, were severally liable for the entire damage.

The questions which have so far been considered solely with reference to the rights of the city of Los Angeles, as the owner of lands subject to overflow and capable of reclamation, assume a somewhat different aspect when considered with reference to the powers and duties of the municipal corporation as a public agent for the exercise of the police power of the state. By section 1 of article 4 of the charter of Los Angeles, which was in force at the date of the passage of the ordinance pleaded in the defendant's answer (St. 1875–76, p. 697), very extensive police powers were conferred upon the corporate authorities for the protection of persons and property within the city; and by section 11, art. 11, of the present constitution, which was also then in force, every municipal corporation may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws. In other words, the corporate authorities were not only by act of the legislature, but by the direct mandate of the people as expressed in the organic law, authorized to exercise the police power of the state for local purposes. There was also in existence an act of the legislature, passed in 1868 (St. 1867–68, p. 167), by which the common council of the city were empowered to levy a special tax for the purpose of creating a Los Angeles river fund, which was to be expended in such manner as the mayor and common council should direct, "in improving the channel and banks of said river in any manner deemed necessary by said mayor and common council for the protection of property on the banks of said river." Under these statutory and constitutional provisions it became the duty, as it was clearly within the power, of the corporate authorities to improve the channel and banks of the river as they might, in the exercise of a sound discretion, deem most advantageous to the city and its inhabitants. The work which they were called upon to perform was, like the work performed by the levee commissioners under the act of the legislature referred to in Green v. Swift, 47 Cal. 539, distinctly of a public character, and within the police powers of the state, its design being to protect a populous and important district of the state. The means of accomplishing this object, as in the case referred to, was confided, and in more ample measure, to the discretion of the body charged with the execution of the work; and if, in creating a plan and locating the lines of the levee, they exercised their judgment honestly, and not maliciously, oppressively, or arbitrarily, to the injury of the rights of other persons, they—the corporation and its authorities—could not be held liable for mere errors of judgment, and the persons executing the work with due care, and according to such plan, would be equally exempt from liability for any direct or consequential damage to third parties. Green v. Swift, supra. It was error, therefore, in this aspect of the case also, to strike from the defendant's answer the matters of defense above mentioned; for, although they may have been defectively pleaded in some particulars, the proper method of reaching such defects was by demurrer, and not by motion to strike out. A party who defectively pleads a good defense should be allowed an opportunity of amending his pleading.

It is suggested that, in view of the provision of our present constitution (article 1, § 14), that "private property shall not be taken or damaged for public use without just compensation having been first made to, or paid into court for, the owner," the doctrine of Green v. Swift is no longer applicable to cases of this character. It is possible that this may be true, but it can make no difference in the present case whether it is true or not. Conceding, for the sake of the argument, that the effect of the constitutional provision is to make the state, or a public agency by it employed in the construction of a work designed to protect the lives and property of a large community, liable for indirect and consequential damages, such as were alleged and proved in this case, and which could not have been estimated or compensated in advance, although some damage might naturally have been apprehended, it does not follow that the contractor, executing the work carefully and properly according to the plan, would be liable. On the contrary, since in the case supposed the state or corporation would be liable, not for a tort, but only upon its obligation to compensate the damages resulting from the rightful exercise of its power, the liability would rest upon it alone, and the contractor, who has merely constructed the work carefully and properly according to the plan, will be exempt from any liability. There was no taking of plaintiff's property in this case, either according to the facts alleged or facts found, even if tested by the doctrine of Pumpelly v. Green Bay Co., 13 Wall. 166, which has been held to be an extreme case. Green v. State, 73 Cal. 29, 11 Pac. 602, and 14 Pac. 610; Lamb v. Reclamation Dist. No. 108, 73 Cal. 125, 14 Pac. 625. Neither was the damage to it the natural, certain, and immediate consequence of the facts alleged. It did not appear, therefore, that the ordinance of the city was invalid by reason of its failure to provide for compensation to plaintiff in advance of the construction of the levee.

What has been said with reference to the error of the court in the order to strike out applies to the error assigned upon the ruling limiting the purpose for which the ordinance was admitted in evidence. Even under the pleadings as they stood at the time of the trial, the ordinance was admissible for the purpose of showing that defendant's track had been rightfully laid within the city, and, consequently, that it could protect them by a lawful and proper levee, the question whether this levee had been constructed with due care being a question for the jury. There were some rulings of the court upon objections to evidence, and in giving and refusing instructions, which, although proper enough under the pleadings as they stood, would not have been proper if the defense pleaded in the original answer had not been stricken out. We need not specify these rulings more particularly, since they are sufficiently indicated by what has been said.

The court did not err in giving instruction No. 4, requested by the plaintiff. Read in connection with other instructions, it could not have been understood to require the defendant to exhaust all possible sources of inquiry as to previous extraordinary floods. Instruction No. 10 was not sufficiently guarded, even according to the theory upon which the case was tried. Instruction 3 was, perhaps, erroneous in assuming as a fact the occurrence of extraordinary floods in the past, though, in view of the unanimity of the witnesses on that point, it can scarcely have been prejudicial. There was no error in the modification made by the court in defendant's instruction 14. Instruction No. 2, asked by plaintiff, seems to have been upon a point not in issue, and should have been omitted for that reason. Aside from these particulars we see no error or inconsistency in the instructions. For the reasons above given the judgment and order appealed from are reversed, and the cause remanded for further proceedings in accordance with the views herein expressed.

We concur: McFARLAND, J.; HARRISON, J.; GAROUTTE, J.; VAN FLEET, J.

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(4 Cal. Unrep. 979)

## CORNWALL v. McELRATH et al. (No. 15,778.)

(Supreme Court of California. March 8, 1895.)

ACTION BY ADMINISTRATOR—NOTE DEPOSITED IN TRUST COMPANY.

It is no defense to an action by an administrator upon a note due his decedent that pending the settlement of the estate the note was deposited with a trust company by order of court, and was produced therefrom only for the purpose of the action.

Department 1. Appeal from superior court, Alameda county; F. B. Ogden, Judge.

Action by one Cornwall, administrator, against one McElrath and others. From a judgment for plaintiff, and an order denying a new trial, defendants appeal. Affirmed.

J. E. McElrath, for appellants. Jas. C. Martin and Geo. M. Shaw, for respondent.

PER CURIAM. Action by the personal representative of Jerusha Cornwall, deceased, upon a promissory note executed to her by the defendants. The defendants do not deny the execution of the note, or the amount claimed to be unpaid thereon. In their answer they deny that the plaintiff has or is entitled to the possession of the note, either as administrator with the will annexed or otherwise. At the trial the note was offered in evidence on behalf of the plaintiff, and the defendants, in support of the above denial, rely upon the fact that it was shown by the plaintiff that under an order of the court, made in accordance with the provisions of section 3 of the act of April 6, 1891 (St. 1891, p. 490), the plaintiff had deposited the note with the California Safe-Deposit & Trust Company, a corporation, and that it was produced from that custody under the order of court for the purposes of this action. This evidence was sufficient to justify the findings of the court. The note was a part of the estate of the deceased, and the plaintiff, as the administrator with the will annexed of said estate, was authorized to bring the action for its collection. The action of the superior court appointing the plaintiff as such administrator, or fixing the amount of his bond, or issuing letters of administration, or giving him directions regarding the temporary custody of the estate, cannot be collaterally attacked in any action by him upon a promissory note belonging to the estate. The note was held by the trust company subject to the order and direction of the court, and it was produced at the trial under the order of the court. Its production authorized it to be admitted in evidence, and the fact that it had been in the temporary custody of the trust company was a matter of no concern to the defendants, and constituted no defense to the action. The note was merged in the judgment, and a satisfaction of the judgment will extinguish the obligation of the defendants thereon. The judgment and order are affirmed.

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(106 Cal. 302)

## PEOPLE v. LEONARD. (No. 21,145.)[1]

(Supreme Court of California. March 9, 1895.)

EMBEZZLEMENT FROM CORPORATION — EVIDENCE OF INCORPORATION — INDICTMENT — EVIDENCE—BOOKS OF ACCOUNT—GRAND JURY—VALIDITY OF DRAWING.

1. Articles of incorporation of a bank executed in 1875 need not state the number of shares subscribed, or the names of the subscribers; the amendment of Civ. Code, § 290, so requiring, not being passed until 1876.

2. On the trial of the manager of a bank for embezzling its funds, a cashbook showing the receipts and disbursements, and kept in the bank under the supervision of the defendant, is admissible to show the balance of cash on hand at the time of the alleged embezzlement.

3. An averment in an indictment for embezzlement that the funds were those of a corporation is supported by proof that it was a corporation de facto.

4. On a trial of a bank manager for embezzlement, a charge that if defendant, when insolvent and aware of such insolvency, "took large sums of money from the vaults of the bank, and executed therefor his unsecured promissory note to the bank, such taking "was a fraudulent appropriation, and falls within the definition of embezzlement," supplemented by another charge that it must also be found that he took such money "contrary to his trust," is not prejudicial to the defendant.

5. When the records of a corporation are excluded from evidence on the ground that the corporation was not legally organized, oral evidence is admissible to show who are the acting officers.

6. Section 242, Code Civ. Proc., which provides that the 19 persons whose names are drawn shall constitute the grand jury, does not deprive the court of the power to discharge persons regularly drawn who do not possess the statutory qualifications.

7. Under Code Civ. Proc. § 210, providing that the persons whose names are returned shall serve for one year, and until other persons are selected and returned, a grand jury organized in November, 1893, and not discharged by the court nor by the subsequent selection and return of another grand jury, may find a valid indictment in January, 1894.

8. A de facto officer of a corporation is criminally liable for embezzlement of funds in his hands.

Commissioners' decision. In bank. Appeal from superior court, Santa Clara county; John Reynolds, Judge.

H. M. Leonard was convicted of embezzlement, and appeals. Affirmed.

Morehouse, Tuttle & Richards, for appellant. Atty. Gen. Hart, for the People.

SEARLS, C. The appellant, H. M. Leonard, was convicted of the crime of embezzlement, and adjudged to suffer imprisonment in the state prison for the term of three years. He appeals from the judgment, from an order denying his motions for a new trial, and from an order refusing to arrest the judgment. The indictment avers that the defendant, on the 8th day of May, 1893, at the county of Santa Clara, state of California, was "an officer, manager, and servant of the bank of Santa Clara, a corporation duly created, organized, and existing under and by virtue of the laws of the state of California." The indictment then proceeds to charge in apt and usual language that there came into the hands of said defendant as such officer, etc., the sum of $8,384.17, which he then and there feloniously appropriated to his own use, etc.

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[1] Rehearing denied.

The first specification of error by appellant relates to the modification of an instruction asked by defendant, and given with an addition made thereto by the court on its own motion. The instruction is as follows: "I instruct you that, in order to sustain the charge herein, the prosecution must prove beyond a reasonable doubt—that is, to a moral certainty—that the Bank of Santa Clara County was at the time of the alleged offense a corporation duly formed, organized, and existing and doing business under the laws of the state of California, and doing business at Santa Clara, in this state; and that on the 8th day of May, 1893, and before that date, the defendant was the manager or servant of said Bank of Santa Clara County, and as such manager or servant had during that time in his possession or under his control the moneys belonging to said corporation mentioned in the indictment." The court gave this with the following modification, to wit: "But if you find from the evidence that the persons named in the certificate of incorporation given in evidence organized as a corporation, and entered upon the business named in the certificate, and that they and their successors continued to conduct business as a banking corporation, under the name of the Bank of Santa Clara County, until after the 8th day of May, 1883, then I instruct you that, for the purpose of this case, the Bank of Santa Clara County was at the time of the alleged defense a corporation duly formed, organized, existing, and doing business,"—to which modification of said defendant's requested instruction defendant then and there duly excepted. It will be observed that the instruction as asked by the defendant involved as an essential element the necessity of a legally-organized corporation; that it should be, in the language of the instruction, "a corporation duly formed, organized, and existing, and doing business at Santa Clara, in this state." The addition to the instruction in effect informed the jury that a de facto corporation, if they found such to exist, was, for the purposes of the case, sufficient. It is proper to a correct understanding of the question to say that the prosecution offered in evidence articles of incorporation of the Bank of Santa Clara County, duly executed and filed on the 28th day of May, 1875. To the introduction of such articles of incorporation counsel for defendant objected, upon the ground that they were incompetent, irrelevant, and immaterial, and inadmissible. After much argument, it appeared that the alleged defect consisted in the omission from the articles of the requirements of the seventh provision of section 290 of the Civil Code, by failing to state the amount of the capital stock subscribed, and by whom. A long argument seems to have occurred over the question, during which the court below expressed the opinion that the articles were insufficient to constitute a corporation de jure, but that, while defective, they might be introduced as one step in the proofs of the existence of a corporation de facto. The objection was thereupon overruled, the articles admitted in evidence, and proof was thereafter received tending to show that the bank acted and did business as a corporation, and defendant acted as a director, manager, and agent thereof. The fact was that in 1875, when the articles of incorporation of the Bank of Santa Clara County were executed and filed, the statute did not require a statement in such articles of the number of shares subscribed, or by whom. Amend. Codes 1873-74, p. 199. Section 290 of the Civil Code was again amended in 1876, so as to include the clause to which we have referred. Amend. Codes 1875-76, p. 70. Counsel and the court overlooked the fact of these changes in the Code, and the cause was tried upon the theory that the corporation was never legally organized. The error in this respect consisted in improperly sustaining the objection made by counsel for defendant, and he should not be heard to complain. There being evidence to sustain the instruction as modified, it was proper to give it in any event.

It has repeatedly been held that proof that a corporation was acting as such is sufficient. People v. Frank, 28 Cal. 508; People v. Hughes, 29 Cal. 258; People v. Schwartz, 32 Cal. 161; Gaslight Co. v. Dameron, 67 Cal. 663, 8 Pac. 595. It is also held in People v. Schwartz, supra, that, if the indictment avers that the company is a corporation, proof of the existence of the corporation de facto will support the averment. To hold that one who has been an officer, agent, or servant of a company acting as a corporation can, upon discovering that, by reason of some defect or oversight in incorporating, the company has not become a corporation de jure, plunder its treasury, and go Scot-free, would be to offer a premium for wrongdoing. "In reason, whenever a man claims to be a servant, while getting into his possession by force of this claim, the property to be embezzled, he should be held to be such on his trial for the embezzlement. * * * When a man has received a thing of another under the claim of agency, he cannot turn round and tell the principal asking for the thing: 'Sir, I was not your agent in taking it, but a deceiver and a scoundrel.'" Bish. Cr. Law, § 397; People v. Treadwell, 69 Cal. 226, 10 Pac. 502;

Ex parte Hedley, 31 Cal. 108. Our Civil Code (section 358) has embodied the rule in the following words: "The due incorporation of any company claiming in good faith to be a corporation under this act, and doing business as such, or its right to exercise corporate powers, shall not be inquired into, collaterally, in any private suit to which such de facto corporation may be a party; but such inquiry may be had at the suit of the state on information of the attorney-general."

Appellant objects to the fourteenth instruction given by the court, as being in conflict with the instruction hereinbefore set out and given in a modified form. This fourteenth instruction is too lengthy to be here set out in full. In it the court gives the definition of embezzlement, the nature of the charge against the defendant as specified in the indictment, and then proceeds as follows: "It appears in the certificate of incorporation, under which it is claimed the association therein named commenced business as a banking corporation, that it was not sufficient to entitle the directors therein named, or the stockholders, or their successors, rightfully to conduct a banking business; but if you find from the evidence that the directors named in this defective certificate entered upon the business named in the certificate, and that they and their successors continued to conduct business as a banking corporation under the name of the Bank of Santa Clara County, then it became and was a corporation de facto,—that is, a corporation in fact, though not so in right," etc. The instruction then proceeds to say that any officer or director who in fact has acted as such is subject to the liabilities and penalties of like officers of a de jure corporation, etc. The last instruction is not in conflict with the former as modified by the court. The conflict, if any, was in the former instruction as asked, and that portion added to it by the court. But this is apparent, not real. When the proofs show such facts as the Code designates as sufficient to constitute a corporation de facto, it is for all the purposes of an action of this character to be treated as a corporation. It is for such purpose a corporation duly formed; and the legality of its organization cannot be questioned. When, therefore, the court instructed the jury, as it did in effect, that it devolved upon the prosecution to prove a corporation duly formed, organized, and existing under the laws of the state of California, but that, if the persons named in the certificate performed certain acts (naming such as are essential to constitute a corporation de facto), it was a corporation duly formed, etc., it gave a correct exposition of the law as applicable to the case. The third point made by counsel for appellant is based upon an instruction given by the court (No. 14) to the effect that if the bank of Santa Clara County was a de facto corporation, any director or officer who in fact acted as such officer of such corporation "is subject to all the liability and penalties attaching to directors and officers duly elected by a corporation de jure," etc. The contention of appellant is that there can be no de jure officer without a de jure office to be filled, and that section 504 of the Penal Code, which defines embezzlement, applies only to de jure officers. The cases already cited, holding that in criminal cases proof that a corporation has acted as such is sufficient, are deemed sufficient upon the first branch of the question. As to the question of the necessity of proof that an officer is such de jure, it has been said there is no conflict in the authorities as to whether a de facto officer is liable criminally for embezzlement of funds in his hands. State v. Goss, 69 Me. 22; Fortenberry v. State, 56 Miss. 286; State v. Sellers, 7 Rich. Law, 368; State v. McEntire, 3 Ired. 171; Diggs v. State, 49 Ala. 311; Rex v. Borrett, 6 Car. & P. 124. We have found no case holding that a de facto officer may not be punished for embezzlement equally with a de jure officer.

The fourth contention of appellant is founded upon an excerpt from the fourteenth instruction of the court; and the attempt to predicate an argument upon it, to support the theory that the court invaded the province of the jury in passing upon the facts, falls to the ground when taken in connection with the whole instruction. In the former part of the same instruction the court has informed the jury that, if they found the company had performed certain enumerated acts, then it became a corporation de facto, and then proceeded to say that "if you find that the defendant, during the latter years of the existence of this de facto corporation as a business association, acted as its manager, and in fact had control of its funds and managed its business, and in the course of such management there came under his control before the 8th day of May, 1893, sums of money in excess of * * *, then the admissions and statements made in the course of his conduct of the business as manager may be considered." In the same instruction the jury was explicitly informed that they were the exclusive judges of the sufficiency of the evidence to establish the facts which it tended to prove, of the credibility of witnesses, etc. When read together, the instruction is proper.

The fifth point in favor of reversal is founded on that portion of the same instruction which reads as follows: "If from the evidence you find that in a certain book kept by the Bank of Santa Clara County entries showing the balance of cash on hand on May 6 and May 8, 1893, were made, under and by the direction of the defendant, then I charge you that such entries are evidence tending to show the cash on hand on said dates." There was evidence tending to show that the cashbook referred to in the instruction was kept in the bank; that it showed the cash receipts and disbursements were kept by a bookkeeper under the direction of defendant; that, at the close of the day's business, defendant would count the cash on hand, and furnish a slip to the accountant, who entered the amount reported and balanced it. Defendant also pointed out the book to an expert accountant soon after the failure of the bank as one of the books essential to a knowledge of the finances of the bank, etc. It was prima facie evidence of the balances of cash on hand at the several dates at which it was important to show such balance. Being admissible in evidence, the instruction predicated upon it was proper.

The court further instructed the jury as follows: "If, from all the evidence, you find that on the 8th day of May, 1893, the defendant knew that he was insolvent, and, knowing his insolvency, he took large sums of money from the vaults of the bank, and executed therefor his unsecured promissory note to the bank, I instruct you that such taking of the money was a fraudulent appropriation, and falls within the definition of embezzlement." This instruction must be read in connection with another given at the request of defendant, in the following language: "I further instruct you that the making, execution, and delivery of a promissory note, on the part of the defendant, in the sum of $8,384.17, is not in itself a criminal act, and that before you can convict the defendant you must find from the evidence to your entire satisfaction, and beyond a reasonable doubt, that not only was the money actually in the Bank of Santa Clara County, but that the defendant took the said moneys out of the said bank, and gave his note in the sum of $8,384.17 therefor, contrary to his trust." There were two other instructions given on the same subject, emphasizing the necessity of there being evidence, independent of the notes, of the taking by defendant of the money from the bank, and appropriating the same contrary to his trust. When thus read together, these instructions were not detrimental to the defendant. There are authorities to the effect that where an officer in charge of the funds of a bank takes therefrom such funds and deposits in place thereof securities known by him to be worthless, and appropriates to his own use the funds thus taken, he is guilty of embezzlement, and no good reason is perceived why such is not the law. The pretense of giving in return for funds thus taken by an officer securities which are worthless, and known to be so by him at the time, is but an evasion or attempt to evade the conclusion following the wrongful act.

Numerous other points are made by appellant in relation to instructions given and refused. Those given by the court, taken together, contained a correct exposition of the law, and those asked by defendant and not given were either embodied in the instructions as given, or were erroneous as presented.

The several objections to the evidence need not be mentioned in detail, as they involve no error calling for a reversal. Most of them are founded upon objections to evidence because secondary in character, and not the best evidence of the facts proven. In these cases the prosecution had offered proper record evidence, which, upon the objection of defendant, was ruled out by the court. The theory of defendant and of the court seems to have been that, as the bank was not legally organized, its records showing the election of officers, adoption of by-laws, etc., were not admissible. It therefore became necessary for the prosecution to show by oral testimony who were in fact the acting officers of the corporation, etc. The evidence was sufficient to support the verdict, and the only other question calling for special mention is that presented by the motion to set aside the indictment.

The bill of exceptions upon which this motion was founded shows that 125 persons were duly selected by the board of supervisors, pursuant to an order of the superior court, to serve as grand jurors for the year 1893, and certified to the county clerk of Santa Clara county. The names of the persons so selected as grand jurors were deposited in a box by the clerk, as by law provided. On the 14th day of November, 1893, the superior court made an order requiring that a grand jury of 30 persons be drawn from the box, and summoned to be and appear on December 5, 1893. The jury was duly drawn, and appeared and answered to their names; whereupon 10 of the number, offering satisfactory excuses, were excused by the court. The names of the remaining 20 persons were duly deposited in a box, from which 19 names were drawn in the usual manner to serve as grand jurors. Thereupon the persons so selected and drawn were questioned by the district attorney touching their qualifications as jurors, whereupon two of them, viz. Cyrus Berry and W. E. Spencer, gave testimony tending to show that they were not assessed upon the last assessment roll of the county for taxation. Thereupon said Berry and Spencer were challenged by the district attorney, and dismissed by the court as incompetent to serve, by reason that their names were not upon such assessment roll. The sole remaining name in the box was then drawn, viz. that of Simeon Holland, who was impaneled, making, with those impaneled, 18 grand jurors. The court then issued a special venire to the sheriff to summon 2 additional persons to complete the panel. They were duly summoned, and 1 of them impaneled, thus completing the panel of 19 grand jurors, by which grand jury the indictment herein was found and presented. At the time the special venire issued, there were 95 names in the grand jury box in possession of the county clerk. The bill of exceptions further shows that at the hearing of the motion to set aside the indictment, the assessment roll of the county was produced, and the name of W. E. Spencer, one of the jurors challenged and excused, was in fact upon said roll.

Two objections are made to the legality of the grand jury as organized: (1) That, the members having been regularly drawn, the court had no jurisdiction to discharge two of the number, and order others. (2) That a grand jury drawn and impaneled in 1893 had no authority to act and find an indictment in January, 1894.

In support of the first objection, we are referred to section 242 of the Code of Civil Procedure, which provides that "when, of the persons summoned as grand jurors and not excused, nineteen are present they shall constitute the grand jury." The same section provides that, if more than 19 are present their names shall be placed in a box, and 19 drawn, who "shall constitute the grand jury." The argument is that as in the present instance there were present and not excused over 19 persons, and as 19 were drawn, they constituted the grand jury, and that no power existed in the court to thereafter excuse any of them. This construction of the statute virtually has the effect of abrogating other provisions of the same Code providing for the qualification of jurors. Section 198 is as follows: "A person is competent as a juror if he be: (1) A citizen of the United States, of the age of twenty-one years, who shall have been a resident of the state one year, and of the county, or city and county, ninety days before being selected and returned; (2) in possession of his natural faculties, and of ordinary intelligence and not decrepit; (3) possessed of sufficient knowledge of the English language; (4) assessed on the last assessment-roll of the county on property belonging to him." The next section provides as follows: "A person is not competent to act as a juror: (1) Who does not possess the qualifications prescribed by the preceding section; or, (2) who has been convicted of malfeasance in office, or any felony or other high crime." These sections provide the qualifications of all jurors, grand and trial alike. Manifestly the supervisors upon whom the duty of selection devolves, who have no means of making a critical examination, and who must depend upon their general knowledge, will select many incompetent persons as jurors. To illustrate: Frank Johnson, who was duly assessed for taxation, etc., was selected and regularly drawn and summoned as a grand juror in one of the counties of this state. Frank Johnson proved to be a woman. Aliens, nonresidents, persons under age, persons who do not understand the English language, the deaf, and other incompetents are frequently, by inadvertence, selected and drawn as grand jurors. One of two things must follow in such cases,—either the court, upon an examination, has authority to discharge the incompetent, or the statute fixing the qualification of jurors becomes an idle declaration. We are of opinion that the language of section 242, supra, which provides that the 19 whose names are drawn "shall constitute the grand jury," must be taken and construed as meaning 19 persons possessing the qualifications of jurors, as defined in sections 198 and 199 of the same Code; and to this end the court before which such jurors are impaneled may, upon an examination which shows the jurors, or any of them, lack the necessary statutory qualifications, discharge such incompetents. This view is strengthened by the language of section 227, Code Civ. Proc., which provides that "when there are not competent jurors enough present to form a panel the court may direct the sheriff * * * to summon a sufficient number * * * to complete the panel." The juror W. E. Spencer, having upon examination declared that he was not assessed for taxation upon the last assessment roll, was properly discharged. The court was authorized to act upon the evidence before it, and the fact that it afterwards appeared that he was mistaken in his sworn statement did not have the effect of making the ruling erroneous. When all the persons summoned were exhausted without procuring a jury of 19, it was discretionary with the court to either order other names drawn from the grand jury box and summoned, or to issue a venire to the sheriff to summon additional persons to complete the panel. Code Civ. Proc., §§ 226, 242. The court adopted the second course, and caused two persons to appear, one of whom was impaneled to complete the grand jury. In this course there was no abuse of the discretion confided to the court.

2. The fact that the grand jury was organized in November, 1893, and found the indictment against defendant in January, 1894, does not render it invalid. The Code of Civil Procedure (sections 204 to 211, both inclusive) provides for the selection of persons to serve as grand and trial jurors. Section 210 provides that "the persons whose names are so returned shall be known as regular jurors, and shall serve for one year, and until other persons are selected and returned." It does not appear from the record, and is not probable, that in fact the jurors for 1894 had been "selected and returned" at the date of the finding of the indictment. If they had not been, it was clearly proper to continue the jury of 1893 until such event happened. Again, under the reasoning in Re Gannon, 69 Cal. 541, 11 Pac. 240, the action of the grand jury may be considered valid until discharged by the court or by operation of law, and it was said the expiration of the year did not effect such discharge by operation of law. There is nothing in Bruner v. Superior Court, 92 Cal. 239, 28 Pac. 341, in conflict with the views herein expressed.

What has been said of the motion to

quash or set aside the indictment applies equally to the motion in arrest of judgment. To dwell in detail upon each of the 33 points made by appellant in his brief would swell this already too long opinion beyond all reasonable limit. It must suffice to say that a careful examination of each of them fails to convince us that the record discloses any error calling for reversal. The serious errors committed by the court below were in favor of the defendant, and need not be further noticed. The judgment and orders appealed from should be affirmed.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and orders appealed from are affirmed.

106 Cal. 289

## PEOPLE v. JOHNSON. (No. 21,181.)

Supreme Court of California. March 9, 1895.)

Assault with Intent to Commit Rape — Evidence—Harmless Error — Age of Consent—Character of Prosecutrix — Instructions — Province of Jury.

1. On a trial for assault with intent to commit rape, the prosecutrix testified that she was under the age of consent, basing such testimony upon entries in the family Bible. Her testimony was corroborated by that of another witness, and the defendant offered no proof that she was above such age. *Held*, that the refusal to strike out such testimony of prosecutrix was, if wrong, a harmless error.

2. The exclusion of a conversation between the witness and defendant, which a person who heard it is allowed to give as a witness for defendant, is not prejudicial to defendant.

3. It is error to strike out on motion an answer which is directly responsive to a question not objected to when asked.

4. When it is sought to weaken the testimony of a witness for defendant by showing that he is interested in the result of the trial, defendant may show that such interest arose from the witness' belief in defendant's innocence.

5. On a trial for assault with intent to commit rape on one under the age of consent, evidence of the former unchastity of the prosecutrix is inadmissible.

6. When the charges asked by the defendant are unreasonably numerous, it is proper to refuse such as are not demanded by the general nature of the case.

7. On a trial for assault with intent to commit rape, a charge to the jury that, "if you believe the prosecutrix, it is your duty to render a verdict accordingly," was reversible error, as it took from the jury the question of defendant's intent.

Department 1. Appeal from superior court, Amador county; John F. Davis, Judge.

Phineas Johnson was convicted of assault with intent to commit rape, and appeals. Reversed.

W. J. McGee, for appellant. Atty. Gen. Hart, for the People.

GAROUTTE, J. The defendant was convicted of a felony, and now prosecutes this appeal to secure a reversal of the judgment and a new trial.

1. The motion to set aside the information was properly overruled, and likewise the demurrer to the information. The defendant was charged with the offense of assault with intent to commit rape by means of force and violence. At the trial the prosecutrix testified that she was but 12 years of age, and that she gained such information from certain entries made in the family Bible. A motion to strike out her testimony as to her age, upon the ground that it was hearsay, was denied, and this ruling of the court is relied upon as error. In this state the age of consent is fixed by the statute at 14 years. There was no testimony whatever offered upon the part of the defendant that the witness was 14 years of age, and her oldest sister testified positively that she was but 12. Under these circumstances, we conclude the ruling of the court, if wrong, was harmless error.

2. A witness, James Woolery, brother of the prosecutrix, testified that after the alleged assault he went to the shoemaker shop of one Pfend, found the defendant there, returned with him to the home of the prosecutrix, and then he related a certain conversation that occurred at that time. Upon cross-examination he stated what he had said to the defendant at the shop of Pfend, and, upon being asked by the defense what the defendant replied to his statement, the court held the question objectionable. This ruling is assigned as error, but inasmuch as Pfend subsequently took the stand in behalf of the defendant, and was allowed without objection to state what the defendant said at that time, no injury to defendant could have possibly resulted from the ruling of the court.

3. The officer who arrested the defendant, while testifying, stated that he had taken quite an active part in the defense. This evidence was adduced by the prosecution (as stated by the district attorney at the time) for the purpose of showing the interest of the witness in the case. In rebuttal the witness was asked the cause or reason of his interest, and, without objection in answer to this interrogatory, he stated that upon investigation he believed the defendant innocent. Upon motion this answer was stricken out. We deem this ruling of the court both erroneous and injurious. The answer was directly responsive to the question, and the opposite party should hardly be allowed to remain silent when the question was asked, and then be permitted to move to strike out the answer when he finds it against him. But, aside from this, we think the question and answer not objectionable. The prosecution having proven that the witness had an interest in the result of the litigation, for the purpose of weakening the effect of his testimony, we see no valid reason why opposing counsel had not the right to show generally what that interest was for the purpose of counteracting the effect of the former evidence.

4. The defendant offered to prove the general reputation of the prosecutrix for unchastity, but the court denied the offer, and allowed evidence of specific acts of unchastity to be proven; relying for such ruling upon the authority of People v. Benson, 6 Cal. 221. While that case holds that specific acts of unchastity may be proven, it does not hold that general reputation for unchastity may not be proven, and, upon the authority of many text-writers and cases, we have no doubt but that the general reputation of a prosecutrix for unchastity is proper and legal evidence. But the present case is an exception to the general rule. The prosecuting witness is under the age of consent, and for this reason evidence either of general reputation or specific acts would seem to be immaterial. This class of evidence is admissible for the purpose of tending to show the nonprobability of resistance upon the part of the prosecutrix; for it is certainly more probable that a woman who has done these things voluntarily in the past would be much more likely to consent than one whose past reputation was without blemish, and whose personal conduct could not truthfully be assailed. In other words, this class of evidence goes to the question of consent only, and in a case like the present the question of consent is not involved. In speaking to this point, while reviewing certain cases, Judge Cowen says in People v. Abbot, 19 Wend. 192: "They seemed to suppose that the testimony was proposed to shake the general credibility of the witness, as if it went to truth and veracity. That is not so. It goes to her credibility in the particular matter, to a circumstance relevant to the case in hand, from which the jury are asked to say she did consent; and it may be proved by the prosecutrix, or, if she deny it, by others." See, also, O'Blenis v. State, 47 N. J. Law, 279; Lawson v. State, 17 Tex. App. 302. Sound reason declares that such of necessity must be the rule. If this class of evidence was admissible as going to the credibility of the testimony of the prosecutrix in its entirety, then it would be equally admissible as against the veracity of any female who might be called upon to give evidence in a case. Yet no such principle is recognized anywhere; and, as an additional reason supporting the principle here declared, this class of evidence is always admitted against a prosecutrix charging the offense here charged, even though she gives no evidence at the trial of the case.

5. The defendant by his counsel prepared and asked the court to give to the jury 49 numbered and separate instructions. This was entirely too many. The case was not of the character demanding any such treatise upon criminal law. The court refused many of them, and was justified in such refusal. The charge as given to the jury fairly covered the law bearing upon the case, and we see nothing objectionable therein, with a single exception. The court gave to the jury the following instruction: "While it is the law that the testimony of the prosecutrix should be carefully scanned, still this does not mean that such evidence is never sufficient to convict. If you believe the prosecutrix, it is your duty to render a verdict accordingly." The plain implication to be drawn by the jury from this instruction is that, if the jurors believe the evidence of the prosecutrix, it then becomes their duty to find the defendant guilty. If this interpretation be too strong, then certainly it may be said that some of the jurors at least probably so understood the language of the court; and, upon any view, it was misleading and prejudicial to defendant's rights. The prosecutrix testified in detail to the acts of defendant which it is claimed constituted the offense charged. All other evidence at the trial was merely corroborative of her statements. It is not claimed that the offense of rape was committed, and by this instruction the question of the intent with which the defendant did the acts testified to by the witness was absolutely taken from the jury. She testified to no intent of defendant. His intent was to be determined by his acts, and that intent was a question of fact with which it was the sole province of the jury to deal. As we have already said, the court instructed the jury in effect that, if they believed the evidence of the prosecutrix as to the acts and conduct of the defendant, they must find him guilty. Now, the defendant may have done all the things charged against him by the evidence of the prosecutrix, and still have been possessed of no intent to commit rape, and the jury should not have been foreclosed by the court from so finding, if they so believed. The question of the intent with which the assault was made being the material element in the case, the court had no right to put a state of facts to the jury which would bar them from finding the intent to be other than that charged by the information. "When a specific intent is an element of the offense, no presumption of law can ever arise that will decide this question of intent." People v. Landman, 103 Cal. 577, 37 Pac. 518. For the foregoing reasons the judgment and order are reversed, and the cause remanded for a new trial.

We concur: HARRISON, J.; VAN FLEET, J.

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106 Cal. 149

## SECORD v. QUIGLEY. (No. 15,878.)

(Supreme Court of California. Feb. 27, 1895.)

ESTOPPEL ON APPEAL—INCONSISTENT POSITIONS.

One who prays for the reformation of a decree, and is not awarded the full relief demanded, cannot contend on appeal that the court had no power to reform the decree.

Department 2. Appeal from superior court, Santa Clara county; W. G. Lorigan, Judge.

Action by Joseph Kelly against Owen

Quigley to quiet title to certain land. Plaintiff died, and J. K. Secord, his administrator, was substituted in his stead. From the judgment, defendant appeals. Affirmed.

Sullivan & Sullivan, for appellant. Jackson Hatch and W. A. Bowden, for respondent.

HENSHAW, J. Action to quiet title, commenced by Joseph Kelly and prosecuted by the administrator of his estate, substituted upon suggestion of his death. Defendant claims title by mesne conveyance from the wife of Kelly. In a former partition suit, in which Kelly and his wife were parties plaintiff, it was found by the interlocutory decree that "said Joseph Kelly and his wife, Catharine Kelly, are the owners of an undivided $^{26}/_{3941}$ part of said Rancho Milpitas." By the final decree was awarded to "Joseph Kelly and his wife, Catharine Kelly, jointly," the lands in controversy. Defendant by cross complaint attacks these decrees, averring that Catharine Kelly was the owner of the land in fee at and during the time of the partition suit; that the final decree was mistakingly drawn; that the judge was deceived in signing it; and that both the interlocutory and final decrees "were frauds upon the rights of said Catharine." He asks for a reformation of the decree, and an adjudication in his favor as to the ownership of the land. The appeal is from the judgment alone, and was taken more than 60 days after its rendition. No question as to the sufficiency of the evidence can be considered. Code Civ. Proc. § 939, subd. 1. The court finds that the purchase price of the land was paid out of the community funds; that Catharine Kelly never owned the fee of the whole or any part of the lands, and never had any interest therein, except as a member of the community; that the interlocutory decree adjudged Joseph Kelly and Catharine Kelly to be the owners of an undivided $^{26}/_{3941}$ of the Rancho Milpitas, but that by a mistake in the final decree the land in controversy was set apart to Joseph and Catharine jointly; that no fraud was practiced or mistake made to the injury of Catharine's rights. The single proposition advanced upon the appeal is that the court had no power to reform the decree in partition. But appellant's cross complaint was a direct proceeding asking for its reformation. The court found, as appellant pleaded, that a mistake had been made, and relieved him from it. He cannot be heard to complain of this, nor of the fact that he was not awarded the full relief sought. Civ. Code, §§ 3515,[1] 3516,[2] 3521.[3] Since the evidence is not before us, it must be held that it was properly refused. The judgment appealed from is affirmed.

We concur: TEMPLE, J.; McFARLAND, J.

106 Cal. 343

## In re WAX'S ESTATE. (No. 18,367.)

(Supreme Court of California. March 11, 1895.)

WILL CONTEST—MENTAL CAPACITY — EVIDENCE—ATTORNEY AS WITNESS TO WILL—CONFIDENTIAL COMMUNICATIONS.

1. In a will contest based on testator's mental incapacity, a witness for contestants cannot state what disposition testator made of a deed to land conveyed to him, when no offer is made to show that he disposed of it otherwise than as deeds are usually disposed of by the holders thereof

2. Where the attorney who drew a will witnesses it, at testator's request, he is free, if the will is contested, to testify as to any fact concerning its execution which he learned by virtue of his professional relation.

3. The withdrawal of an objection to the admission of evidence deprives the party objecting of the right to subsequently move to strike it out.

4. On the contest of a will, a witness may testify that testator in their business relations acted like a rational man.

5. Under Code Civ. Proc. § 1870, providing that in a will contest an "intimate acquaintance" of testator may give his opinion as to his sanity, it is largely within the discretion of the trial court to decide when a witness is an intimate acquaintance.

Commissioners' decision. Department 1. Appeal from superior court, El Dorado county; N. D. Arnot, Judge.

Proceeding to contest the will of Joseph A. Wax, deceased. From a judgment admitting the will to probate, William Wax and others, contestants, appeal. Affirmed.

Johnson & Johnson and Chas. A. Swisler, for appellants. Irwin & Irwin and E. W. Witmer, for respondent.

BELCHER, C. Joseph A. Wax was a resident of and died in El Dorado county on February 4, 1893. His only surviving heirs were three sisters and one brother. He left a paper purporting to be his last will and testament, which was thereafter duly presented for probate to the superior court of that county. Two of the sisters and the brother appeared and filed written opposition to the probate of the alleged will, upon the ground that when it was executed the decedent was not of sound and disposing mind. The issue thus raised was tried before a jury, and the verdict was against the contestants. Thereupon judgment was entered admitting the will to probate, and from that judgment and an order denying their motion for a new trial the contestants appeal. The only points made for a reversal are that the court erred in certain rulings upon the admission of evidence.

1. William Wax, one of the contestants, was called as a witness for them, and testified that the decedent was his brother, and that his manner was peculiar and strange; that

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[1] Civ. Code, § 3515, provides: "He who consents to an act is not wronged by it."

[2] Civ. Code, § 3516, provides: "Acquiescence in error takes away the right of objecting to it."

[3] Civ. Code, § 3521, provides: "He who takes the benefit must bear the burden."

their mother made a deed to them jointly, prior to the making of the deed by her to decedent, and that decedent told him what became of the deed. He was then asked, "What did he say became of that deed?" The question was objected to as irrelevant and immaterial, and the objection sustained. An exception was reserved, and it is now urged that the ruling was erroneous. Counsel say: "Suppose the answer had been that deceased ate the deed in his soup, or cut it up as a salad, or burned it and used the ashes as snuff, or soaked it in vinegar and drank it as wine, or that he carried it around with him in his pocket as a charm, or kept it in his boot as a preventive to rheumatism, or that he had thrown it away or fed it to his cattle or his dogs; certainly such an answer would have tended to show that his mind was affected, and would have been proper evidence for the jury to consider in determining the issue presented to them." It does not appear when either of the deeds referred to was made, nor what land or property, if any, was transferred or attempted to be transferred thereby. Both deeds may have been made many years before the execution of the will in contest. Contestants made no offer to prove that the deed to decedent was treated or disposed of by him otherwise than as deeds usually are by the holders thereof. The suggestions of counsel, therefore, as to possible answers to the question objected to, are without weight, and deserve no consideration. Under the circumstances shown, the question was entirely irrelevant and immaterial, and the objection to it was properly sustained.

2. Charles F. Irwin and Fred Irwin were attorneys at law, practicing their profession as partners under the firm name of Irwin & Irwin, at Placerville, in El Dorado county. The proposed will was drawn in their office by Fred Irwin on January 18, 1893. After it was drawn the testator subscribed his name thereto, and declared to the two Irwins that the instrument was his will, and they, at his request and in his presence, and in the presence of each other, signed it as attesting witnesses. Fred Irwin was called as a witness for the proponents, and, after testifying to the preliminary facts, was asked: "Now, Mr. Irwin, you will please proceed and relate in narrative form all that occurred between you and Joseph Anton Wax on the 18th day of January, 1893." Counsel for contestants objected to the question upon the ground that it called for confidential communications between client and attorney, and the witness had no right to reveal them, and thereupon proceeded to question the witness further. At the conclusion of the questions the objection was renewed, when one of the attorneys for proponents stated that he wished to argue the question, and thereupon the attorney for contestants stated that rather than lose the time he would withdraw his objection. The witness then went on to testify at length on direct and cross-examination, and at the conclusion of his evidence contestants moved to strike it out upon the ground that the witness was acting as attorney for Wax at the time, and the statements he made were within the provisions of subdivision 2 of section 881 of the Code of Civil Procedure. The motion was denied and an exception reserved. Charles F. Irwin was also a witness for proponents, and was asked, among other things, to state everything that occurred between him and the testator on the day the will was executed. The testimony was objected to as being a violation of a confidential communication made between client and counsel, and the objection was overruled and exception taken. It is urged that these rulings were erroneous and prejudicial to contestants.

As to the refusal to strike out the testimony of Fred Irwin, it is enough to say that when contestants withdrew their objection to the question propounded to him they effectually deprived themselves of the right to afterwards move to have his testimony stricken out. People v. Long, 43 Cal. 444; People v. Rolfe, 61 Cal. 540; People v. Samario, 84 Cal. 484, 24 Pac. 283. As to the other objections raised under this head, it must be held that, when the testator requested the Irwins to sign the will as attesting witnesses, he in effect consented that whenever the will should be offered for probate they might be called as witnesses and testify to any facts, within their knowledge, necessary to establish its validity. In New York, where the statute in regard to the right to examine an attorney as to communications made to him by his client is substantially the same as ours, the court of appeals held in Re Will of Coleman, 111 N. Y. 220, 19 N. E. 71, that, where the attorney is requested by the testator to sign the attesting clause of the will as witness thereto, this is an express waiver, within the meaning of the Code, of the pledge of secrecy imposed thereby, and authorizes the disclosure. The court said: "The act of the testator in requesting his attorneys to become witnesses to his will leaves no doubt as to his intention thereby to exempt them from the operation of the statute, and leave them free to perform the duties of the office assigned them, unrestrained by any objection which he had power to remove." In Wisconsin the statute provides that "an attorney or counselor shall not be allowed to disclose a communication made by his client to him, or his advice given thereon, in the course of his professional employment." In McMaster v. Scriven, 85 Wis. 162, 55 N. W. 149, the contest was in regard to the probate of the will of one Susan R. Pitt, deceased. The paper propounded as such last will was drawn by J. G. Wickhem, an attorney, and signed by him as one of the attesting witnesses. The court said: "The testatrix requested Mr. Wickhem to sign the will, which was the result of the communications between them, as a subscribing witness, and he signed it accordingly. This must be held to be a waiver of objection to his competency, so as to leave the witness free to perform the duties of the position, and to testify to any matter in relation to the will and its execution of which he acquired knowledge by virtue of his professional relation, including the mental condition of the testatrix at the time." In Doherty v. O'Callaghan, 157 Mass. 90, 31 N. E. 726, the appeal was from a decree admitting to probate the will of one Patrick Grealy. Thomas J. Gargan, an attorney at law, was permitted to testify, against the objection and exception of appellants, in regard to what was said to him by Grealy when the latter came to see him for the purpose of having his will drawn. The appellants contended that the communications were privileged, and therefore inadmissible. The court, after reviewing the authorities, said: "Undoubtedly, while the testator lives the attorney drawing his will would not be allowed, without the consent of the testator, to testify to communications made to him concerning it, or to the contents of the will itself; but after his death, and when the will is presented for probate, we see no reason why, as a matter of public policy, the attorney should not be allowed to testify as to directions given to him by the testator, so that it may appear whether the instrument presented for probate is or is not the will of the alleged testator." And see, also, subdivision 10 of section 1870 of our Code of Civil Procedure, which provides: "The opinion of a subscribing witness to a writing, the validity of which is in dispute, respecting the mental sanity of the signer," may be given in evidence.

3. David S. Simon was called as a witness for proponents, and testified that he had resided in Placerville about 35 years, and was engaged in the business of selling dry goods, clothing, boots, and shoes, under the firm name of Simon & Son, and was so engaged in November, 1890; that he knew Joseph Wax "some,—had a slight acquaintance with him"; that some time in November Wax came to him and wanted to know if he could borrow $1,200, and said he wanted it for one year; that witness inquired about the property offered as security, and found the loan would be safe, and then told him he could have the money; that witness had a mortgage made out, which was executed, and then let him have the money; that witness closely observed Wax when the loan was being negotiated, and at the end of the year the money, with the interest thereon, was repaid by him in full. The witness was then asked: "How did he conduct the transaction of borrowing the money, paying the interest, etc.?" The contestants objected to the question, upon the ground that it was irrelevant and immaterial; that it called for the opinion of the witness, and not a statement of facts; and that the proper foundation had not been laid. The objection was overruled and an exception reserved, and thereupon the witness answered: "He acted like any rational man would; like anybody else would." There was no error in this ruling. The question did not call for an opinion of the witness, but for a statement as to the conduct and appearance of Wax at the time he made the loan and paid it. The question was relevant and material, and was proper under the law as declared in People v. Lavelle, 71 Cal. 351, 12 Pac. 226, and in Holland v. Zollner, 102 Cal. 633, 36 Pac. 930, and 37 Pac. 231. The witness was further asked: "From your acquaintance with the man, from his manner of transacting business with you, what is your opinion of the soundness or unsoundness of his mind at these times?" The contestants objected to the question, upon the ground that it was irrelevant, incompetent, and immaterial, and that no foundation had been laid for it, in that it was not shown that the witness was intimately acquainted with the man. The objection was overruled and an exception reserved, and thereupon the witness answered: "As stated before, he acted like any rational man would. The time we done business with him, as far as my opinion goes, his mind was perfectly sound." Contestants moved to strike out the answer, on the ground that it came in under objection, and was irrelevant, incompetent, and immaterial, as the witness had no intimate acquaintance with the man. The motion was denied, and an exception taken.

It is earnestly urged that these rulings were erroneous, under subdivision 10 of section 1870 of the Code of Civil Procedure, which provides that "the opinion of an intimate acquaintance respecting the mental sanity of a person, the reason for the opinion being given," may be given in evidence. It is difficult to define definitely what constitutes "an intimate acquaintance" within the meaning of the statute, and hence it has been held by this court that the matter is left largely to the discretion of the trial court. People v. Pico, 62 Cal. 50; Estate of Carpenter, 94 Cal. 406, 29 Pac. 1101; Wheelock v. Godfrey, 100 Cal. 578, 35 Pac. 317. In the case first cited it is said: "The witnesses having shown themselves respectively to have been acquainted with the defendant, the determination of the question as to whether that acquaintance was of an intimate character was within the discretion of the court below, with the exercise of which, there being no abuse, this court will not interfere." And in the case last cited it is said: "From necessity, much must be left to the discretion of the trial court in determining whether or not a given witness is an 'intimate acquaintance' within the purview of the statute." Here, looking at all the evidence given by the witness, we cannot say that there was such a clear abuse of discretion by the court below, in overruling the objection to the question propounded and in refusing to strike out the answer thereto, as would justify a reversal of the order denying a new trial.

The above are all the points made for a reversal, and, as no material error is disclosed by the record, the judgment and order appealed from should be affirmed.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

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106 Cal. 296

Ex parte WONG YON TING. (No. 21,177.)

(Supreme Court of California. March 9, 1895.)

CONSTITUTIONAL LAW—RIGHT TO JURY TRIAL.

One charged with practicing medicine, without having procured a certificate, in violation of Act April 3, 1876, as amended, is entitled to a trial by jury.

In bank.

Habeas corpus by Wong Yon Ting. Petitioner discharged.

A. B. Hotchkiss and John T. Jones, for petitioner. M. T. Owens, for respondent.

McFARLAND, J. The petitioner is in the custody of the chief of police, under a conviction in the police court of the city of Los Angeles of the offense of practicing medicine without having procured a certificate from a board of examiners, contrary to the provisions of "An act to regulate the practice of medicine," approved April 3, 1876, and an act supplemental thereto, which went into effect April 1, 1878 (St. 1875–76, p. 792; St. 1877–78, p. 918); and he asks to be discharged from such custody on a writ of habeas corpus heretofore issued out of this court.

Many of the grounds upon which the discharge is asked cannot be considered on this writ. The only question before us necessary to be decided is whether or not the appellant was entitled to a jury trial. He demanded a trial by jury; but his demand was denied, and the police judge proceeded to try and convict him without a jury. It seems to be admitted by counsel for respondent that if petitioner was entitled to a jury trial, and had demanded it, then the judge, sitting without a jury, did not constitute a court having jurisdiction to try the case. The point that the refusal of a jury can be reviewed only on appeal is not made. The case of Taylor v. Reynolds, 92 Cal. 573, 28 Pac. 688, seems to be determinative of the case at bar in favor of petitioner. Indeed that case was not so strong in favor of the petitioner as the one at bar; for in that case the violation of a city ordinance was involved, while here the petitioner was charged with a criminal offense created by a state law. But it was held in the former case that the action was a general "criminal proceeding," and that therefore the petitioner was entitled to a jury trial; and in the opinion the following language used by Dillon in his work on Municipal Corporations is quoted approvingly: "So here, when the act or omission sought to be punished by imprisonment under a municipal ordinance is in its nature not peculiarly an offense against the municipality, but rather against the public at large, and when it falls within the legal or common-law notion of a crime or misdemeanor, and especially when, being of such a nature, it is embraced in the criminal code of the state, then the constitutional guaranties intended to secure the liberty of the citizen and the right of a trial by jury cannot be evaded by the nature of the powers vested in the municipal corporation or the nature of the jurisdiction conferred upon the municipal courts." And the foregoing language applies with much greater force to a case like the one at bar, where the offense charged arises under a general state law, than to a case where the offense arises under a mere municipal ordinance. It is also an answer to the contention that the so-called "Whitney Act" (Deering's Pol. Code, pp. 716, 717) gives jurisdiction to the judges of police courts of cities "having thirty thousand and under one hundred thousand inhabitants," which included Los Angeles and Oakland, to try misdemeanors without a jury. The language of section 5 of said act relied on is as follows: "And in such of the cases enumerated in this section in which trial by jury is not secured by the constitution of the state, he may proceed in the first instance without a jury; but on appeal the defendant shall be entitled to trial by jury in the superior court." This language is at least quite uncertain and ambiguous. It is difficult to determine what cases are "enumerated in this section," or whether it is intended to give the accused absolutely a trial by jury in the superior court, if he chooses to appeal. If valid otherwise, it would be a grave question whether it is not invalid for want of uniform operation, in that under its provisions a person charged with violating a general law in any other part of the state would be entitled to a jury trial, while a person charged with the same offense in either of said two cities would be denied the right to such a trial. However, the words, "in which trial by jury is not secured by the constitution," leave the whole question open; and the legislature, under the authorities above cited, did not have the power to take away the constitutional right to a jury trial in a case like the one at bar. The petitioner was accused of an offense "against the public at large," and falling "within the legal or common-law notion of a crime or misdemeanor," and "embraced in the criminal code of the state," and was therefore entitled to the constitutional guaranty of the right to a trial by jury.

There are, no doubt, some cases which do not come within the constitutional guarantee that "the right of trial by jury shall be secured to all and remain inviolate." It has been held to refer generally to the right of trial by jury as it existed at common law and at the time the constitution was adopted. With respect to the civil as distinguished from the criminal law, the right never existed in purely equity cases or in many other proceedings for the enforcement of private rights. It has been held also not to apply here to certain statutory proceedings not known to the common law. It has also been sometimes said in a general way, when the point was not before the court, that it does not apply to a crime created by statute and which did not exist at common law; but this certainly cannot be taken as a correct general statement of the law. No court would hold, for instance, that a person charged with the statutory crimes of embezzlement or displacing part of a railroad, which is a felony, could be legally tried without a jury. Modern improvements and changes in society and business have made it necessary to create felonies unknown to the common law; but, if they had existed in the last century, they certainly would have been triable in England by a jury. In fact, the general rule at common law proper was that accusations of all crimes involving loss of liberty as a punishment were triable by a jury; but parliament (which is supreme) provided by various statutes that there should be summary trials by justices of the peace, without a jury, of certain petty offenses. Blackstone refers to the matter, as follows: "By a summary proceeding I mean principally such as is directed by several acts of parliament (for the common law is a stranger to it, unless in the case of contempts) for the conviction of offenders and the inflicting of certain penalties created by those acts of parliament. In these there is no intervention of a jury, but the party accused is acquitted or condemned by the suffrage of such person only as the statute has appointed as his judge." He protests against the extent to which such statutes had gone, and says: "But it has of late been so far extended as, if a check be not timely given, to threaten the disuse of our admirable and truly English trial by jury, unless only in capital cases." In addition to offenses against the revenue laws and attachments for contempts, he describes the class of ordinary petty offenses provided for by such statutes as follows: "Another branch of summary proceedings is that before justices of the peace in order to inflict divers petty pecuniary mulcts and corporal penalties denounced by act of parliament for many disorderly offenses, such as common swearing, drunkenness, vagrancy, idleness, and a vast variety of others, for which I must refer the student to the justice books formerly cited, and which used to be formerly punished by the verdict of a jury in the court-leet." 4 Bl. Comm. 281. And again, speaking of the right of jury trial, he says: "So that the liberties of England cannot but subsist so long as this palladium remains sacred and inviolate, not only from all open attacks (which none will be so hardy as to make), but also from all secret machinations which may sap and undermine it, by introducing new and arbitrary methods of trial by justices of the peace, commissioners of the revenue, and courts of conscience. And however convenient these may appear at first (as doubtless all arbitrary powers, well executed, are the more convenient), yet let it be again remembered that delays and little inconveniences in the forms of justice are the price that all free nations must pay for their liberty in more substantial matters." Id. p. 350. From the foregoing it clearly appears that those summary proceedings under special statutes were marked innovations upon the common law. But, as they were in existence at the time of the separation of the American colonies from England, it is, perhaps, proper to say that the guaranties in the various state constitutions of the right of jury trial do not prohibit the legislature from providing for summary proceedings without a jury, in cases of such petty offenses as are enumerated in said English statutes, or in cases where the offenses so dealt with are intrinsically of the same nature and degree as those mentioned in said statutes. But the rule cannot safely be made much broader. This rule would, no doubt, allow the legislature to provide for summary proceedings without a jury, against those violating municipal by-laws, proper where the offenses charged are in their nature similar to those petty offenses mentioned in said English statutes. See 1 Dill. Mun. Corp. § 433. Of course, cases may arise very difficult of assignment to the proper side of the line of constitutional right to a jury trial, but no absolute rule can be formulated that will dispose of all possible cases. However, in the case at bar the petitioner was clearly entitled to a jury trial. The offense with which he was charged was a violation of a general law of the state; it was punishable by a fine of $500 and imprisonment for on year, and his conviction destroyed, practically, his means of livelihood; it was not in any sense a minor or petty offense; and such a crime would have been triable at common law by a jury. Parliament could, of course, have provided that a trial for such a crime, or for any crime, should be without a jury, because parliament is omnipotent; but American legislatures have no such power, for they are limited by written constitutions. It is ordered that the petitioner be discharged from custody.

We concur: VAN FLEET, J.; HARRISON, J.; GAROUTTE, J.

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106 Cal. 332

## RAGSDALE v. NAGLE. (No. 15,741.)

(Supreme Court of California. March 11, 1895.)

SALE OF GOOD WILL—BREACH OF CONTRACT.

1. A breach of his covenant, by one who conveys his interest in the business of abstract

maker, that he will not engage in such business in the county so long as it is carried on by the purchaser, cannot be justified by him on the ground that the purchaser was not carrying on such business because of his having previously transferred the property engaged therein to a certain corporation, where such corporation was formed for the sole purpose of raising funds, and was conducted for the exclusive benefit of the purchaser who owned practically all its stock.

2. A contract otherwise valid is not void in toto merely because, in certain independent particulars, it is broader than, or goes beyond the scope of, the law.

3. The searching or abstracting of records is a "business," within Civ. Code, § 1674, providing that one who sells the good will of a business may agree with the buyer to refrain from carrying on a similar business.

Department 1. Appeal from superior court, Sonoma county; R. W. Crawford, Judge.

Action by J. W. Ragsdale against F. G. Nagle to enjoin the defendant from carrying on the business of searcher of records or abstracter, under an alleged contract, whereby defendant had agreed not to carry on such business in a specified territory. From a judgment granting the injunction as prayed for, and an order denying a new trial, defendant appeals. Affirmed.

J. T. Campbell, A. B. Ware, and Ruthledge & Pressly, for appellant. J. A. Barham and C. S. Farquar, for respondent.

GAROUTTE, J. This is an action to restrain the defendant from carrying on the business of searcher of records, or abstracter, in the county of Sonoma. An injunction as prayed for was issued by the trial court, and an appeal has been taken from the judgment, and from the order denying a new trial. The cause of action is based upon a certain contract entered into between plaintiff and one Brown, upon the one side, and defendant Nagle, upon the other. At the date of the contract, both plaintiff and defendant were engaged in the business of abstracting in the county of Sonoma, and, in consideration of the sum of $7,000, Nagle transferred to Ragsdale and Brown the personal property then used by him in the business, also the good will; and he further covenanted that he would not carry on the business of searcher of records in Sonoma county, or the business of conveyancing in the city of Santa Rosa, so long as either Ragsdale or Brown should carry on a like business in said county. In accordance with the terms of his agreement, defendant ceased business for the time being, but some months thereafter re-entered the field and was actively engaged in the abstract business at the time this action was begun. Defendant denies that he has violated the terms of his agreement, and justifies his acts upon the plea that neither plaintiff, Ragsdale, nor Brown was engaged in the business when he entered the field the second time. Upon this question it appears by the evidence that, prior to the contract with the defendant, plaintiff, Ragsdale, had transferred to a corporation known as the Sonoma County Abstract Bureau all the personal property used by him in the making of abstracts, and that, subsequent to the contract with Nagle, he transferred to this corporation all the personal property secured by him and Brown under said contract. And, to put the matter more concisely, defendant claims that neither Ragsdale nor Brown was engaged in the business of abstracting at the time he re-entered therein, but that their business had passed to the said corporation, and consequently he was absolved from the covenants of the contract.

1. The court found that during these times plaintiff had continuously carried on the business of making abstracts, searching records, and conveyancing in Sonoma county, and this finding meets with our approval. The evidence discloses: That Ragsdale did business under the name of the Sonoma County Abstract Bureau prior to its incorporation, and that it was incorporated by him for the sole purpose of securing funds by placing the stock as collateral. He subscribed for all the stock save 40 shares, which passed to the other four directors without consideration, they being accommodation directors only. That during this time, and up to the date of the aforesaid contract with the defendant, plaintiff had full and entire charge of the business; hired, paid, and discharged employés; appropriated the receipts; accounted to nobody; did not consult the directors; and in every way carried on the business as an owner and proprietor. This was all done, not only without objection by the directors of the corporation, but with their knowledge and consent. As far as conducting the business was concerned, the corporation was entirely passive, and, judged by the evidence, it certainly was a matter in which it manifested no interest. The corporation was created, and the title to the property used in the abstract business was vested in it, for a certain purpose, to wit, the raising of money. It served the purpose of its creation, and, having done so, appears to have been entirely satisfied. Such was the condition of things at the date of the contract, and they so remained. The business was conducted the same after the making of this contract as it was before. If Ragsdale was out of the business at any time thereafter, he was out of the business at the time he entered into the contract; yet such cannot be the case, and counsel for defendant do not claim it. It is claimed that Ragsdale went out of business when he transferred the personal property obtained from Nagle to the corporation; but such a result does not follow. The location of the legal title to this property in some particular person or corporation in no way casts light upon the question at issue. That fact in no way determines who is carrying on the business of abstracting by the use of that property. The title to the property

may be in one person, and the business of abstracting with it in another.

2. It is claimed that the contract is void because it goes beyond the scope of the law in certain particulars. For present purposes only, let us concede that the contract is broader in certain respects than the law; still, it is entirely valid in all those particulars in which it comes within the provisions of the law. Brown v. Kling, 101 Cal. 295, 35 Pac. 995; City Carpet Works v. Jones, 102 Cal. 506, 36 Pac. 841.

3. Section 1674 of the Civil Code says that one who sells the good will of a "business" may agree with the buyer to refrain from carrying on a similar "business." It is now claimed that abstracting is not a business, but a profession or trade; and that, therefore, the provisions of the Code do not apply to the present case. It is sufficient to say the section is broad enough to bring the present case within its scope. As to the meaning of the word "business," see 2 Am. & Eng. Enc. Law, p. 699.

For the foregoing reasons, the judgment and order are affirmed.

We concur: HARRISON, J.; VAN FLEET, J.

108 Cal. 306

## LOWER KINGS RIVER RECLAMATION DIST., NO. 531, v. PHILLIPS et al.

(No. 18,341.)

(Supreme Court of California. March 11, 1895.)

RECLAMATION OF SWAMP LAND—ASSESSMENT—CONCLUSIVENESS—SUFFICIENCY OF DESCRIPTION—QUALIFICATION OF COMMISSIONERS.

1. An order of the board of supervisors approving the organization of a reclamation district organized under Pol. Code, § 3446, is conclusive, in an action by the district to recover an assessment against the owner of land situated therein, that the district was lawfully organized, and that such land is overflowed land, but not that the assessment was lawfully made, so as to preclude evidence that his land was not benefited, and was excessively assessed.

2. Such landowner is not deprived of the right to defend because of the alleged inequality of the assessment on the ground that such defense is a collateral attack upon the determination of the assessment commissioners, there being no law giving him an opportunity to be heard at the time of such assessment of his land.

3. The lands included in a reclamation district assessment are sufficiently described in a list which contains such abbreviations as are uniformly used in such lists, and which must have been understood by all taxpayers who examine them.

4. A person appointed a commissioner to view and assess the lands in a reclamation district is a "disinterested person," within Pol. Code, § 3456, where he owns no land in the district, and has no pecuniary interest that could have affected the assessment, although he was secretary of the board of trustees of the district, and received a salary as such.

Commissioners' decision. Department 1. Appeal from superior court, Fresno county; William W. Cross, Judge.

Action by Lower Kings River Reclamation District, No. 531, against P. C. Phillips and another to recover from the said Phillips an assessment levied on his land by said district, and also to procure an order for the sale of the land to satisfy the assessment. From a judgment in favor of plaintiff, and denying a new trial, defendants appeal. Reversed and remanded.

Daggett & Adams, for appellants. S. C. Denson, for respondent.

VANCLIEF, C. The plaintiff purports to be a corporation organized under the provisions of Pol. Code, § 3446 et seq., for the reclamation of swamp and overflowed lands, a majority of which are situate in the county of Fresno, and the remainder in the county of Tulare; and the proceedings for the organization of which were taken by petition to the board of supervisors of the county of Fresno. The object of this action is to recover from the defendant Phillips an assessment of $1,542.45, levied upon a tract (300 acres) of his land situate within the plaintiff district, and in the county of Fresno, where this action was tried; and also to procure an order for the sale of said land to satisfy the assessment. The San Francisco Savings Union (a corporation) is made a party defendant on the ground that it claims a lien on the assessed land. The unverified complaint is composed of allegations of all facts necessary to show that the district was duly organized, that the assessment was properly levied, and that the defendant refused to pay the assessment. The answer of defendants admits that the defendant Phillips owns the land alleged to have been assessed to him, but denies all other allegations of the complaint; and then alleges the following further defenses: "(1) That defendant's lands were not subject to be embraced in any swamp and overflowed land district formed under the provisions of the Political Code, for the reason that they are not, and never have been, swamp or overflowed land, but are, and always have been, high and dry lands; that they were originally owned by the government of the United States, and never granted to the state of California, but were granted by said government directly to the grantors of the defendant Phillips under the laws of congress providing for the sale of lands belonging to the government of the United States. (2) That the commissioners appointed to view and assess said lands were not disinterested persons; that one of them, F. A. Blakely, was interested, and therefore disqualified to act as such commissioner, because he was secretary of the board of trustees of plaintiff, under a salary, at the time he was appointed, and during all the time he acted, as such commissioner. (3) That the commissioners appointed to view and assess the lands in said district did not view the lands which they assessed to the defendant Phillips, and did not assess them in proportion to the whole expense of the works, and to the benefits resulting to them from such works, but, on the contrary, fraudulently and arbitrarily assessed the lands of the defendant Phillips without regard to any benefit to them resulting from said works; and that said works do not and will not benefit defendant's lands in any form or to any extent whatever." The court found as facts "that all and singular the allegations contained in plaintiff's amended complaint are true as averred," and further specially found for plaintiff on all issues tendered by the answer, and thereupon rendered judgment in favor of plaintiff in accordance with the prayer of the complaint. The defendants have appealed from the judgment and from an order denying their motion for a new trial.

The assessment list shows that the whole number of acres assessed was 8,490; that the amount of the assessment was $42,786.48, and that the average rate was $5.04 per acre; that 28 distinct tracts of land were assessed, each to a distinct owner, at rates ranging from $4.11 to $5.55 per acre, except one tract of 26 acres, which was assessed to a railroad company at $10.28 per acre, while the rate of the assessment on defendant's tract of 300 acres involved in this action is $5.14 per acre, being 10 cents above the average. For the purpose of proving that the 300 acres of land assessed to defendant was not and would not be benefited by the reclamation works, and that the assessment thereof at $5.14 per acre had been arbitrarily imposed, without regard to benefits, and was grossly excessive and oppressive, and also to show that the district was not lawfully organized, the defendant offered certain documentary evidence and the testimony of several witnesses. All such evidence was objected to by plaintiff's counsel on the ground of incompetency for the following reasons: (1) That the order of the board of supervisors approving the organization of the district is conclusive evidence that all the lands included in the district are swamp and overflowed lands in the sense of section 3446 of the Political Code, and are susceptible of benefit by reclamation; and (2) that the action of the commissioners in apportioning the assessment is likewise conclusive that the assessment of defendant's land is proportionate to the benefits resulting from the reclamation works. The court heard the evidence offered by defendant without ruling upon the objections thereto at the time they were made, but with the understanding that the questions raised by the objections would be expressly decided before the decision of the case. The substance of the evidence thus received subject to the objections was: (1) A map of the township according to government survey, showing that defendant's land was segregated from swamp and overflowed land by the government survey; (2) patent for said land from the United States to defendant's grantor; (3) written protest of defendant and others against the inclusion of their lands in the district, presented to the board of supervisors of Fresno county in answer to the petition for the formation of the district; (4) the testimony of the defendant Phillips and five other witnesses, —P. Byrd, George D. Wood, J. T. Brooks, M. C. Wood, and T. J. Hames,—tending to prove that only a small part of defendant's land had ever been overflowed, and only five or six times within 30 years; that such overflows did not prevent the raising of a crop thereon during the years of the overflow; and that defendant's land was not swamp or overflowed land, and would not be benefited by the reclamation works. Before finding the facts, the court expressly sustained the objections of plaintiff to all evidence offered by defendant "touching the character of the lands in the district, the due incorporation of plaintiff, or the question of benefits to the lands"; to which rulings defendants duly excepted. The most important question to be decided is whether or not the court erred in thus excluding defendant's evidence. The evidence excluded was amply sufficient to justify a finding that at least five-sixths of defendant's land was not, in fact, swamp nor overflowed land, and would not be benefited by the reclamation works.

1. The due organization of the district was alleged in the complaint and denied in the answer, and therefore was in issue; and this issue was tendered by plaintiff, and was material. On the part of the plaintiff, the affirmative thereof was proved by the order of the board of supervisors of Fresno county, made upon a proper petition, after due notice to, and appearance and answer (remonstrance) by, the defendant in this action. That order of the board of supervisors was, therefore, conclusive evidence against the defendant that the district was lawfully organized, including his land (though it may not have been so against the state), because it was an adjudication of the same issue tried in this case, and between the same parties, and not because the attack upon that order was a collateral attack, nor because the district may have been a de facto corporation. The rules as to collateral attack and de facto corporations do not apply, it being a case of res judicata. Van Fleet, Coll. Attack, § 17, and cases there cited as to the distinction between res judicata and collateral attack. In this connection it is to be noted that the grounds of the written remonstrance filed by defendant with the board of supervisors in answer to the petition for the formation of the district were that defendant's land was not swamp nor overflowed land, and would not be benefited by the proposed works in any degree. Therefore the order of the board including defendant's land in the district is conclusive against him that the land included was of a character which the law authorized to be included in the district. But the question whether the law au-

thorizes the inclusion of land, under any circumstances, which is not swamp nor overflowed land, or which would not be benefited, is not a question of fact; and, as a question of law, does not appear to have been decided by the board of supervisors. Perhaps lands which are not, in fact, swamp nor overflowed may be benefited in some degree by the reclamation of adjacent swamp and overflowed land; and in some cases it may be impracticable to form a district without including some land that is not swamp nor overflowed. But, however this may be, the law is imperative that all lands included in a district must be assessed in proportion to benefits resulting from the reclamation works; and, consequently, that lands which are not in any way benefited by such works should not be assessed at all. From the foregoing considerations it follows, I think, that the court did not err in excluding all evidence offered to prove that the plaintiff district was not lawfully organized.

2. But I think the court erred in excluding the evidence tending to prove that defendant's land was not benefited by the reclamation works, and was arbitrarily and excessively assessed, without regard to proportionate benefits. As to this, also, the pleadings raised a material issue tendered by the plaintiff by the allegations that the duly-qualified commissioners "did jointly view each and every tract thereof [the district], and did assess upon the same charges proportionate to the entire amount assessed and to the benefits which would result to each tract from the reclamation works." This allegation having been denied, it devolved upon the plaintiff to prove it; and it is claimed by respondent's counsel that plaintiff did conclusively prove it by the introduction in evidence of the assessment list duly authenticated by the certificate of the commissioners. The contention of respondent's counsel that the assessment roll in due form is conclusive evidence that the assessment was lawfully made in proportion to benefits, etc., seems to find countenance in the cases of People v. Hagar, 52 Cal. 181, and People v. Hagar, 66 Cal. 59, 4 Pac. 951. But in Reclamation Dist. No. 108 v. Evans, 61 Cal. 104, it was held otherwise. That was an action to enforce a swamp-land district assessment, in which it was contended that the law authorizing such assessment is unconstitutional, since it purports to authorize a deprivation of the taxpayer of his property without due process of law, in that it affords him no opportunity to be heard upon the question as to whether the assessment is proportionate to benefits, as the law requires it to be. The only answer to this by this court was that, inasmuch as the assessment could be enforced only by an action to which the taxpayer must be made a party, and to which "the Code does not limit the defenses," he is thereby given his day in court, with full opportunity to contest the charge before it is declared a lien upon his land, or reduced to a personal judgment against him. And it appeared that in that case the defendant had set up in his answer "that his lands were not, and could not have been, benefited by the works of reclamation," but that the trial court had expressly found against him on that issue; and this court affirmed the judgment as being the result of "due process of law." In a later case than any of those above noticed, viz. Swamp-Land Dist. v. Gwynn, 70 Cal. 566, 12 Pac. 462, the identical question under consideration arose, and was decided adversely to the views of respondent's counsel. In that case the plaintiff, to prove the assessment, offered the duly-certified assessment roll, to which the defendant objected, and offered to prove that the assessment was arbitrarily made, and not proportionate to benefits, etc. To this evidence the plaintiff objected on the ground that it was irrelevant, immaterial, and incompetent; and the trial court sustained the objection. This was held to be error, for which alone the judgment was reversed; this court saying that the assessment roll "was only prima facie evidence, and, as such, was subject to be contradicted. * * * We think that, notwithstanding the certificate signed by the commissioners, the defendants were entitled to prove, if they could, that the assessment involved in this case was not made in conformity to the requirements of the law, and so was not binding upon them, and that the court erred in excluding the proper evidence"; citing People v. Coghill, 47 Cal. 361; People v. Hagar, 49 Cal. 229; and People v. Ahern, 52 Cal. 208,—which apply the same principle to a different defect in assessments by swamp-land districts.

The constitutional question raised in Reclamation Dist. v. Evans, supra, as to due process of law, arose in Hagar v. Reclamation Dist. No. 108, 111 U. S. 701, 4 Sup. Ct. 663, in which the opinion of the court was written by Mr. Justice Field, who admits that where a tax or assessment is required to be levied in proportion to the value of the property assessed, or in proportion to benefits to such property, it would not be due process of law to enforce the payment of such tax or assessment without giving the owner of the land assessed an opportunity to be heard on the question of value or benefits; but holds that, where the assessment can be enforced only by an ordinary action at law, to which the taxpayer is made a party, it is immaterial whether or not he had notice or opportunity to be heard before the commencement of the action. "In such cases," says the learned justice, "all the opportunity is given to the taxpayer to be heard respecting the assessment which can be deemed essential to render the proceedings due process of law. * * * The assessment under consideration could, by the law of California, be enforced only by legal proceedings, and in them any defense going either to its validity or amount could be pleaded. * * * In them he may set forth, by way of defense, all his grievances;" citing Reclamation Dist. No. 108 v. Evans, supra. It is not pretended that the defendant had any opportunity to be heard as to the propriety or legality of the assessment before this action was commenced; but it is claimed that, having been heard as to the propriety of the formation of the district, and the inclusion of his lands therein, the order of the board of supervisors including his lands is conclusive of the legality of the subsequent assessment of them. But the legality of no subsequent assessment was in question, or could have been questioned, before the supervisors on the hearing of the petition for the formation of the district. While, as we have seen, the order of the board of supervisors was conclusive, as against the defendant, that the district including his lands was lawfully organized, it was not, and could not have been, so far-reaching as to touch the question whether subsequent assessments would be lawfully imposed according to benefits.

It is further contended that defendant's defense is a collateral attack upon the determination of the assessment commissioners, and therefore not permissible. Conceding it to be a collateral attack (which I think questionable), yet a collateral attack is precluded only where the judgment, order, or determination attacked was, or may be presumed to have been, the result or effect of due process of law, which implies that the party against whom such judgment, order, or determination was rendered or made was heard, or had an opportunity to be heard, in his defense. But where it does not appear and cannot be presumed that such party was heard, or had an opportunity to be heard, any judgment, order, or determination against him is without due process of law and void; and, consequently, may be attacked collaterally. That the Political Code provides no opportunity for the owner of the land assessed to be heard as to the equality of assessments according to benefits, except in defense of the action for the enforcement of such assessments, is not doubted, and has been so decided (Reclamation Dist. v. Hagar, 66 Cal. 54, 4 Pac. 945; Hagar v. Reclamation Dist. No. 108, 111 U. S. 701, 4 Sup. Ct. 663); nor does any other law provide for such opportunity. Therefore there is no ground upon which it can be presumed that defendant was heard or had an opportunity to be heard, and it does not appear that he was heard. It follows that, if he is to be denied a hearing in defense of this action, he will be deprived of his property without due process of law, contrary to section 13, art. 1, of the constitution of this state, and the fourteenth amendment of the constitution of the United States. As shown in the opinion of Mr. Justice Field, above cited, absolute equality of assessments according to benefits is not practically attainable, and may be only approximated, even by competent and honest assessors or commissioners. Yet any material overrating of benefits and consequent assessments, injurious to the taxpayer, and not within the maxim de minimis, may be pleaded and proved as a defense to an action to enforce the assessment, whether such overrating be the result of fraud, negligence, or incompetence of the commissioners; for it would be no recompense, and but poor consolation, to the landowner who has been overtaxed without a hearing to be assured that the unlawful burden put upon him was the result of an honest judgment of incompetent or negligent commissioners. And the issue as to this should be determined by the tribunal of original jurisdiction (whether a court or a board of equalization) according to a satisfactory preponderance of evidence, allowing just weight to what may appear to have been the honest judgment of the commissioners.

3. I think defendant's land is sufficiently described in the assessment list. Although the abbreviations used are not those ordinarily used, they are such as are uniformly used in that list, and must have been understood by all taxpayers who examined them. For example, the W. ½ of S. E. ¼ of section 28, Tp. 17, is described thus: "W.$^2$ of S. E.$^4$ of Sec. 28, Tp. 17;" and by such abbreviations all subdivisions of sections in the list are described.

4. It is contended by appellant that F. A. Blakely was disqualified for the office or position of commissioner to view and assess the land, for the reason that he was interested in the matter of those assessments. But the only evidence of his interest is that at the time he was appointed commissioner, and during the time he acted as such, he was the secretary of the board of trustees of the district, receiving a salary. He owned no land in the district, and had no pecuniary interest that could have been affected by the assessments, though he received his appointment to the office of secretary from the trustees of the district, who owned a majority of the land in the district, and held that office at their pleasure. The law (Pol. Code, § 3456) requires the board of supervisors by which the district was formed to "appoint three commissioners, disinterested persons, residents of the county in which the district or some part thereof is situated, who must view and assess upon the lands situated within the district a charge proportionate to the whole expense and to the benefits which will result from such works." I think Blakely was a "disinterested person" in the sense of this section of the Political Code, and that the most that can be properly said against his appointment is that, if his relation to the board of trustees of the district was known to the board of supervisors at the time he was appointed, the appointment was injudicious, because the appointee, under such circumstances, was liable

to a suspicion that he might be improperly influenced by members of the board of trustees of the district.

For the error in excluding evidence offered by the defendant, as above stated, I think the judgment and order should be reversed, and the cause remanded for a new trial.

We concur: BELCHER, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are reversed, and the cause remanded for a new trial.

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## LOWER KINGS RIVER RECLAMATION DIST., NO. 531, v. PHILLIPS et al.

(No. 18,344.)[1]

(Supreme Court of California. March 11, 1895.)

Department 1. Appeal from superior court, Fresno county; M. K. Harris, Judge.

Action by the Lower Kings River Reclamation District, No. 531, against P. C. Phillips and others. There was a judgment for plaintiff, and defendants appeal. Reversed.

Daggett & Adams, for appellants. S. C. Denson, for respondent.

PER CURIAM. This cause being, in all respects, similar to that of Reclamation Dist. v. Phillips (No. 18,341, this day decided) 39 Pac. 630, the judgment and order herein appealed from are reversed upon the authority of that case, and the cause remanded for a new trial.

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## LOWER KINGS RIVER RECLAMATION DIST., NO. 531, v. WOOD. (No. 18,343.)[2]

(Supreme Court of California. March 11, 1895.)

Department 1. Appeal from superior court, Fresno county; M. K. Harris, Judge.

Action by the Lower Kings River Reclamation District, No. 531, against George Wood. There was a judgment for plaintiff, and defendant appeals. Reversed.

Daggett & Adams, for appellant. S. C. Denson and Bradley & Farnsworth, for respondent.

PER CURIAM. This cause being in all respects similar to that of Reclamation Dist. v. Phillips (No. 18,341, this day decided) 39 Pac. 630, having been tried upon the same evidence, the judgment and order herein are reversed upon the authority of that case, and the cause is remanded for a new trial.

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(5 Cal. Unrep. 776)

## LOWER KINGS RIVER RECLAMATION DIST., NO. 531, v. PHILLIPS.

(No. 18,363.)

(Supreme Court of California. March 11, 1895.)

MOTION FOR NEW TRIAL—ASSIGNMENT OF ERRORS.

1. Assignments of error, on a motion for a new trial, in sustaining objections to and refusing to receive certain evidence, will be disregarded where they are not supported by the record, which shows that the court overruled all objections to and admitted such evidence.

2. Assignments of error, on motion for new trial, that the court erred in rendering judgment in favor of defendant, when the decision and judgment should have been for plaintiff, will be disregarded under Code Civ. Proc. § 659, because of being a mere general objection to the final judgment.

Commissioners' decision. Department 1. Appeal from superior court, Tulare county; William W. Cross, Judge.

Action by Lower Kings River Reclamation District, No. 531, against P. C. Phillips to recover an assessment by such district upon defendant's land, situated therein. From a judgment in favor of defendant, and denial of a new trial, plaintiff appeals. Affirmed.

S. C. Denson and Bradley & Farnsworth, for appellant. Daggett & Adams, for respondent.

VANCLIEF, C. The plaintiff is a corporation purporting to have been organized under provisions of Pol. Code, § 3446 et seq., for the reclamation of swamp and overflowed lands situate in the counties of Fresno and Tulare, the proceedings for the formation of which were initiated by petition to the board of supervisors of the county of Fresno. The object of this action is to recover from defendant an assessment of $1,098.18, levied upon a tract (267 acres) of his land situate in the county of Tulare, where this action was tried. The complaint is in the ordinary form, specially alleging all facts necessary to show that the district was duly organized, that the assessment was properly levied, and that defendant had refused to pay the assessment; but was not verified. The answer of the defendant admits that he is the owner of the land alleged to have been assessed to him, but denies all other allegations of the complaint. It then alleges, substantially, the following further defenses: (1) That the lands assessed to him are not, and never have been, swamp or overflowed lands, but always have been high and dry lands originally owned by the government of the United States and never granted to the state of California; and that defendant's grantor purchased said land directly from the government of the United States as not being swamp or overflowed lands, but duly segregated therefrom by the government surveys. (2) That the commissioners appointed to view and assess said lands were not disinterested persons; that one of them, F. A. Blakely, was interested, and therefore disqualified to act as such commissioner, because he was secretary of the board of trustees of plaintiff under a salary at the time he was appointed, and during all the time he acted, as such commissioner. (3) That the commissioners did not view the lands of defendant, and did not assess them in proportion to the whole expense of the works and to the benefits resulting from such works; but, on the contrary, arbitrarily assessed the lands of the defendant without regard to any benefit to them resulting from said works; and that said works do not and will not benefit defendant's lands in any form, or to any extent whatever. Other defenses, more or less technical, were pleaded, but need not be considered. While the court found that the district was duly organized, it found for the defendant upon all other material issues, and thereupon rendered judgment in favor of the defendant.

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[1] Reversed in banc. See 41 Pac. 337.

[2] Reversed in banc. See 41 Pac. 337.

The plaintiff has appealed from the judgment and from an order denying its motion for a new trial. On the appeal from the order, counsel for appellant contends that the court erred in matters of law, and that the evidence is insufficient to justify the findings of fact. The motion for new trial was made on a statement of the case, which contains only the following specifications of error either in law or in fact: "The plaintiff now assigns the following errors of law occurring upon the trial: First. The court erred in sustaining defendant's objections to the assessment list offered in evidence by plaintiff, a copy of which is contained in the foregoing statement, and designated 'Exhibit N.' Second. The court erred in sustaining defendant's objections to and in refusing to receive in evidence the original assessment list of Lower Kings River Reclamation District, No. 531, as made and returned by F. A. Blakely, W. J. Newport, and Frank Laning, commissioners appointed for that purpose by the board of supervisors of Fresno county. Third. The court erred in ruling and deciding that the assessment roll offered in evidence was indefinite, and that the same did not contain sufficient descriptions of the real estate therein described or attempted to be described. Fourth. The court erred in finding and deciding in favor of the defendant, when the finding and decision should have been in favor of the plaintiff. Fifth. The court erred in rendering judgment in favor of the defendant when the judgment should have been in favor of the plaintiff." There is no warrant in the record for the first three of these specifications, since it does not appear that the court sustained any objection to the assessment lists. On the contrary, the court overruled all objections thereto, and admitted both the original assessment roll filed in the county of Fresno, and a copy thereof filed in the county of Tulare. Nor does it appear that the court ruled or decided that the assessment roll offered in evidence was indefinite, nor that it did not contain sufficient descriptions of the real estate therein described or attempted to be described, as stated in the third specification of error. Neither the fourth nor fifth assignment of error is a specification at all of any error in law "occurring at the trial," or of any particular in which the evidence is insufficient. Each is but a general objection to the final judgment. Therefore the statement on motion for new trial must have been disregarded (section 659, Code Civ. Proc.), and the motion was properly denied. On the appeal from the judgment it is enough to say that the findings of fact undoubtedly support the judgment. I therefore think the order and judgment appealed from should be affirmed.

We concur: BELCHER, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order and judgment appealed from are affirmed.

## LOWER KINGS RIVER RECLAMATION DIST., NO. 531, v. HAMES et al.

(No. 18,364.)

(Supreme Court of California. March 11, 1895.)

Department 1. Appeal from superior court, Tulare county; William W. Cross, Judge.

Action by the Lower Kings River Reclamation District, No. 531, against T. J. Hames and others. There was a judgment for defendants, and plaintiff appeals. Affirmed.

S. C. Denson and Bradley & Farnsworth, for appellant. Daggett & Adams, for respondent.

PER CURIAM. This case is similar in all respects to that of Reclamation Dist. v. Phillips (No. 18,363, this day decided) 39 Pac. 634. Upon the authority of that case the judgment and order appealed from in this case are affirmed.

106 Cal. 451

## HALL, Road Commissioner, v. KAUFFMAN.
(No. 15,739.)

(Supreme Court of California. March 19, 1895.)

OBSTRUCTION IN HIGHWAY—SUIT FOR ABATEMENT—REVIEW ON APPEAL—OBJECTIONS WAIVED.

1. The use of land by the public for the purpose to which it was dedicated is sufficient to show an acceptance by them.

2. Evidence that a road has been openly and continuously used as a public highway for over 30 years, with the knowledge and consent of the former owner, will justify a finding that it had been dedicated as a highway.

3. An action to abate an obstruction in the public highway is properly brought in the name of the road commissioner.

4. In an action to abate an obstruction in a public highway, defendant cannot object, on appeal, that the notice to remove the obstruction was not sufficient, it being put in evidence without objection, and a finding that it was given not being attacked in the specifications of insufficiency of evidence.

Department 1. Appeal from superior court, Sonoma county; S. K. Dougherty, Judge.

Action by James W. Hall, as road commissioner, against John Kauffman, to abate an obstruction erected by defendant upon a public highway. From a judgment for plaintiff and order denying a new trial, defendant appeals. Affirmed.

George Pearce and Thomas Rutledge, for appellant. Emmet Seawell and J. R. Leppo, for respondent.

VAN FLEET, J. This is an appeal by defendant from a judgment rendered against him and an order denying him a new trial, in an action brought by plaintiff, as road commissioner, to remove and abate an encroachment and obstruction erected by defendant upon a public highway. The court found that the road had, for more than 30 years prior to the commencement of the action, been "continuously, peaceably, uninterruptedly, notoriously, openly, and with the knowledge and consent of defendant and his grantors, used as and for a public highway and road by the public in general, and by all persons who chose to travel such road"; and "that said user, as aforesaid, was adverse to the possession of defendant and his said grantors, and with the knowledge and consent of said defendant and his grantors, up to about April 1, 1893." From these facts the court found and concluded that the road was a public highway at the time of the encroachment (which was made in 1893); and that the defendant and his grantors and predecessors had dedicated said road to the public as a highway, and that the same had been accepted as such. These findings are attacked as unsupported by the evidence in various particulars, but we think the attack unwarranted. The evidence as to the intention to dedicate is, perhaps, somewhat meager, but we deem it substantially conflicting, while, upon the question of user, it was practically without conflict, and this was sufficient to show an acceptance by the public. "This acceptance is generally established by the use by the public of the land for the purpose to which it was dedicated." Smith v. City of San Luis Obispo, 95 Cal. 470, 30 Pac. 591; People v. Davidson, 79 Cal. 170, 21 Pac. 538; Stone v. Brooks, 35 Cal. 497. The notice given by the road commissioner to defendant to remove the obstruction was, we think, in substantial compliance with the statute; but, if otherwise, defendant is not in a position to be heard upon his objection thereto. The notice was put in evidence without objection, and the finding of the court that such notice was given is not attacked in the specifications of insufficiency of evidence. The evidence was sufficient to sustain the finding as to the extent and width of the road. The action was properly brought in the name of the road commissioner. Bailey v. Dale, 71 Cal. 36, 11 Pac. 804; San Benito Co. v. Whitesides, 51 Cal. 416. These are the only points requiring special mention. We find no error in the record, and the judgment and order denying a new trial are affirmed.

We concur: GAROUTTE, J.; HARRISON, J.

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106 Cal. 453

## In re DAVIS' ESTATE. (No. 18,383.)

(Supreme Court of California. March 19, 1895.)

ADMINISTRATION—RIGHTS OF WIDOW—RELEASE.

1. Under Code Civ. Proc. § 1365, providing that the "relatives" of a decedent can administer only when they are entitled to succeed to his personal estate, or some part thereof, letters of administration should not be granted to the widow of decedent, who had previously entered into a contract with him by which each mutually relinquished all inheritable interest in the other's estate, such contract being expressly authorized by Civ. Code, §§ 158, 159.

2. Under Code Civ. Proc. § 1365, the right of the widow to inherit is necessarily involved in the application for letters; and, in a hearing upon such application, a contract showing that the widow had released her inheritable interest in decedent's estate is admissible.

In bank. Appeal from superior court, Butte county; John C. Gray, Judge.

Appeal by B. F. Woolner from an order denying his application for letters of administration upon the estate of W. W. Davis, deceased, as nominee of Alice A. Davis, widow of said deceased. Affirmed.

E. M. Gibson and Welles Whitmore, for appellant. A. F. Jones, for respondent.

VAN FLEET, J. W. W. Davis died intestate, in the county of Butte, in this state, being a resident of said county at the time of his death, and leaving estate therein. Two applications were made for letters of administration upon his estate, one by the public administrator of said county, and the other by B. F. Woolner, as the nominee of Alice A. Davis, the widow of said deceased. The court granted the application of the public administrator, and denied that of Woolner, and the latter appeals. At the hearing, it appeared that on the 7th day of May, 1878, the said W. W. Davis and Alice A. Davis, his wife, entered into written articles of separation, whereby they agreed to divide their property, relinquish all claims of every nature upon the property of each other then owned or thereafter to be acquired, and to immediately separate and live apart from each other during their natural lives. In these articles, Alice A. Davis, the wife, stipulates and agrees, for the consideration expressed, "that she will receive the same in full satisfaction of all claims she may have as the wife of said W. W. Davis on any property he now has or may in any manner acquire; * * * and hereby does relinquish and surrender forever all claims of any nature she may now or hereafter have against any property that said W. W. Davis may now have or may hereafter in any manner acquire." It further appeared that, upon the execution of said articles, the parties thereto immediately separated, and continued to live apart as therein stipulated down to the death of said deceased; that all the terms and conditions of said articles to be kept and performed by said deceased were fully excuted and carried out by him; and that said articles were in full force and effect at his death.

The only question arising upon this appeal is whether, upon these facts, Alice A. Davis, as the widow of deceased, was entitled to letters of administration upon his estate. If she was, her nominee was so entitled, and the order appealed from would be erroneous. The grant of letters of administration in case of intestacy is provided for by section 1365 of the Code of Civil Procedure, which reads: "Administration of the estate of a person dying intestate must be granted to some one or more of the persons hereinafter mentioned, the relatives of the deceased being entitled to administer only when they are entitled to succeed to his personal estate or some part thereof; and they are respectively entitled thereto in the following order: (1) The surviving husband or wife, or some competent person whom he or she may request to have appointed. (2) The children. (3) The father or mother. (4) Etc." It is to be observed that the statute makes the right of the relations to administer to depend upon the question of their right to succeed to the personal estate or some portion thereof. And it is further to be noted that the term "relatives," as used in the statute, is employed in its generic sense, and so as to expressly include the husband and wife in the same category with the other relatives therein enumerated. The right of the widow to letters, therefore, in this instance, depended upon whether she was entitled to inherit any of her husband's property. We think it clear from the evidence that she was not, and that the conclusion reached by the court below was correct.

The agreement of separation entered into between Davis and his wife was a contract which they were competent to make with one another, and one in fact expressly authorized by the statute. Civ. Code, §§ 158, 159. It rested upon a good and sufficient consideration, and was fully carried out. The obvious purpose was not only to definitely sever the property rights of the parties, but mutually to relinquish and release all inheritable interest of each in the property and estate of the other. It was apt and ample in form for the purpose, and that such was its effect we have no doubt. And that its purpose and effect in that regard are to be upheld is fully sustained by authority. Dillinger's Appeal, 35 Pa. St. 357; Wickersham v. Comerford, 96 Cal. 433, 31 Pac. 358; In re Noah's Estate, 73 Cal. 583, 15 Pac. 287; Id., 88 Cal. 468, 26 Pac. 361. See, also, as bearing upon the question, In re Garcelon's Estate (Cal.) 38 Pac. 414.

The appellant contends that, inasmuch as the agreement could not and did not take from the wife her status as such, she remains the widow of deceased, and is entitled to administer upon his estate, irrespective of the question as to her right in the property; in other words, that she is so entitled merely by reason of being the widow, and that the question as to heirship is not involved on an application for the grant of letters. But in neither respect can appellant's position be sustained without doing violence to the express language of the statute. In the first place, as we have seen, the right of the widow to administer, like that of any other relative, is made to depend upon her right to take of the personal estate; and, that being so, the question as to her right to inherit is necessarily involved in the application for letters. See Howell v. Budd, 91 Cal. 342, 27 Pac. 747; In re Carmody's Estate, 88 Cal. 618, 26 Pac. 373. Of course, she remains the widow, since the parties could not by their contract change their matrimonial status; but it was perfectly competent for them to alter their legal relations as to their property, and this they accomplished. The wife contracted away her inheritable interest in her husband's property, and with that right went the right to administer upon his estate. The principle involved in this provision of the statute, restricting the right of administration to those relatives entitled to take the personal estate, is not new. It is but the expression of a policy which will be found to control in the statutes of many, if not most, of the states upon the subject, and is well recognized in England. It has its foundation in the consideration that administration should be committed to those who are the ultimate residuary beneficiaries of the estate,—those to whom the property will go after administration. Its reason is well stated in 1 Woerner, Adm'n, § 235, where it is said: "It is obvious that those who will reap the benefit of a wise, speedy, and economical administration, or, on the other hand, suffer the consequences of waste, improvidence, or mismanagement, have the highest interest and most influential motive to administer property." And this principle is held to apply to the case of a husband or wife, when for any reason not entitled to inherit, equally with any other relative. 1 Woerner, Adm'n, §§ 235–237; Randall v. Shrader, 17 Ala. 333; Maurer v. Naill, 5 Md. 324; Ward v. Thompson, 6 Gill & J. 349. It also follows from these principles that the agreement of separation was competent and admissible for the purpose offered, and the lower court did not err in overruling appellant's objection thereto. Order affirmed.

We concur: BEATTY, C. J.; HARRISON, J.; GAROUTTE, J.

McFARLAND, J. I concur in the judgment and in the opinion of Mr. Justice VAN FLEET. It is to be observed, however, that the case was tried, and is argued here, upon the theory that by the "articles of separation" Mrs. Davis relinquished all her rights as heir of her husband. As to the question whether or not she did so relinquish her heirship I express no opinion. The language of the said articles is very different from that employed in the case of In re Garcelon's Estate (Cal.) 38 Pac. 414.

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(106 Cal. 224)

## PACIFIC MUT. LIFE INS. CO. v. FISHER et al. (No. 19,361.)[1]

(Supreme Court of California. March 8, 1895.)

NOTICE OF APPEAL—MECHANICS' LIENS—INTEREST—ATTORNEY'S FEES—REVIEW.

1. Notice of appeal by plaintiff in foreclosure, from an adjudication that certain mechanics' liens are entitled to priority over the mortgage, must be served on the mortgagor and his grantee, to entitle the plaintiff to a modification of the judgment as to priorities, where such modification might shift the personal responsibility, as between the mortgagor and his grantee, as to the personal liability for the liens.

2. But such judgment may be modified without the mortgagor's grantee being served with notice, to the extent of determining that the lien claimants have no lien upon the mortgaged premises.

3. One who contracts with the owner to do the plumbing for a building is an original contractor, and entitled, under Code Civ. Proc. § 1187, to file his claim of lien "within sixty days after the completion of his contract," although such filing be prior to the completion of the building.

4. In a judgment foreclosing liens for materials furnished under contracts with the owner, interest is properly allowed from the date payment should be made, as to contracts fixing the date, and as to the others from the commencement of the several actions to foreclose the liens.

5. The claim of one who has furnished materials from time to time as needed, and received payments on account, is not unliquidated, but his right to recover becomes vested at the commencement of his action to foreclose his lien, and he is entitled to interest thereon from that date.

6. Reasonable attorney's fees, authorized by Code Civ. Proc. § 1195, to be allowed claimants of liens, are to be fixed by the court, irrespective of any averment in the complaint as to what would be a reasonable amount; and, in the absence of evidence as to the amount of services, the allowance will not be reversed because in excess of the amount so designated in the complaint.

7. A judgment foreclosing a lien, in favor of one who is not shown by the record ever to have filed any claim of lien, and also allowing him attorney's fees, will be reversed.

8. An allowance for the materials alone, in favor of one who performed no labor, although he embraced both labor and materials in his claim, will not be reversed, and the entire claim rejected, under Code Civ. Proc. § 1202, providing that the lien of any person who shall willfully include, in his claim, work or materials not done or furnished shall be forfeited, where the record contains no evidence to show whether the false item was included willfully.

9. A lien for all materials furnished, whether under an express or implied contract, takes effect by relation as of the date of furnishing the first materials, and is entitled to priority over a subsequently recorded mortgage, although other portions may have been furnished after it was recorded.

10. A conclusion of law by the court, made after finding the facts as to the priority of lien as between a mortgage and certain claims for labor and materials, is not reviewable on a motion for a new trial.

11. A party cannot assign as error a particular part of a judgment, as to which he has not appealed.

In bank. Appeal from superior court, San Diego county; E. S. Torrence, Judge.

Action by the Pacific Mutual Life Insurance Company against John C. Fisher and others to foreclose a mortgage. From a judgment that the defendants, other than the said Fisher, are entitled to laborers' and material men's liens upon the mortgaged lands, and that they are prior to the lien of the mortgage, plaintiff appeals. Modified.

Fox & Kellogg, for appellant. Trippet, Boone & Neale, Parrish, Mossholder & Davis, Works & Works, Shaw & Holland, Wellborn, Stevens & Wellborn, Hunsaker, Britt & Goodrich, and E. W. Britt, for respondents.

HARRISON, J. In April, 1891, the San Diego Opera-House Company, a corporation, commenced the construction of an opera house upon certain lands in the city of San Diego, employing the laborers and procuring the materials therefor, without the intervention of an original contractor, for the entire work. The land upon which the building was constructed was at that time owned by the defendant Fisher, who was the president of the opera-house company, and directed the construction of the building as its president and in its behalf. Fisher continued to be the owner of the land until November 20, 1891, when he conveyed it to the corporation. The building was completed February 22, 1892, and within 30 days thereafter various claims of liens for materials and labor were filed in the recorder's office. June 12, 1891, Fisher and his wife executed to the plaintiff a mortgage upon the lands on which the building was being constructed, to secure his promissory note for $30,000, then loaned to him by the plaintiff; and on November 5, 1891, the plaintiff made him a further loan of $12,500, which was consolidated with the former loan, and a new mortgage made to the plaintiff by Fisher and his wife to secure the payment of $42,500, the amount of the two loans. In July, 1892, the plaintiff brought this action to foreclose the said mortgages to it, making the several lien claimants defendants. Upon the trial of the cause the court rendered judgment in favor of the plaintiff, and against Fisher, for the sum of $74,905, together with its costs, and in favor of the several lien claimants, and against the San Diego Opera-House Company, for the amount of their respective liens, aggregating upwards of $20,000; and directing a sale of the land, and the appropriation of the proceeds thereof—First, to the payment of the liens of the respondents; and, secondly, to the claim of the plaintiff.

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[1] Rehearing denied.

1. The plaintiff has appealed from that portion of the judgment which determines that the respondents have any lien upon the premises, and also from that portion of the judgment which gives to their lien a priority over the lien of the plaintiff. The respondents contend that the appeal of the plaintiff cannot be considered, for the reason that its notice of appeal has not been served upon the "adverse party,"—that is, upon all the parties to the action who would be injuriously affected by a reversal or modification of the judgment; and they have moved for a dismissal of the appeal upon that ground. They are not precluded from making this motion by reason of the fact that the cause had been previously submitted to the court for decision. In re Castle Dome Mining & Smelting Co., 79 Cal. 246, 21 Pac. 746. The notice of appeal states that the appeal is taken "from that part and so much of said judgment and decree as adjudges and determines that out of the proceeds of sale of said mortgaged premises, or of any part thereof, there be paid to the said defendants, or to either or any of them, any sum of money whatever prior to the payment of the full amount due to said plaintiff under said decree; also from that part and so much of said judgment and decree as makes the payment of the amount due to plaintiff under said decree second in order to the payment of the claim of said defendants, or either or any of them." The judgment appealed from, after determining the amounts due from Fisher to the plaintiff, and from the San Diego Opera-House Company to the several lien claimants, orders and directs a sale of the premises, and that "out of the proceeds of such sale there be paid to the holders of said liens, other than the mortgage lien of plaintiff, any balance that may remain due to them for principal, interest, and costs under this decree, after first paying the costs and expenses of such sale; second, to the payment of the amount due the plaintiff under this decree for its principal, interest, counsel fees, and costs of suit"; and then further orders and decrees that "if, after applying the proceeds of such sale in manner and form aforesaid, there be any deficiency due to either of the said lien claimants or the plaintiff herein, the amount of such deficiency be reported to the court, and that judgment be thereupon docketed in favor of such lien claimants, respectively, for the amounts of such deficiency in favor of the lien claimants, respectively, against the said San Diego Opera-House Company and in favor of the plaintiff herein, for any amount of deficiency that may remain in its favor against the said defendant John C. Fisher, and that the party or parties in whose favor judgment is so docketed may have execution therefor." The notice of appeal was not served upon either Fisher or the opera-house company, and we are of the opinion that the failure to serve these defendants is fatal to the plaintiff's right to have this portion of the judgment considered upon this appeal. The modification in the judgment which the plaintiff seeks would have the effect to change the personal liability of these defendants in case the proceeds of the sale should be insufficient to satisfy the liens in favor of the appellant, as well as those of the respondents, and would injuriously affect the interest of the opera-house company. It is only upon the theory that the proceeds of such sale will leave such a deficiency that the plaintiff is interested in having the judgment modified, and it is readily seen that the modification sought by the plaintiff might operate to the detriment of the opera-house company. As the judgment now stands, if the premises should sell for the amount of the plaintiff's judgment, the respondents would be fully paid, and the opera-house company discharged of all personal liability; whereas, if the order of priority contained in the judgment should be reversed, and the property should sell for the same amount, Fisher would be discharged of all personal liability, and the opera-house company would be personally liable for the entire amount of the liens of the respondents. To this extent would the reversal of the judgment in this particular make the opera-house company pay the debts of Fisher. This court can have no jurisdiction to render such a judgment, unless the parties to be affected thereby are before it.

2. The appeal from that portion of the judgment which determines that the respondents, or either of them, have a lien upon the mortgaged premises is not necessarily open to the same objection. The plaintiff is at liberty to falsify any of these liens for the purpose of reducing the amount to be appropriated out of the proceeds of the sale before making any application therefrom to its own claim, even in the absence of the opera-house company, if such reduction can be made without injuriously affecting that defendant. It was competent for the plaintiff in the trial court to defeat any claim of lien, even though it had

been assented to by the opera-house company, and it has the same right upon this appeal, except as the exercise of such right may have the effect to transfer an obligation from the property to a personal obligation of that defendant. To the extent that the record shows that the obligation of the opera-house company may be extinguished, the plaintiff is entitled to have the judgment modified in the absence of that defendant, since such modification would not be adverse to its interests. See Green v. Berge (Cal.) 38 Pac. 539.

(a) George A. Merritt, one of the respondents, made a contract in writing with Fisher, as the president of the opera-house company, to do the work of plumbing and to furnish the materials therefor in the building. He completed his contract, February 4, 1892, and on the 10th of February he filed with the county recorder his claim of lien therefor. The appellant contends that this claim of lien should have been disallowed, for the reason that it was filed prior to the completion of the building. Merritt was, however, an "original contractor" for this portion of the construction of the building, and under the terms of section 1187, Code Civ. Proc., could file his claim of lien "within sixty days after the completion of his contract," irrespective of the time when the building was completed. The chapter in the Code relating to mechanics' liens does not contemplate that there can be no original contractor except for the entire work of constructing the building. For the purpose of constructing the building, the owner may enter into different original contracts for the different departments of work involved therein. If he should enter into a contract with one person for the construction of the building in all its parts, except the painting, and should afterwards enter into a contract with another person to do the painting of the building, each of these individuals would be an original contractor, within the meaning of the statute, and it would be immaterial whether the latter contract was entered into prior to or subsequent to the completion of the former one. If the owner did not enter into the latter contract until after the completion of the former contract, it could not be claimed that a lien to be filed therefor would in any respect depend upon the completion of the building. It would be equally immaterial whether such contract was entered into during the performance of the prior contract, or whether the work to be done under the contract was to be performed after or prior to the completion of the other contract. The laborers and material men under Merritt would be entitled to a lien, and the contract price with him would be the limit of the owner's liability for such liens. La Grill v. Mallard, 90 Cal. 373, 27 Pac. 294; Baird v. Peall, 92 Cal. 235, 28 Pac. 285; Sparks v. Mining Co., 55 Cal. 389,—merely hold that a material man who furnishes materials directly to the owner is not an original contractor, in the sense of the statute, for the reason that there can be no subcontractor or intervening lienor; and, consequently, that he must file his claim of lien within 30 days after the completion of the building. Schwartz v. Knight, 74 Cal. 432, 16 Pac. 235, is to the same effect.

(b) To some of the claimants the court allowed interest up to the time of entering judgment upon the principal sum found due for the materials furnished. For some of these claims the materials were furnished under a contract prescribing the time of payment, while in others no time of payment was provided, other than would be implied from the transaction itself. When the contract fixed the date of payment, interest was allowed from that date. In others the date from which interest was allowed does not appear, but presumably it was allowed from the commencement of the several actions to foreclose the liens. There was no error in thus allowing interest. The appellant has not cited any authority to sustain its contention that interest should not be allowed, and it has been held in other states that the claimants are entitled to interest. Falls Co. v. Riley, 1 Or. 183; Trustees, etc. v. Heise, 44 Md. 472; Johnson v. Boudry, 116 Mass. 196. If the action were merely to recover for the materials, the claimant would be entitled to interest from the time the purchaser had agreed to pay for them, and, if there were no express agreement, he would be entitled to interest at least from the time of filing his complaint; and the lien which the statute gives him is as extensive as the claim which it is intended to protect. If a claimant has furnished materials from time to time as they were needed, and receives payments on account, his claim is not "unliquidated and open to be adjudicated," as urged by appellant. At the time he commenced the action to foreclose his lien, his right to recover that open account was vested in him, and was capable of being made certain by calculation, and he was also entitled to recover interest thereon from that date. Civ. Code, § 3287.

(c) Some of the claimants, in their complaint for the foreclosure of the liens, asked for counsel fees, and designated what would be a reasonable amount for such fee. In rendering its decision, the court allowed them a sum in excess of the amounts so designated, and this is assigned as error. Section 1195, Code Civ. Proc., authorizes the court to allow reasonable attorney's fees to each lien claimant whose lien is established for services in the superior and supreme courts. This allowance is an incident of the judgment (Rapp v. Gold Co., 74 Cal. 532, 16 Pac. 325), and is to be fixed by the court irrespective of any averment in the complaint (Mulcahy v. Buckley, 100 Cal. 490, 35 Pac. 144). The averment of the amount, not being essential, is not, therefore, conclusive, and was, at most, only an opinion based upon an estimate of services to be rendered. The court was authorized to exercise its discretion in the allowance of these fees, and, in the absence of any evidence regarding the amount of services, its action cannot be reviewed here. See Watson v. Sutro, 103 Cal. 169, 37 Pac. 201.

(d) The court found that the respondent Heath was entitled to a lien to the extent of $112.30 and costs. The record, however, fails to show that Heath ever filed any claim of lien with the county recorder, and the judgment of the court to that extent is erroneous. As he did not establish his lien, the court was not authorized to allow him any attorney's fees or any amount for filing a claim of lien, and these sums, amounting to $60.30, should be deducted from the amount allowed him. As he failed to establish a lien, it was error for the court to direct the payment of his claim for materials out of the proceeds of the sale of the building; but the opera-house company is not before the court on this appeal, and, as we cannot modify the judgment in any respect which will increase its liability, we are unable to direct any further modification of the judgment than to strike therefrom the sums thus allowed.

(e) The Coronado Foundry & Machine Company in its complaint alleged, as a part of its claim, that it had performed work and labor upon the building for which the opera-house company agreed to pay it $123.25, in addition to paying for the materials which it had furnished. The court finds that it furnished the materials, but that it did not perform any labor, and allowed its claim of lien for the materials alone. The appellant urges that the entire claim of this respondent should have been rejected by reason of its having included therein the claim for such labor. Section 1202, Code Civ. Proc., provides: "Any person who shall willfully include in his claim, filed under section 1187, work or materials not performed upon or furnished for the property described in the claim shall forfeit his lien;" and it was held in Lumber Co. v. Neal, 91 Cal. 362, 27 Pac. 743, that this provision must not only be strictly construed, but the evidence under which it is invoked should be clear and convincing that the violation was willful and intentional. The claim itself is not in the record, and its contents are only a subject of inference; but, aside from this, the record does not contain any evidence concerning the claim, and the finding of the court in favor of its validity is not to be set aside upon a mere surmise.

3. The plaintiff moved for a new trial as to the claim of Sosman and Landis, and has appealed from the order denying its motion. The motion was made upon the minutes of the court, and the notice of intention specified that the evidence was insufficient to show that the materials for which these defendants claimed a lien "were furnished or commenced to be furnished prior to the 11th day of November, 1892, the day on which plaintiff's said mortgage was recorded." The year "1892" is evidently a clerical error for "1891," and it is sufficient to say that there was evidence that a portion of the materials for which they claimed a lien was furnished in September of that year. Their lien for all the materials that they furnished for the building would relate to this date, notwithstanding the fact that another portion was furnished subsequent to November 11th, and under an express contract. The lien commences when the claimant begins to furnish the materials, and includes all the materials that he may thereafter furnish for the building (McCrea v. Craig, 23 Cal. 525), whether they are furnished under an express contract in which the terms and quantity are fixed, or under a contract implied from their purchase and use in the building from time to time as they are needed. The material man cannot file his claim of lien until after the completion of the building, but he must then include in it all the materials which he has furnished, and not file a separate claim for those furnished under different contracts; and the lien for which the claim is thus filed will relate to the time when he first began to furnish the materials. The plaintiff also specified in its notice of intention the insufficiency of the evidence to justify the decision of the court that the lien of these defendants had priority to the lien of the plaintiff, and that the ruling of the court to that effect was an error of law. This decision of the court is not, however, a finding of fact or a ruling made in the course of the trial, but is the conclusion of law which it made after the facts had been found, and it is well settled that the conclusion of law which the court draws from the facts cannot be reviewed upon a motion for a new trial. Estate of Doyle, 73 Cal. 571, 15 Pac. 125; Brison v. Brison, 90 Cal. 327, 27 Pac. 186.

4. The plaintiff also urges that the court erred in its directions respecting the sale of the premises under foreclosure, but, as it has not appealed from this part of the judgment, we are not at liberty to consider its correctness. The court below is directed to modify the judgment by substituting the sum of $52 for the sum of $112.30 in the amount adjudged to be due to the defendant Heath, and, as so modified, the judgment will stand affirmed; the costs of this appeal to be paid by the appellant. This conclusion renders it unnecessary to pass upon the motion to dismiss the appeal.

We concur: BEATTY, C. J.; McFARLAND, J.; GAROUTTE, J.

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4 Cal. Unrep. 980

## PACIFIC MUT. LIFE INS. CO. v. FISHER et al. (No. 19,441.)[1]

(Supreme Court of California. March 9, 1895.)

NOTICE ON APPEAL.

An appeal by lien claimants, who have obtained a personal judgment against the mortgagor's grantee, from an adjudication that their liens are invalid as against the lien of a prior mortgage, will be dismissed, where the notice of appeal has not been served on the mortgagor and his grantee.

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[1] Reversed in banc. See 42 Pac. 154, 109 Cal. 566.

In bank. Appeal from superior court, San Diego county; E. S. Torrence, Judge.

An action to foreclose a mortgage, brought by the Pacific Mutual Life Insurance Company against John C. Fisher, the mortgagor, his grantee, and others, claiming laborers' and material men's liens on the mortgaged premises. From a judgment adjudging invalid the liens of certain claimants, who obtained a personal judgment against the mortgagor's grantee, such claimants appeal. Appeals dismissed.

Trippet, Boone & Neale, Parrish, Mossholder & Davis, Works & Works, Shaw & Holland, and Wellborn, Stevens & Wellborn, for appellants. Fox & Kellogg, for respondent.

PER CURIAM. The judgment herein is the same as that presented in case No. 19,361, this day decided. 39 Pac. 758. The appeal herein is taken by certain defendants who obtained a personal judgment against the San Diego Opera-House Company, but whose liens were adjudged to be invalid. The notices of appeal herein on behalf of the appellants Thomas Day & Co., Limited, C. W. Pauly, H. P. Gregory & Co., and Clark & Co. were not served upon the defendant Fisher or the Opera-House Company, and the plaintiff has moved that for that reason the said appeals be dismissed. We held in the other appeal that these defendants were necessary parties to any modification of the judgment which would increase their liability, and, under the principles of that case, the appeals of the above-named appellants must be dismissed. A determination upon this appeal that either of these appellants is entitled to a lien upon the property described in the complaint would affect, not only the rights of those whose liens have been determined, but also the rights of the defendant Fisher. The judgment makes him personally liable for any deficiency there may be after applying the proceeds of the sale of the property to the liens specified therein, and, if the amount of these liens should be increased, his personal liability will be increased to the same extent. Moreover, a reversal of the entire judgment would deprive the Opera-House Company of the determination already had of the extent of its liability, and compel it again to contest matters already decided in its favor. The appeals of the above-named appellants are dismissed.

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106 Cal. 237

## VERNON IRRIGATION CO. v. CITY OF LOS ANGELES et al. (No. 19,388.)

(Supreme Court of California. March 8, 1895.)

DIVERSION OF WATER—RIGHTS OF RIPARIAN OWNERS—APPROPRIATION BY CITY—LOS ANGELES RIVER.

1. Where lands of a riparian owner are not injured by a diversion of water above them, or where, if the diversion were enjoined, such water would not, owing to ditches built by him, flow by the lands in its natural channel, the diversion will not be enjoined.

2. The fact that an irrigation company, owning riparian lands below a city, diverts water which the city, while actually diverting a part of and claiming the whole stream of right, as it had done for years, permitted to flow by it, does not constitute an appropriation as against the city.

3. The fact that a city, in violation of its charter, has, from time immemorial, continuously diverted the water of a stream, and sold it to consumers without its limits for extramunicipal use, does not constitute an appropriation thereof as against a lower riparian owner.

4. The city of Los Angeles, as successor to the pueblo of that name, has a right to the water of Los Angeles river for its inhabitants and for municipal purposes, superior to that of a lower riparian owner.

5. The city of Los Angeles, as successor to the pueblo of that name, has no right to divert water from the Los Angeles river for the purpose of selling it for extramunicipal use to persons residing without its limits, as against a lower riparian owner.

6. The fact that a municipal appropriator of water from a stream for the purpose of sale to outside owners for extramunicipal purposes is subsequently restricted by the legislature to the use of the water for municipal purposes only, amounts to an abandonment by it of the appropriation, though it continues to make the same use of the water.

7. The fact that levees are built to prevent the waters of a stream from percolating through its bed, whereby the stream's lower volume is increased, does not render such increase "developed" or "artificial" water.

8. On an issue whether a city had used the waters of a stream under a claim of right, evidence is admissible that it was a matter of common reputation, more than 30 years before, that the city claimed and controlled the water.

9. A riparian owner is entitled to the continuous flow of the water, with a usufructuary right therein, provided he returns it to the stream above his lower boundary; but has the right to completely appropriate only a part of it.

In bank. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

Action by the Vernon Irrigation Company against the city of Los Angeles, H. M. Ames, and others. From a judgment for defendants, and an order denying a new trial, plaintiff appeals. Reversed.

Chapman & Hendrick and Hughes & Garrison, for appellant. D. P. Hatch, Geo. W. Knox, and Anderson & Anderson, for respondents.

PER CURIAM. When this case was originally submitted for decision, an opinion was prepared by Mr. Commissioner Temple, which is now adopted by the court:

"Plaintiff, a corporation, brings this suit, averring that it is the owner of a tract of land which is riparian to Los Angeles river, to enjoin defendants from diverting water. Plaintiff avers that the flow of water over its natural bed renders its lands fertile and valuable, and that it is entitled to have the waters flow as they have been accustomed to flow; that defendants claim an interest in the water adverse to plaintiff; that the claims of defendants Ames and James are wholly without right, and the claim of the city of Los Angeles is without right, except that the city has the right to divert and use a certain quantity, which it has been using for municipal purposes, and distributing to its inhabitants, which does not exceed three hundred inches, miners' measurement; that the city claims not only the right to divert the water for said purposes, but to divert water to sell to the owners of nonriparian lands outside the city for profit, and is diverting large quantities of water, and is conducting it beyond the city limits, and selling it to the owners of nonriparian lands; that the city is preparing to enlarge its ditches so as to divert from the river all the water remaining therein, for the express and sole purpose of selling the same outside the city limits, and will do so unless restrained. That defendants Ames and James threaten to, and will, unless restrained, divert from the stream all the water which the city permits to flow past the city. Plaintiff's riparian lands are below the city and the lands of Ames and James.

"As a second cause of action it is shown that plaintiff is the owner of a water ditch and owns a water right, acquired by appropriation, to divert from Los Angeles river twenty-one hundred inches of water, the point of diversion being its said riparian lands. As in the first count, it is averred that defendants claim rights adverse to plaintiff, and threaten to, and, unless restrained, will, divert all the water of the river, thus depriving plaintiff of the water right it has acquired by appropriation. Therefore, plaintiff prays that: (1) Defendants be required to state the extent and nature of their claims. (2) That Ames and James be decreed to have no rights to any water, and be perpetually enjoined from diverting any. (3) That it be adjudged that the city has no right to any water except for municipal uses, and to distribute to its inhabitants; that the amount required for such uses be ascertained by the court, and the city be enjoined from diverting from the river any larger amount.

"The Los Angeles river flows from the north, through the city of Los Angeles, past the lands of Ames, which adjoin the city on the south, to plaintiff's land, which adjoins Ames' land. Ames answered, denying plaintiff's rights, and that he had interfered with any rights of plaintiff to the water, and in substance averring that the water in controversy is developed water, which he was not bound to permit to flow over his land to plaintiff, and also setting up a right to the water in himself, acquired by appropriation. The city denies the rights of plaintiff, and claims the right to take all the water of the river (1) as successor to the pueblo of Los Angeles, which it contends owned all the water in the river; (2) as an appropriator of the water, claiming that it has been in the undisturbed and undisputed use of it, under claim of right, for fifty years. It is also contended that under the laws of Mexico the pueblo had the power to distribute the water for the benefit of all the lands then claimed by the pueblo, and that the city has succeeded to that right; that the outside lands to which it is conducting water were within the limits formerly claimed by the pueblo. The findings are quite voluminous, and include a finding to the effect that the city and its predecessor, the pueblo, have, since 1786, claimed the absolute ownership of all the waters usually flowing in the river as a supply for the city and pueblo and the inhabitants thereof for any and every purpose, and under and by virtue of said claim has during all said time continuously controlled the use, diversion, and disposition thereof; and has delivered the surplus not needed in the city to be used outside the city limits; and for more than thirty years the effect of such diversion has been to take all the water flowing in the stream from June until the fall rains, except in a few years of unusual rainfall. That the city is the absolute owner of all the water naturally flowing in the river, and holds the same for the use of its inhabitants, and for all other municipal purposes. The volume of water varies from year to year, and has sometimes been insufficient for such uses. The city contains at least sixty thousand inhabitants, and the population is rapidly increasing, as are also the necessities of the city and inhabitants for water. That bordering on the city, but without the municipal limits, is a large and valuable tract of suburban lands, containing a large population, with orchards, vineyards, and other plants, which use water for irrigation, and which from time immemorial have been supplied from the city water works, which water is needed to keep the plants alive. That there is no other source from which water can be obtained for this territory, and, if it cannot be so supplied, the loss will be great and irreparable. It is also found that all the water of the river is necessary for the city and its inhabitants and for the irrigation of the lands in the city and bordering thereon, and will probably be insufficient for use in the city in a short time, and 'the same is not an unreasonably large supply for the city in the conditions now existing as aforesaid.' That, although there has usually been some water, in the dry season, flowing past the city to plaintiff's land, the city has always claimed the right to take it, and has taken it when desirable. That in 1889, 1890, and 1891 the city caused certain levees to be made, which raised to the surface water which theretofore had percolated through and under the sands composing the river bed, and since that time the flow in the stream has increased. That in 1893 the city made preparations to divert this increased flow, intending to sell the same to parties outside the city limits, until required for the use of the city or the inhabitants thereof. That the amount required for such use varies daily, and cannot be exactly estimated. It is also found that plaintiff is a riparian owner, and has constructed a dam and a ditch for diverting water as averred in the complaint, but has acquired no right to any water by a compliance with the provisions of the Civil Code in regard to appropriation by the notice and record required, but has actually diverted some of the surplus water which the city permits to flow past when not required or desired by it. The greatest quantity which it has ever appropriated to any useful purpose is five hundred inches.

"Plaintiff's point of diversion is, apparently, at or near the upper line of its riparian lands. No portion of the water which it proposes to divert from the stream is to be used on its own land. There is no evidence or finding that its lands are susceptible of cultivation, or can be made productive, or that plaintiff is or can be injured as to its riparian lands, though deprived of all the water flowing in the stream. Since, therefore, plaintiff's riparian lands would not be injured by the diversion of the water at a point in the river above its lands, and especially since the injunction, if issued, would not have the effect to cause the water to flow over or along its riparian land as it was accustomed to flow, plaintiff is not entitled to an injunction to protect its riparian rights. See Modoc Land & Live-Stock Co. v. Booth, 102 Cal. 151, 36 Pac. 431. The actual diversion by plaintiff of five hundred inches of water was made while the city was actually diverting the stream as it had been doing for many years, claiming the right to take it all, and occasionally actually doing so. Again, it must be understood that the conditions discussed mainly apply to the dry season,—from June until the fall rains. At other times there is an abundance of water for all parties and for all purposes. Neither the evidence nor findings show when the plaintiff was able to take and sell five hundred inches of water. Was it during the dry season, or when there was an abundance? Was it only when the defendants permitted the water to flow temporarily, while, for some reason, the water was not required? The needs of the city fluctuate daily. So, it seems, did the quantity flowing in the stream below the city. For how long a time plaintiff was able to sell five hundred inches of water is not shown. It does appear that sometimes larger quantities passed into its ditches. But that, of itself, does not constitute an appropriation. It was not appropriated to a useful purpose. This uncertain, and perhaps permissive, use of water is not sufficient to prove a right as against the defendants. But the plaintiff not only seeks an injunction, but asks to have its title quieted as against defendants, and its claim to the water, both as riparian owner and as an appropriator, determined. Counsel concede the claim of the city to the amount required and now actually used by the city, either for municipal purposes or for the inhabitants. This concession seems to be founded upon the idea that the city has acquired such right as it has by appropriation. Counsel, however, contend that the city has no power to appropriate water to sell to outside consumers for a profit, and that it has acquired no rights by these acts of its officers, which are wholly ultra vires. Unauthorized acts of its officers are not the acts of the municipality. As applied to this case, I am inclined to think this position must be sustained. It is not the ordinary case in which property has been acquired, by a corporation, through a transaction which was ultra vires as to the corporation. In such case it may be that the title of the corporation could only be called in question by the state. Here the title, if any, is gained through a continuous use, which is forbidden, and the corporation cannot hold or use the property without the continued violation of its charter. It involves the continuous exercise of powers with which the corporation is not vested. It is not authorized to carry on the business of selling water to outside parties, and its officers are therefore not empowered to appropriate water for that purpose. But the city claims to have title to all the water derived from the Mexican pueblo of which it is the successor. It becomes necessary, therefore, to examine the nature of the right which the pueblo had to the water of the river under the Spanish and Mexican laws.

"It is not easy for one accustomed to common-law terms and ideas, and particularly to the system adopted by the United States for the settlement of vacant territories, to comprehend the Spanish and Mexican systems, or to estimate properly the nature of the right which the Mexican pueblos had to their land and waters. The laws, ordinances, and regulations of Spain and Mexico frequently seem to us at once oracular and vague. The trouble is, largely, that they were addressed to a people of very different habits of life and thought, and who were familiar with the system of which they constituted a part. This system is strange to us, and we are thoroughly indoctrinated with ideas arising from a very different system. The governmental modes differed so widely as to create in the people different necessities and habits of life. Some it may be interesting and profitable to notice.

"1. Our plan has been to encourage settlement of the country by selling land in small tracts at a minimum price. When so settled, villages, cities, and towns have grown up as required to supply the wants of the settlers. They have been called into existence by the settlements, but, in the beginning, have not contributed much to cause the country to be settled. The Spanish system was the opposite. They founded or encouraged the formation of villages, which, by affording protection as well as educational and religious privileges, would encourage settlement of the neighboring country.

"2. These pueblos differed from our municipalities in many respects. They had no charters, and seem always to have been subject to the control and supervision of superior officers, and this control seems to have been complete and constant. They could suspend, restrict, or enlarge the powers of the officers of the pueblo; and yet the pueblos, to an extent and in a mode which is strange to us, constituted convenient instrumentalities for the government of the neighboring country. Their jurisdiction, subject always to the supervision of higher officers, often extended over large territories. Hart v. Burnett, 15 Cal. 531. No grants of land were ever made to them, but, as soon as organized, they became entitled to have certain lands set apart to them for the use of the pueblo and its inhabitants. Stevenson v. Bennett, 35 Cal. 432; Brownsville v. Cavazos, 100 U. S. 138. Our courts have determined that the successors of these pueblos held the pueblo lands in trust for the inhabitants, and that the legislature can control the execution of this trust; and the United States has, in accordance with the decisions, confirmed the lands to the successors of the pueblos. Whether, under the Mexican system, any title was vested in the pueblos, or the title remained in the nation, with power in the ayuntamientos to administer the properties, is now immaterial. In either event, the mode adopted was a proper mode to preserve the equity which it is agreed the pueblos had in the lands set aside and devoted to the use of the pueblo.

"3. Perhaps the most important respect in which the pueblos and the habits of the inhabitants differed from our municipalities and the habits of our people is found in the extent to which individual wants were supplied from public or common lands. In this respect the difference is almost startling. Our practice is to reduce everything to private ownership from which a profit can be made; and, of course, the more essential it is to the members of the community, the more profit can be made from it. The rule of the pueblo was almost the reverse of this. So far as communal ownership would answer the purposes of the community, it was preferred. As water was one of the things thus held, we may understand better the nature of the right which the pueblos had to it by considering other properties so held. Many Spanish and Mexican documents were put in evidence on the trial of the case, and their substance is set out in the statement. The counsel for the city has also compiled a great deal of Spanish and Mexican law on the subject. I draw from these sources: First. There was the 'Montes' or woodlands, from which the inhabitants could get firewood. A quotation is made from Alveres (volume 2, page 12): 'In the law of Castile we meet many regulations concerning the woodlands and bounds (terminos) of cities and villas, in addition to the very great utility which results from their preservation, since from them was to be drawn the timber necessary as well for the construction of ships as for firewood. With this object it is commanded that the trees shall not be cut from the foot, so that they may grow up again, and that the open fields shall serve for common pasture of the cattle; that in the bounds of villas and places shall be planted woods and pinones, where there may be better pasturage and shelter for cattle, and supplies of wood and timber to them, and that the inhabitants may avail themselves of all.' They were common to all the inhabitants. Second. The 'Dehesas.' This was a tract of land inclosed, where all the laboring cattle of the neighborhood might be put. Third. 'Fuentes.' These were springs of water appropriated to the supply of the town. Fourth. 'Ejidos.' These were commons surrounding the town in front of the gates. They were kept open; not cultivated. Here the people threshed their grain, or resorted for recreation. Fifth. 'Prados,' — fields. Sixth. 'Pastos,' — pastures. Seventh. 'Aguas,'—waters. Eighth. 'Salinas,'—salt springs. Ninth. 'Abreveduras,'—places for watering cattle. Tenth. 'Valdios,'—terminus not devoted to special use. All the inhabitants, under regulations designed to secure the utility of the lands and secure equality, could use all these lands. Then there were the lands devoted to churches and the 'propios.' These were generally the lots fronting on the plaza, and were rented for stores, shops, etc. The rents were for the use of the pueblo. Among there were the 'Alhondijas,'—a house set apart for strangers who came there to trade. I do not understand that these properties were commons in the common-law sense. They were communal property, subject to be administered by the pueblo authorities. The public could be dispossessed, and the character of the lands changed. They might be sold or converted into solares or suertes, which could be reduced to private ownership. They were not dedicated to the public.

"Now, the waters of all rivers were, under the Spanish and Mexican rule, public property, to be administered and distributed for the use of the inhabitants. Apparently this was sometimes done by the pueblo authorities outside of the pueblo lands. It must be remembered that towns and villages were greatly favored under the Mexican system; that to establish them was the mode adopted for the settlement of the country. Contractors (capitulantes) were rewarded for organizing them. The ordinances of the king of Spain and the provisions of the government of Mexico in regard to them direct that they be located where water will be convenient. The organization of the pueblo of Los Angeles itself—to be hereafter referred to—will show the solicitude of the government in regard to this matter. Since the water belonged to the nation, and could not be acquired from it by condemnation, it would seem to follow as a matter of necessity that, when the pueblo was organized under the laws, a sufficiency of ,this water for the pueblo was appropriated to it. The country was arid. The population was at first almost wholly agricultural, and we have seen the waters were held by the pueblo, subject to the duty of distributing the same in the public interest. Nor do I think this was a mere political power, which could be revoked at any time, so as to deprive the settlers who had been induced to become inhabitants of the pueblo of it. They had the same kind of right with reference to it which they had to the lands. Both were held as communal property, for the benefit of the inhabitants, and as an inducement to attract settlers. This view was adopted by this court in Lux v. Haggin, 69 Cal. 255, 10 Pac. 674. The question there was whether, under Mexican or Spanish law, the water of rivers was dedicated to the public in such sense that the people could not be deprived of the common use. It was said that pueblos acquired a species of property in the water of streams within their boundaries,—a right which was inconsistent with such supposed dedication. They had title to such waters, subject to the public trust of continuously distributing the same in just proportion. After citing authorities in support of the position, the court proceeds: 'From the foregoing it appears that the riparian proprietor could not appropriate water in such manner as should interfere with the common use or destiny which a pueblo on a stream should have given to the waters; and semble, that the pueblos had a preference or prior right to consume the waters, even as against the upper riparian proprietor. The common use here spoken of is the use for the benefit of the community or the inhabitants of the pueblo.' This view, I think, finds support in the history of the pueblo of Los Angeles. In 1779 it was determined to found a pueblo called 'Reyna de Los Angeles,' settling it with soldiers and families told off from the garrisons; and the location was selected with a view to land and water for cultivation. In 1781, Don Phillipe de Neve, governor, issued a decree providing for the founding of the pueblo in the immediate vicinity of the river Porcuncula. All the land capable of irrigation should be carefully examined, and a point selected for the erection of a dam which would insure the distribution of the water to the greater portion of the lands, and the site of the town should be as near the river as possible. When we remember that these pioneers were really farmers or stock raisers, and the irrigation was a necessity, this order, with the instructions, is very significant. There is also an order made by Don Pedro Fages, governor of the peninsula of California, August 14, 1786, for the distribution of lands to the settlers at Los Angeles. It commissions the ensign Don Jose Arguello to proceed to Los Angeles, and give formal possession, directing him to clearly define what are public domains, viz. water, pasture, wood, etc. Arguello reported his compliance September 5, 1786, showing that he had confirmed to each settler his lot, and had measured the lands still unassigned and reserved to the crown, assigning them for the common use of the settlers for pastures, for keeping stock, with a common right in all the waters, wood, and timber. It also appears that in 1810 complaints were made to the commandante that the priests of San Fernando had diverted the water on the Cahuenga ranch to the injury of the pueblo. The controversy was settled, the priests acknowledging the superior right of the pueblo. Counsel have furnished me with translations of numerous ordinances, laws, rules, and regulations of Spain and Mexico, relating to this subject. After perusing them, I am satisfied with the conclusion reached in Lux v. Haggin, that pueblos had a right to the water which had been appropriated to the use of the inhabitants, similar to that which it had in the pueblo lands, and that the right of its successor, the city, to the water for its inhabitants and for municipal purposes is superior to the rights of plaintiff as a riparian owner.

"The question recurs, has the city a right to take from the river more water than it requires for those purposes, that it may sell such water to those outside the city limits? I think this question must be answered in the negative. It was so determined in Feliz v. City of Los Angeles, 58 Cal. 73, although it was also said in that case that the city had a right to all the waters of the river, if required for municipal purposes, or for the use of the inhabitants. I quote: 'It was conceded on the argument that the city had appropriated a portion of the waters of the Los Angeles river before the plaintiff constructed its ditches, and that the use by the city to the extent of such appropriation could not be interfered with by any subsequent appropriation; but it was contended that the rights of the city were limited to the amount appropriated at the time plaintiffs or their grantors built their ditch. Such a construction of the defendants' rights would not be in harmony with the facts found by the court. From the very foundations of the pueblo, in 1781, the right to all the waters of the river was claimed by the pueblo, and that right was recognized by all the owners of land on the stream, from its source; and under a recognition and acknowledgment of such right plaintiff's grantors dug their ditch. * * * The city, under various acts of the legislature, has succeeded to all the rights of the former pueblo. * * * From the fifth finding it appears that when the acts complained of were done by the officers and agents of the defendant, all of the waters of the Los Angeles river were required, and were not sufficient, to supply the wants of the city; and we are of the opinion that it was the right of the municipal authorities to prevent any diversion of said waters at the time by the plaintiffs. We do not intend to be understood as holding, nor do we hold, that the city has the right at any time to dispose of the waters for use upon land situated without the city limits. On the contrary, we are of the opinion that the city has not that right.' That opinion was based on the judgment roll, which contained findings which showed the nature of the claim of the pueblo. A reference will show that as to such facts the findings accord with those stated in this opinion. The case is therefore direct authority upon the proposition here involved. It is in entire accord with Lux v. Haggin, and with the views herein expressed. Indeed, so far as this particular question is concerned, it would be difficult to reach any other conclusion. The water of rivers belonged to the nation,—was held by it for the use of the inhabitants. It retained the power to distribute and to redistribute it as the interests of the community required. While, therefore, pueblos had a preferred right to the water, it must be understood that such right could be asserted only to the amount needed to supply the wants of the inhabitants.

"The city, however, and its predecessor, the pueblo, has, from a time antedating the change of flags, continuously taken from the river more water than was required for municipal uses and for the inhabitants, and has supplied the same extramunicipal territory with water. Relying upon it, orchards, vines, and other plants have been set out, and the country has become valuable and thickly populated. Has the city, by such use, acquired a right to do so? This question must also be answered in the negative. Whatever may have been the case once, the city for many years has certainly had no right, under its charter, to sell water to outside parties for use on extra-municipal lands. When the municipal officers do this, they exceed their authority, and their act is not that of the city. Under our system, the exercise of such powers for a great length of time will raise no presumption of a grant to the city of such powers. Its powers are derived from its charter and from public laws, of which courts take judicial notice. Nor can the city, in this action, assert any right in the inhabitants of the extra-municipal district to the water. Waiving other difficulties which would arise if we could suppose that such right existed, it does not appear that the same lands or the same individuals have been continuously supplied. It is the territory or community which has been so supplied. If such right existed in the community or in individuals, it could be asserted against the city. But they have taken the water by purchase from the city, thereby showing that the use has not been under a claim of right on their part. Indeed, the city now not only claims the right to entirely deprive them of the water, but asserts that it will soon do so.

"I cannot see that the city has acquired any further rights to water through the various acts of the legislature referred to. The act of 1850 (St. 1850, p. 155) incorporated the city, limited it to four square miles, and provided that it should succeed to the property rights and powers of the pueblo. The act of 1851 (St. 1851, p. 329) authorized the city to sell or lease its lands, and to take water from the river, to irrigate the land outside the city, but provided that it should exercise no municipal authority over such lands. In 1854 an act was passed construing the act of 1850 as vesting in the mayor and common council power and control over the distribution of water for the purpose of irrigating vineyards and lands within the limits claimed by the pueblo. In 1874 an act was passed (St. 1873–74, p. 633) granting to the city the absolute ownership of the waters of the river. In April, 1876, the charter of the city was revised (St. 1875–76, p. 693), and the power of the council to distribute the waters of the river was limited to the city. In all subsequent revisions or amendments to the charter the power of the municipal officers over the water is similarly limited. It will hardly be claimed that the legislature could grant to the city the water of the river so as to deprive riparian owners of it. It may be claimed, however, that the act of 1854 enlarged the corporate powers of the municipality, and that thereafter the water was lawfully distributed and sold to be used on extramunicipal lands. Granting that this was so, the only title that the city would thus acquire would be by appropriation. The rights of an appropriator may be lost by abandonment, and the subsequent acts, restricting the power of the city to distribute the water to the inhabitants and lands of the city, amounted to such abandonment. At present, the city has no power to take and distribute the water to such extramunicipal lands.

"It is also asserted on the part of the city that the increased water which it proposes to take is developed water, to which plaintiff can assert no right. It appears that artificial banks have confined the waters to a narrower channel, and it is inferred from the fact that, since that time, more water has been running in the stream below the city, that this developed or made artificial water. But, admitting that such inference can be made, this would be to save water, not to develop it. As plaintiff is not entitled to an injunction, it is not necessary to determine whether the court could ascertain the amount of water needed by the city, and limit its right to such necessity. If this could be done at all, it is evident that it would be in a very liberal spirit. The wants of a city naturally fluctuate, and on an emergency may be greatly increased beyond ordinary wants. A court would hardly say that where it can a city may not provide for such emergencies, even though they are very unlikely to occur. This trouble does not exist, however, when it is confessed, as here, that the motive of enlarging the ditches to take more water is for the purpose of selling it to irrigate outside lands. From what has been said it would seem to follow that the city cannot do that. The city was allowed, over the objection of plaintiff, to prove that it was matter of common reputation, more than thirty years ago, that Los Angeles claimed the water, and had the control of it. It is contended that the city could not thus prove that it had title to the water. That the claim of the city is based either upon appropriation, which must be shown by acts, or upon the usages and laws of Spain and Mexico, of which the courts take judicial notice, and which are not matters of proof. The effect of these upon the right of the city to the water must be determined by the court, and cannot be shown by the opinions of witnesses or of the general public. Admitting appellant's position here, it is difficult to discover how it has been injured, but I do not understand such to have been the purpose of the evidence. It was proposed to show that the city had used the water under a claim of right. It was proper to show this, and, as it was a matter of general interest, and, as to a portion of the time, of ancient date, and the declarants dead, it could be established by proof of the prevailing current of assertion. 1 Greenl. Ev. 128.

"We come now to the case of defendant Ames. Ames owns forty acres of riparian land immediately below the city, and immediately above the riparian lands of the plaintiff. He had erected a dam in the river, just above his line, on the lands of the city, but with the consent of the city, and proposes to divert 600 inches of water, miners' measure, for the purpose of selling the same to nonriparian owners, using none on his own land. It was adjudged that neither Ames nor plaintiff had any right to any of the waters of the river which they could assert against the city, but when the city permits any water to flow past, if it be all developed or artificial water, Ames may take it all. When it is mingled with the natural flow in the stream, it must be regarded as though it were the natural flow. Then, when there is only sufficient water to supply the uses required for the riparian lands of plaintiff and defendant Ames, plaintiff may have one-fifth of such water and Ames four-fifths. When there is more than is required for such needs, Ames may first take one hundred inches, and then plaintiff may take two thousand inches, and Ames may then take the remainder, if any there be, and both plaintiff and Ames are perpetually enjoined from taking any water from the stream except as permitted in the decree. This decree is not supported by the facts found, or by any facts which could have been found, from the evidence, and is inconsistent with the law applicable to such cases. As we have seen, there is no evidence which tends to show that there is any developed or artificial water in the stream. The next disposition professes to protect the riparian rights of the parties, but is utterly inconsistent with such rights. Under that doctrine, Ames would not be entitled, as against plaintiff, to four-fifths of the water, nor to any other quantity, except when it was required for cerain uses; nor would he then be permitted to take more than such uses required, and possibly not even that much. And then, how, consistently with the doctrine of riparian rights, could Ames take one hundred inches of water, not required on his riparian lands, or the further indefinite quantity, after plaintiff has been allowed to take two thousand inches? What right, under the findings or evidence, has plaintiff made out to two thousand inches of water under any circumstances? This shows a very loose idea of the doctrine of riparian rights. If that doctrine be the true one, as this court has repeatedly held, the riparian owner is entitled to the continuous flow of the stream as part and parcel of his estate, and not as an easement or incorporeal right issuing out of land. He does not own the corpus of the water, but incident to his riparian right is the right to appropriate a certain portion of it. It is only, I think, by some species of appropriation that one can ever be said to have title to the corpus of the water. The right of the riparian owner is to the continuous flow, with a usufructuary right to the water, provided he returns it to the stream above his lower boundary, and the right, as I have said, to make a complete appropriation of some of it. But, as our decisions stand, an appropriator cannot acquire a right to any of the waters of a stream to the prejudice of a riparian owner, by any use, except under the statute of limitations. I think some material findings are not sustained by the evidence, and that the judgment is not justified by the findings, and recommend that the judgment and order be reversed, and a new trial had."

For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, and a new trial granted.

McFARLAND, J. I concur in the judgment and in the opinion adopted by the court. I desire to say, however, that the case of Modoc Land & Live-Stock Co. v. Booth, 102 Cal. 151, 36 Pac. 431, cannot be taken as authority for the proposition that a riparian proprietor on an ordinary natural stream cannot, by injunction, restrain an unlawful diversion of the water of the stream, unless he can show actual special damage other than such as thus legally arises from a deprivation of the substance of his estate. To so interpret that case would be to make it overrule every decision of this court upon the subject from the organization of our state government to the present moment. All the Modoc Case decides is that—to use the language in the opinion in that case, taken from Pomeroy: "Unless the flow of a stream to the land of a riparian proprietor has been appreciably or perceptibly diminished, he is not entitled to an injunction," etc. Of course, with respect to a river of the size of the Mississippi or the Sacramento, no probable diversion would ever perceptibly diminish the flow of the current. Illustrations drawn from supposed riparian rights in such rivers are scarcely more pertinent than would be illustrations from supposed riparian rights on the Gulf Stream. In the case at bar, however, as stated in the opinion, the injunction "would not have the effect to cause the water to flow over or along its riparian land, as it was accustomed to flow."

(113 Cal. 503)

## CULLEN et al. v. GLENDORA WATER CO. (No. 19,360.)[1]

(Supreme Court of California. March 11, 1895.)

IRRIGATION DISTRICTS — CONSTITUTIONAL LAW — CONFIRMATION OF PROCEEDINGS — DESCRIPTION OF LAND—SUPERVISORS—DISCRETION—ELECTION OF DIRECTORS — DUTY TO ESTIMATE COST OF SYSTEM.

1. That part of St. 1889, p. 213, § 4, providing that, in proceedings by directors of irrigation districts for the confirmation by the superior court of the organization of the districts, and of the issuance of bonds, a motion for a new trial must be made on the minutes of the court, is in conflict with Const. art. 4, § 25, which declares that the legislature shall not pass local or special laws regulating the practice of courts of justice.

2. St. 1889, p. 212, authorizing the directors of an irrigation district to petition the superior court to confirm their proceedings in the issuance of bonds of the district, is not, because it authorizes the court to determine the right of the parties interested in the bonds before any controversy as to such right, in conflict with Const. art. 6, § 5, fixing the jurisdiction of the superior court.

3. If, in a petition to establish irrigation districts, the landmarks called for in the description of the land to be included in the district can be found on the ground, the description is sufficient, though the land is not definitely described.

4. The board of supervisors have discretionary power to determine what lands shall be included in an irrigation district, and, in the absence of abuse of discretion or fraud, their determination shall not be disturbed.

5. Act March 7, 1887, § 2, as amended by St. 1891, p. 143, provides that the board of supervisors shall divide an irrigation district into five divisions, as nearly equal as practicable, and one director, who shall be a "freeholder and resident of the district," shall be elected by each division, and that, if a majority of the holders of title petition for a formation of the district, the board of supervisors may, if so requested in the petition, order that there may be three or five directors for such district, and that they may be elected by the district at large. Section 3 provides that, for the purposes of election to determine whether the district shall be organized, the board of supervisors must establish a convenient number of election divisions in the proposed district. *Held* that, if the petition asked that the directors be elected at large, the board of supervisors had power to declare one precinct a convenient number, and, having done so, they were not required to divide the district into divisions, the act not requiring that, where the election was at large, one director should reside in each division.

6. The fact that public lands are included in an irrigation district will not invalidate the organization of the district.

7. Under St. 1891, p. 147, § 15, providing that the board of directors of an irrigation district must determine the amount necessary to be raised for the purpose of providing for the work of irrigation, and shall call a special election, at which shall be submitted to the electors of the district the question whether or not the bonds of the district in the amount as determined shall be issued, the directors must, before calling an election, make an estimate of the probable cost of the work, based on some definite plan.

Commissioners' decision. In bank. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Application of W. B. Cullen and others, as directors of the Glendora irrigation district, to the superior court, praying that the organization of the district, and issuance and sale of bonds, may be examined, approved, and confirmed. The Glendora Water Company appeared and answered. Judgment was rendered for the petitioners, and defendant, Glendora Water Company, appeals. Reversed.

Chapman & Hendrick, for appellant. A. W. Hutton and Chas. L. Batchelder, for respondents.

VANCLIEF, C. The Glendora irrigation district is composed of a tract of land containing about 3,000 acres, situate in the county of Los Angeles, and was organized December 21, 1891, by the board of supervisors of that county, in alleged accordance with an act of the legislature generally known as the "Wright Act," approved March 7, 1887 (St. 1887, p. 29), and amendments thereof. And this is a proceeding by petition of the board of directors of said irrigation district to the superior court of that county, praying that the organization of said district, and all the proceedings by which said board of directors ordered the issuance and sale of bonds of said district for $170,000 may be examined, approved, and confirmed, as authorized by an act "supplemental," to the "Wright Act," approved March 16, 1889 (St. 1889, p. 212). The Glendora Water Company (a corporation), being the owner of land in said irrigation district, appeared as a defendant, and demurred to the petition on the ground that it does not state facts sufficient to entitle the petitioners to any relief; and especially that it does not state facts sufficient to give the court jurisdiction of the subject-matter thereof. The demurrer was overruled, and the defendant answered the petition. The court made written findings of facts, nearly all of which were stipulated by the parties, and thereupon rendered judgment according to the prayer of petitioners, approving and confirming the organization of the district, and the order of the board of directors for the issuance and sale of bonds. The defendant, Glendora Water Company, appealed from the judgment and from an order denying its motion for a new trial.

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[1] Rehearing granted.

1. The respondents contend that the appeal from the order should be dismissed, or, at least, that the order should be affirmed, on the ground that the notice of motion for new trial does not specify any particular in which the evidence is alleged to be insufficient, nor any particular error in law, as required by section 659, Code Civ. Proc., when the motion is made on the minutes of the court, and the ground of the motion is insufficiency of evidence or error in law. It is true that the only grounds of the motion are insufficiency of evidence and errors in law, and that the notice contains no specification of either. But it does not appear that the motion was made on the minutes of the court. On the contrary, the notice states "that the motion will be made on a bill of exceptions," and it was so made. In answer to this, however, counsel for respondents contend that the motion for new trial must have been made, if made at all, on the minutes of the court, since section 4 of the act of 1889 (page 213), under which this proceeding was taken, imperatively so provides; and therefore, if not made on the minutes of the court, the motion was wholly unauthorized and void. On the other hand, counsel for appellant plausibly contends that the provision in section 4 of said act, requiring a motion for new trial to be made on the minutes of the court, is repugnant to the third subdivision of section 25 of article 4 of the constitution, which declares that the legislature shall not pass local or special laws "regulating the practice of courts of justice." While section 4 of the supplemental act provides that "the rules of pleading and practice provided by the Code of Civil Procedure, which are not inconsistent with the provisions of this act, are applicable to the special proceeding herein provided for," it further provides that "a motion for a new trial must be made on the minutes of the court." The inevitable effect of this last-mentioned provision is not only to deny the right to move for a new trial either on a statement of the case or on a bill of exceptions, as permitted by the Code in all other cases, but also to preclude a motion for new trial on any one of the first four grounds upon which the Code allows such motion to be made, namely: (1) Irregularity in the proceedings of the court, jury, or adverse party, or abuse of discretion by which a party was prevented from having a fair trial; (2) misconduct of the jury; (3) accident or surprise; (4) newly-discovered evidence,—since upon each of these grounds the Code (section 658) requires the motion to be made upon affidavits. Conceding, as I do, that the objects and purposes of one class of actions or special proceedings may require a peculiar method of practice differing from those of other classes whose objects or purposes are substantially different, and also that a classification of methods of practice, appropriately adapted to the objects or purposes of each of the different classes of actions of special proceedings, may be based upon the distinction between the different objects to be attained, so that a law providing a different method of practice adapted to the attainment of the peculiar object of any one of such different classes of actions or special proceedings would be a general law, yet I am unable to perceive that any lawful or honest object or purpose of the special proceeding under consideration requires, or would be promoted by, any restriction of the grounds upon which a motion for new trial is authorized by the Code of Civil Procedure; or, by requiring such motion to be made only on the minutes of the court, instead of permitting it also to be made on a statement of the case, or on a bill of exceptions, at the option of the moving party, as provided by the Code of Civil Procedure. On the contrary, it is obviously apparent that the main object of this special proceeding, as expressed in the act authorizing it, may be thwarted, and even defeated, by restricting the motion for new trial as required by section 4 of said act; since it is plain that either party to a proceeding of this class may be prevented from having a fair trial by irregularity in the proceedings of the court or adverse party, or abuse of discretion, or by misconduct of a jury in case of trial by jury, or by accident or surprise; and that material evidence may be discovered after the trial which could not, with reasonable diligence, have been discovered and produced at the trial; and also that the motion for new trial may sometimes be more conveniently, more clearly, and more effectively presented by a statement or bill of exceptions than upon the minutes of the court. It therefore appears that there is no reasonable ground for the distinction between the special mode of moving for new trials provided by section 4 of the act in question and that provided by the unquestionably general law,—the Code of Civil Procedure. The distinction, as we have

seen, suggests no reason why the general mode provided by the Code of Civil Procedure should not be applied to motions for new trials in this special proceeding for the confirmation of bonds of irrigation districts, but the contrary. It follows, I think, that the distinct part of the fourth section of the act in question, which provides that "a motion for a new trial must be made upon the minutes of the court," is a special law "regulating the practice of courts of justice" in a matter to which an existing general law is appropriately applicable; and is therefore repugnant to section 25, art. 4, of the constitution. Darcy v. Mayor of San Jose (Cal.) 38 Pac. 500; City of Pasadena v. Stimson, 91 Cal. 238, 27 Pac. 604; Dougherty v. Austin, 94 Cal. 601, 28 Pac. 834, and 29 Pac. 1092. But it does follow from this that any other part of the act may not have the full operation and effect intended by the legislature, since the intended effect of the invalid provision as to new trials is not necessary to the complete operation and effect of all other provisions of the act, which other provisions constitute a general law applicable to a class of special proceedings distinguished from all other classes by attributes which reasonably require all the peculiarities of practice thereby provided, excepting, perhaps, the limitation of the time within which an appeal must be taken to 10 days, as to which no question is involved in this case. But the concession that, for most of its purposes, the act is a valid general law, does not help the special provision regulating the practice as to new trials. For the purpose of testing its constitutionality, that special provision must be treated as a distinct law, as it is, and as if it had not been injected into an act whose other provisions are constitutional. So considered it is seen to apply to only a limited species of special judicial proceedings, for which it provides a mode of moving for new trials materially different from that provided by the Code of Civil Procedure, without any reason or necessity for the difference, arising from any peculiar characteristic of the class of proceedings to which it is applied, nor from any other source. It is therefore inappropriate to the class of proceedings to which it is applied; for, as was said in the case of Dougherty v. Austin, 94 Cal. 621, 28 Pac. 834, and 29 Pac. 1092, "a classification permitted for one kind of legislation cannot be made the basis of a different kind of legislation, to which it is manifestly inappropriate." Besides, "it destroys the uniform operation of a general law and is special in a case where a general law not only can be made applicable, but in which a general law had been enacted, and in which there is no conceivable reason for discrimination." City of Pasadena v. Stimson, 91 Cal. 249, 27 Pac. 604. It is further said in the case last cited "that, although a law is general and constitutional when it applies equally to all persons embraced in a class founded upon some natural or intrinsic or constitutional distinction, it is not general or constitutional if it confers particular privileges or imposes peculiar disabilities or burdensome conditions, in the exercise of a common right, upon a class of persons arbitrarily selected from the general body of those who stand in precisely the same relation to the subject of the law." Upon this point see, also, Darcy v. Mayor of San Jose, supra, and cases there cited. The subject of the law in question is the mode of moving for new trials in the superior courts, to which subject the parties to all actions and special proceedings stand in precisely the same relation as do the parties to the small class of special proceedings, to which, alone, this law is made applicable, and should equally share the peculiar privileges conferred, or equally suffer the disabilities and burdens imposed by it; since no discrimination in the application of the law is justified by any peculiar characteristic of any object of the law, or of the parties to the special proceeding to which the law is applied. That part of the act requiring a motion for new trial to be made on the minutes of the court being void, the defendant properly disregarded it, and is entitled to be heard on its appeal from the order denying a new trial, upon questions of both law and fact, the appeal having been taken within two days after the date of the order.

2. Counsel for appellant contend that the act of March 16, 1889, providing for a judicial examination, approval, and confirmation of bonds of irrigation districts, is unconstitutional for the reason that it authorizes a court to hear and determine what will be the rights of parties interested in those bonds, in advance of any controversy as to such rights. No provision of the constitution is cited to this point, except it is claimed that in all the different species of jurisdiction conferred on superior courts by section 5, art. 6, of the constitution, "it is presupposed that somebody is prosecuting somebody else to enforce or protect some right, or to redress or to prevent some wrong." But surely this is not true of actions or special proceedings in rem, of which superior courts are expressly given jurisdiction. For example, there can be no such presupposition in proceedings for the probate and confirmation of wills, nor in insolvency proceedings, since they may be, and often are, prosecuted to final and conclusive judgments without any controversy whatever. In all this class of cases, however, the petition or complaint contemplates a controversy and tenders issues which may be accepted and joined by any person interested who has been actually or constructively served with any kind of lawful process; and so it often happens in actions in personam that issues are tendered by pleadings in advance of any actual con-

troversy, and before it is known whether or not any averment in the pleading will be controverted. Besides, the question under consideration has been decided by this court adversely to appellant, at least by implication, in several cases. Crall v. Irrigation Dist., 87 Cal. 140, 26 Pac. 797; Board v. Tregea, 88 Cal. 338, 26 Pac. 237; In re Madera Irr. Dist., 92 Cal. 296, 28 Pac. 272, 675. And counsel for appellant concedes that the question was involved in those cases, but claims that the ground of objection here urged by him was not expressly presented to the court in either of those cases. But I think it would have been of no avail if it had been presented.

3. The objections on the grounds that the proposed district was not definitely described in the petition for its organization, nor in the order calling the election, and that the latter varies from the former, seem to have been answered by this court in the case of Irrigation Dist. v. De Lappe, 79 Cal. 360, 21 Pac. 825, and cases last above cited. If the landmarks called for in the petition can be found on the ground, the description is sufficiently definite; and there is no evidence that such landmarks cannot be found. Nor does it appear that the description in the order calling the election varies from or is less definite than that in the petition.

4. It does not appear that the board of supervisors improperly either included in the district, or excluded from it, any parcels of land; and the objections made on these grounds are fully answered in the cases supra. What the board did in this respect was within its discretionary power, and the only available objection to it would be abuse of such power, or fraud; of neither of which is there any evidence. Irrigation Dist. v. De Lappe, 79 Cal. 360, 21 Pac. 825; Board v. Tregea, 88 Cal. 354, 26 Pac. 237; In re Madera Irr. Dist., 92 Cal. 343, 28 Pac. 272, 675. Besides, no person whose land is alleged to have been improperly included or excluded has complained.

5. Section 2 of the act for the formation of irrigating districts, as amended (St. 1891, p. 143), provides that the board of supervisors shall divide the district "into five divisions as nearly equal in size as may be practicable, which shall be numbered first, second, third, fourth and fifth, and one director, who shall be a freeholder in the division and an elector and resident of the district, shall be elected by each division: provided, that if a majority of the holders of title * * * petition for the formation of a district, the board of supervisors may, if so requested in the petition, order that there may be either three or five directors, as said board may order, for such district, and that they may be elected by the district at large." The third section of the act provides: "For the purposes of the election above provided for (to determine whether the district shall be organized), the said board of supervisors must establish a convenient number of election precincts in said proposed district, and define the boundaries thereof, which said precincts may thereafter be changed by the board of directors of such district. In any district the board of directors thereof may, upon the presentation of a petition therefor by a majority of the holders of title, * * * order that on and after the next ensuing general election for the district there shall be either three or five directors, as said board may order, and that they shall be elected by the district at large, or by divisions, as so petitioned and ordered; and after such order such directors shall be so elected." Under these provisions, the board of supervisors declared one precinct to be a convenient number for the election; and, as requested in the petition, ordered that five directors be elected by the district at large, and did not divide the district into five divisions. Counsel for appellant contend, notwithstanding the board had properly established but one election precinct, and properly ordered that five directors be elected by the district at large, yet the board was bound to divide the district into five divisions, and to elect one director from (not "by") each division. In this I think counsel mistaken, since the board may order either five or three directors, and, in either case, that they be elected "by the district at large"; and when it does so there can be no rational object for dividing the district into five divisions, especially if only three directors are to be elected. When the election is by the district at large, neither of the five divisions would be distinctly represented on the board, even though a director should be taken from each division, since a majority of the electors at large might select a director who would not truly represent the division in which he resides, or whose interest might be greater in another division. Besides, a district may be so divided as to enable a majority of the electors at large to select four-fifths of the directors from the same quarter section of land, while each resides in a distinct division. Had the legislature intended that each director should be taken from a division distinct from all others when elected by the district at large, it could easily have said so, and in that event would hardly have failed to provide for a division of the district into three divisions, when only three directors are to be elected. The statute is not so explicit on this matter as it might be, yet I have no doubt the legislature intended that there should be no division of the district when the election is to be by the district at large.

6. Prior to the filing of the petition of the organization of the irrigation district, a written agreement was executed between the defendant (Glendora Water Company) of the first part, and J. P. West and 45 other natural persons, alleged to have been interested in effecting an organization of the Glendora

irrigation district, of the second part, which agreement is substantially as follows: First. Party of first part agrees to sell all its property "consisting of water and water rights, reservoirs, land held to protect water rights and for reservoir sites, tunnels, supply and distributing pipes, and tools," to the proposed irrigation district, within ninety days, for the sum of $32,362.71, "together with a small amount for railroad lands, held by Geo. D. Whitcomb to protect the water interests of the company, said sums being considered sixty per cent. of the costs of said property." Second. If the irrigation district is not organized within said time, "then this agreement shall immediately cease upon the expiration of the said ninety days. But, if said district shall be organized within the said ninety days, then the said property will be sold to the district, or to the other parties to this agreement for the district, within sixty days after the organization is completed. The said district, if organized, shall include the town of Glendora and the lands included within the bounds of the district as advertised in the petition to the board of supervisors of Los Angeles county." Third. The purchase money to be paid within 12 months from January 1, 1892, with interest at 6 per cent. per annum. Said property to remain in possession of the party of the first part, which is to collect "all water rates and income therefrom, the rates to be approved jointly by the directors of the water (irrigation) district and the Glendora Water Company, until full payment is made for said property, and thereafter until water sufficient for the whole district is put on the lands of the district. But the receipts, after paying running expenses, are to be credited upon the interest account. All sums expended subject to the approval of the board of directors of the water (irrigation) district for necessary repairs and improvements after the date of this contract are to be repaid in full to the party of the first part within said twelve months from January 1, 1892." Fourth. The parties of the second part are to be personally responsible to the party of the first part for the purchase price of the property and repayment of all other sums, as herein provided. Nothing in the way of performance of this agreement has been done by either party, and it is not made clear by the evidence or findings that either party has ever been ready or willing to perform. Appellant claims, however, that the parties of the second part executed the agreement in bad faith, merely for the purpose of preventing the Glendora Water Company and its stockholders from opposing the organization of the irrigation district, and without any intention of performing the agreement on their part, and therefore that the organization of the irrigation district was fraudulent. But there is no evidence of the bad faith or fraud charged, and the court found that while it is true that the parties of the second part, or some of them, claim that they are not bound by the agreement because the district was not organized with the boundaries advertised in the petition as required by the agreement, and because of other objections to the agreement, it is not true that they and the board of directors of the Glendora irrigation district "do not intend to carry out said agreement." This disposes of the question of fraud in the organization of the district in favor of respondent; and all other questions relating to the agreement, discussed by counsel, are obviously irrelevant.

7. It is claimed by appellant that the district was illegally organized, because it contains 80 acres of railroad land which has not been patented to the railroad company, or to its grantees, although such land had been sold by the railroad company to bona fide purchasers, who were citizens of the United States, before the district was organized, and appellant claims no interest therein. It is not necessary to determine what interest or title, if any, said purchasers had in or to said land. Assuming it to have been public land, its incorporation into the district did not make the organization invalid. In re Madera Irr. Dist., 92 Cal. 343, 28 Pac. 272, 675; Board v. Tregea, 88 Cal. 334, 26 Pac. 237. Whether or not said purchasers were qualified signers of the original petition for the organization of the district is a question which does not here arise.

8. Section 15 of the Wright act, as amended (St. 1891, p. 147), provides as follows: "For the purpose of constructing irrigation canals and works, and acquiring the necessary property and rights therefor, and otherwise carrying out the provisions of this act, the board of directors of any such district must, as soon after such district has been organized as may be practicable, * * * estimate and determine the amount of money necessary to be raised, and shall immediately thereafter call a special election, at which shall be submitted to the electors of such district * * * the question whether or not the bonds of said district in the amount as determined shall be issued." The petition in this case states that the board of directors did estimate and determine that $170,000 would be necessary for the purposes of constructing necessary irrigation canals and works, and acquiring the necessary property and rights therefor, and otherwise carrying out the provisions of said act. This allegation was denied by the answer of the defendant, and upon the issues thus joined the court found in favor of the petitioners. Appellant contends that this finding is not justified by the evidence, and as to this point I think appellant's contention should be sustained. Respondents offered no evidence in chief touching this issue. The defendant called C. S. Whitcomb, who upon this issue testified as follows: "Am acquainted with the water rights and

waterworks of the Glendora Water Company. I know the document set out in the stipulation, being an agreement between the Glendora Water Company and certain persons resident in the irrigation district, entered into prior to the formation of the district. The water rights and works of the Glendora Water Company are worth the sum mentioned in the agreement. I was one of the board of directors of the Glendora irrigation district when first organized, and continued in that position for one year. It ended in March, 1893. Am acquainted with the record book of the district. (The book is here shown to the witness, and identified as the record book containing the minutes of the board of directors of the Glendora irrigation district.)" The witness was then asked to state to the court whether the board of directors of that district ever adopted any plan for the construction of any works, or determined upon what works they would construct, for the purpose of supplying the district with water for irrigation, or made any estimate of the cost of such construction, and, if so, to point out in the minutes of the board of directors where any such plan appeared. The witness answered, "They did not, and I know of no minutes to the contrary"; and, further testifying, said: "I am acquainted with the waters in the vicinity of this district. There are no live streams of any size within reach of the district. There are what might be called two 'wet-weather streams,'—one of them flowing possibly three or four months, and the other flowing probably five months, on an average, during the year. During the irrigating season all of the springs now used inside of the district would probably flow about twenty inches; that includes the Glendora Water Company's. All of the other springs to which I have referred are the property of private individuals. The irrigation district has not made any attempt or commenced any proceedings for the purchase or condemnation of those rights. There are no streams of water outside of the district the waters of which can be brought into the district. The stream from which the Glendora Water Company obtains its waters flows at times during the winter a very large stream, but, take the average flow for five months, and it would probably be about a hundred inches. After that it runs down to a small stream during the late spring months, and sometimes during the summer months dries up on the surface. There is no other plan, to my knowledge, by which any additional water than that owned by the Glendora Water Company and these other springs belonging to private parties could be obtained for that district, other than the construction of storage reservoirs to catch and hold the winter and spring flow. The irrigation district has done nothing in reference to obtaining any water, to my knowledge. Cross-examination: I am not a director of the irrigation district now, nor an officer of the Glendora Water Company. My father is president of the Glendora Water Company. He is now in Chicago. I didn't say at Mr. Chapman's office, in the presence of Judge Hutton and Mr. La Fetra, that that storage system would cost about one hundred and twenty or thirty thousand dollars. I said that the buying of the Glendora system, and piping of the district, and building storage reservoirs and completing the whole plan, would cost about one hundred and twenty or one hundred and thirty thousand dollars." Two other directors of the Glendora irrigation district, namely, M. H. La Fetra and W. B. Cullen, were called by plaintiff in rebuttal, but neither of them disputed any part of the above-stated testimony of Whitcomb as to plans and estimates. Furthermore, their testimony shows that no plans for the work nor estimate of the cost had been made up to the time they testified. Nor did they then know from what source they could procure any water, unless they could purchase the water rights and improvements of the defendant, which it is agreed are not sufficient to supply the district, though they intend to get water from other sources if they can. It must be conceded, I think, that the provisions of both the Wright act and the confirmation act generally facilitate the organization of irrigation districts and the issuance and confirmation of bonds, and thus afford some excuse, if not justification, for the practical construction which seems to have been given them by the promoters of the Glendora district, and, perhaps, by other irrigation districts, to the effect that the principal object of those acts is the issuance and confirmation of a liberal supply of bonds, and that a sufficient supply of water for irrigation is chiefly incidental. But the absurdity and injustice of intending such a construction cannot be attributed to the legislature, since it has interposed, at least, one salutary check upon an improvident issue of bonds, namely, that, before calling an election to determine whether or not bonds shall be issued, the board of directors of any such district "must estimate and determine the amount of money necessary to be raised" "for the purpose of constructing irrigation canals and works, and acquiring the necessary property and rights therefor, and otherwise carrying out the provisions of this act." In the case of the Glendora district no such estimate was made before calling the election, nor at any time thereafter. This requirement to estimate the amount of money to be raised for the purposes named implies that the directors must have some of those purposes in view, and, at least, such general knowledge of them as would constitute sufficient data for an approximate estimate of their cost. As the ultimate purpose of the law is to obtain water to irrigate the land of the district, the sources from which such water may be obtained, the kind and length of canals or other conduits through which it may be conveyed to the lands to be irrigated, and the general character and magnitude of other necessary works, must be known before even a proximately correct estimate of their cost can be made. But in this case it appears that none of these things were known to the directors before they called the election, or even at the time of the trial, except that they had in view a purchase of the water rights, canals, and reservoirs of the defendant at a price not exceeding $35,000, and which the evidence tends to show they may still purchase for that price. The three directors called as witnesses concurred in testifying that they did not know, even at the time of the trial, from what source they could obtain any water, except that of the defendant, and that they had made no arrangement to get water from any other source. Upon what data could they have estimated before the election that $170,000 ($58 per acre on all the land in the district) was the amount necessary to be raised? It is enough, however, for the purpose of disposing of the point under consideration, that the evidence, without conflict, shows that they made no such estimate, nor any estimate whatever, before they ordered the election. While I am inclined to the opinion that the statutory requirement that an estimate must be made implies that it must be made by a competent engineer, upon such plans or data as that it may be proximately correct, and that it should be recorded in the office of the district or otherwise made accessible to all parties interested, it is not necessary so to decide in this case. I think the few checks provided by the statute against the reckless or improvident creation of bond liens of $60 per acre on all the lands in one of these irrigation districts, largely by the votes of electors who own no part of such lands, should be strictly enforced in favor of the owners of such lands. Therefore, for the reason that the board of directors of the Glendora irrigation district made no estimate of the amount necessary for any purpose, I think the order and judgment appealed from should be reversed, and the cause remanded.

We concur: SEARLS, C.; BELCHER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the order and judgment appealed from are reversed, and the cause remanded.

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(106 Cal. 400)

## In re MANSFIELD. (No. 3.)

(Supreme Court of California. March 13, 1895.)

INTOXICATING LIQUORS — LICENSE FOR SALE — COUNTY ORDINANCE — VALIDITY — COMPLAINT BEFORE JUSTICE—SUFFICIENCY IN FORM.

1. A county ordinance requiring "every person who in any saloon, bar, inn, * * * or other public place sells or gives away" spirituous liquor to obtain a license, is not objectionable as requiring a license for the mere sale or giving away of such liquor by any person not in such a business.

2. A clause of a section in a county ordinance imposing a fine and imprisonment as a penalty for selling liquor without a license, though invalid as conflicting with Pen. Code, § 435, making the carrying on of any business without a license, where a license is required by law, simply a misdemeanor, being severable from the preceding clause, making sales without a license unlawful, does not destroy its force.

3. Pen. Code, § 1426, provides that proceedings before a justice court for a public offense must be commenced by complaint setting forth the offense with such particularity that the defendant will understand the nature of the charge; and Id. § 960, declares that no indictment or information shall be insufficient by reason of a defect in form not prejudicial to a substantial right of the defendant on the merits. *Held*, that a complaint which clearly informs defendant of the nature of the charge, is not defective for failure to conclude with the words "against the form of the statute in such case made and provided," or their equivalent.

In bank.

Application by John H. Mansfield, convicted of selling liquor without a license, for a writ of habeas corpus. Writ denied.

J. D. Sproul and Park Henshaw, for petitioner. H. V. Rearden, for respondent.

HENSHAW, J. Petitioner was convicted in Butte county under a complaint charging him with carrying on the business of selling distilled, fermented, malt, vinous, and other spirituous liquors without having first procured a license so to do, contrary to the provisions of Ordinance No. 124, Butte county ordinances, entitled "An ordinance to regulate the business of selling liquors in Butte county, California, to provide for licensing the same, and for the revocation of such licenses in certain cases, and prescribing penalties for the violation thereof." The ordinance is pleaded in full in the complaint. Defendant was sentenced to pay a fine of $150, and, in default of payment, to be imprisoned in the county jail of Butte county, in the proportion of one day's imprisonment for every dollar of the fine.

Ordinance 124 provides as follows: Section 1: "Every person who in any saloon, bar, inn, tavern, hotel, tippling place, or other public place, sells or gives away any distilled, fermented, malt, vinous, or other spirituous liquors, or wines, in less quantities than one quart, must obtain a license from the tax-collector as prescribed in this ordinance, and make therefor the following payments." Saloons, bars, inns, taverns, hotels, tippling places, or other public places, located in cities, towns, villages, or hamlets, constitute the first class, and are required to pay $50 per month license; others constitute the second class, and are required to pay the sum of $25 per month. Section 4 of said ordinance provides for certain restrictions upon the issuance of these licenses, requiring as a prerequisite a written recommendation, signed by at least 10 out of 20 responsible freeholders residing or doing business of a permanent or respectable character nearest the place where the said applicant or applicants proposed to carry on said business, together with a bond in the penal sum of $2,000, conditioned, etc. Section 5 provides: "Sec. 5. It shall be unlawful for any person or persons to engage in or carry on, within the corporate limits of the county of Butte, the business of selling or giving away any distilled, fermented, malt, vinous or other spirituous liquors or wine, either in their own names and for their own profit and benefit, or as agents or employés for any other person or persons, unless said person or persons, their principals or employers, shall first procure from the tax-collector a license so to do. And if such person or persons, either for themselves or as agents or employés or otherwise, shall engage in or carry on said business without having first procured such license, he, she or they, for each violation of this ordinance, shall be deemed guilty of a misdemeanor, and upon conviction by any court having jurisdiction thereof shall be punished by a fine not less than $150 and not exceeding $500, or by imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment."

By subdivision 27 of section 25 of the county government act (St. 1891, p. 306), power is given to the boards of supervisors "to license for the purposes of regulation and revenue all and every kind of business not prohibited by law, and transacted and carried on in the county; to fix the rates of license tax upon the same, and to provide for the collection of the same by suit or otherwise."

The defendant, it is conceded, was carrying on his business in the incorporated town of Chico. This town, by its own ordinance, had fixed rates of license, and prescribed regulations for the conduct of the business in which defendant was engaged; and it is averred, and not denied, that defendant had complied with all the terms and requirements of such town ordinance, and was doing his business in conformity with the town ordinance, and under a license issued to him by said town. The ordinance under consideration undertakes to license, not only for the purpose of regulation, but as well for the purpose of revenue. If there be a conflict in terms between the ordinance of the town of Chico and the ordinance of the county of Butte in the regulations prescribed for the carrying on of the business in the exercise of this police power, the ordinance of the town of Chico has superior force within the municipal limits. Ex parte Roach (Cal.) 37 Pac. 1044. That such a conflict exists, however, is not made to appear; and, in any event, it would not affect the consideration of the remaining question; for the ordinance of Butte county, while containing provisions in the nature of the exercise of police powers, at the same time is a license ordinance for purposes of revenue, and it is with the ordinance in that aspect that we are called upon to deal.

That it is within the power of the county of Butte to license for revenue the business of liquor dealing is obvious and unquestioned. People v. Martin, 60 Cal. 153. That the county has the power to collect such a license from those doing business within the territorial limits of towns and cities inside of its boundaries was decided in Re Lawrence, 69 Cal. 608, 11 Pac. 217. Against the ordinance here under consideration, however, it is urged that it prescribes the procurement of a license by any one who sells or gives away liquor; that under the rule laid down in Merced Co. v. Helm, 102 Cal. 160, 36 Pac. 399, the county has the power to fix licenses, not for the selling or giving away of liquor, but for the engaging in the business of doing these or any of these things; that there is a broad and well-defined distinction between a single act of selling and giving, or acts which do not constitute the business and are merely incidents to it, and the actual, bona fide business of dealing in liquors, either as a wholesale vendor or as a retail dealer or "saloonkeeper." But Merced Co. v. Helm is not a parallel case with the one at bar. There the county sought to collect its license tax from Helm by civil action; here (as will be discussed later) the defendant is charged criminally with a misdemeanor, under section 435 of the Penal Code. There the tax was a charge imposed upon the sale, and not for carrying on or engaging in the business of selling; here, while section 1 does provide that every person who sells or gives away any liquors or wines must obtain a license, section 5 further provides that it shall be unlawful for any person to engage in or carry on within the limits of the county of Butte the business of selling or giving away liquors or wines without first procuring from the tax-collector a license so to do. That the license required to be procured by one engaging in the business is the license called for by the ordinance is plain. Moreover, the language of section 1 of this ordinance is not obnoxious to the objections successfully urged against the Merced county ordinance. In the latter ordinance the language was: "All persons who sell either spirituous, malt or fermented liquors, wines or ciders in said Merced county shall pay quarterly, in advance, a license tax of $3,000 for each quarter of the year." Nothing in that language went to show that it was designed to limit its scope and applicability to those who gave or sold as a business, and the language was found to be objectionable for two reasons: First, because it was beyond the power of boards of supervisors to require a license for the mere single act of giving away or selling liquor; second, that the powers of boards of supervisors were limited to exacting licenses from those engaged in a particular business, and that the act of selling or giving away might be but an incident to some other business,—e. g. the selling of beer by a brewer being an incident to the business of manufacturing. Ex parte Mason, 102 Cal. 171, 36 Pac. 401.

But in the ordinance under consideration the language is: "Every person who in any saloon, bar, inn, tavern, hotel, tippling place or other public place sells or gives away." By fair intendment, this language should be accorded a different construction from that applied to the language of the Merced ordinance. There no restriction was made. "All persons" who sell or give away were subject to the license tax. Here it is only those persons who sell or give in the enumerated kinds and classes of places, and those places, it is of common knowledge, are places where liquors are vended as a business. But, even if it is conceded that it was beyond the power of the supervisors to exact licenses from those selling or giving away, they unquestionably have the power to require licenses of those engaged in the business, as provided in section 5. Section 5, however, it is urged, must be eliminated as void. The contention is based upon the fact that the latter portion of the section provides a penalty, which penalty comes in conflict with the provisions of section 435 of the Penal Code. In re Sic, 73 Cal. 142, 14 Pac. 405. The conflict exists, and because of it the penal clause of the ordinance is void, but that does not of necessity destroy the whole of section 5. The rule is well settled that, if the void portion is severable, the rest will stand. Ex parte Christensen, 85 Cal. 208, 24 Pac. 747; End. Interp. St. §§ 35–40 et seq. The first portion of the section is complete without any reference to the latter portion. Indeed, the two portions might easily and well have been cast, as is usual, in different sections. It is only necessary to eliminate that portion of the section beginning with the words "and if such person," and ending with the words "or by both such fine and imprisonment." So treated, there still remains a valid ordinance requiring the procurement of a specified license by those who in the county of Butte engage in or carry on the business of selling or giving away liquors.

It is finally contended that the defendant was tried and convicted, not under the state law (Pen. Code, § 435), but under the penal clause of the ordinance; and, in support of this contention, it is pointed out that defendant was fined the minimum amount prescribed in the ordinance, and that the complaint on which he was tried referred only to the ordinance, and did not conclude with the declaration that his acts were contrary to the form, force, and effect of the statute. Where no change has been made by the constitution or by statute, the conclusion of an indictment contra formam statuti is always required where a statute creates an offense, or declares a common-law offense, when committed under particular circumstances not necessarily in the original offense, punishable in a different manner from what it would have been without such circumstances, or where the statute changes the nature of the common-law offense to one of a higher degree, or under a statute revising the common law. Whart. Cr. Pl. & Prac. (9th Ed.) § 280. In general, where the common law is unmodified by statutes, every indictment on the statute must conclude with the words "against the form of the statute in such case made and provided," or their equivalent. One which does not will not sustain a conviction. 1 Bish. Cr. Proc. § 602. Even a complaint for the violation of a town or city by-law, though it concludes "against the form of the by-law," must also conclude "against the form of the statute." Com. v. Gay, 5 Pick. 44; Stevens v. Dimond, 6 N. H. 330; Com. v. Worcester, 3 Pick. 462. In this state, therefore, the rule obtains, except as it may have been modified by the constitution or by the statutes. The constitution does not speak upon the matter. The Penal Code, in section 952, declares that the indictment or information must be direct and certain as regards (1) the party charged; (2) the offense charged; and (3) the particular circumstances of the offense charged, when they are necessary to constitute a complete offense. Section 958 declares that words used in a statute to define a public offense need not be strictly pursued in the indictment or information, but other words conveying the same meaning may be used. Section 959 enumerates those things which, if they can be understood from the pleading, render the indictment or information sufficient. Section 950 declares that the indictment or information must contain the title of the action, specifying the name of the court to which the same is presented and the names of the parties; second, a statement of the acts constituting the offense in ordinary and concise language, and in such a manner as to enable a person of common understanding to know what is intended. Section 951 states that the indictment or information may be substantially in the form given, which form concludes with the customary phrase "contrary to the form, force and effect of the statute in such case made and provided, and against the peace and dignity of the people of the state of California." These provisions are made applicable to indictments and informations.

This complaint is a complaint charging misdemeanor, the jurisdiction of the offense being in the justices' and police courts. As to the form of such a complaint the Penal Code elsewhere speaks, and in the following terms (Pen. Code, § 1426): "All proceedings and actions before a justice's or police court for a public offense of which such courts have jurisdiction must be commenced by complaint under oath, setting forth the offense charged, with such particulars of time, place, person and property as to enable the defendant to understand distinctly the character of the offense complained of, and to answer the complaint." Greater liberality is now allowed in criminal pleadings than was formerly permissible. As was said in People v. King, 27 Cal. 507: "Our Criminal Code is designed to work the same change in pleading and practice in criminal actions which is wrought by the Civil Code in civil actions. Both are fruits of the same progressive spirit which in modern times has endeavored, at least, to do away with the mere forms and technicalities of the common law, which were productive of no good, and frequently brought the administration of justice into contempt by defeating its ends." The Penal Code itself declares that no indictment or information is insufficient, nor can the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form which does not tend to the prejudice of a substantial right of the defendant upon its merits. Pen. Code, § 960.

The defendant in this case was plainly informed of the nature of his offense. It consisted, in the language of the complaint, in carrying on the business of selling distilled, fermented, malt, vinous, and other spirituous liquors and wines without having procured a license so to do, contrary to the provisions of Ordinance No. 124, Butte county, Cal., which ordinance is fully set forth. This was his alleged offense. If guilty of it, he became amenable to section 435 of the Penal Code, which provides that every person who commences or carries on any business, trade, profession, or calling for the transaction or carrying on of which a license is required by any law of this state, without taking out or procuring the license prescribed by such law, is guilty of a misdemeanor. The essentials to a criminal complaint in a justice's or police court, as set forth in section 1426 of the Penal Code, do not include a conclusion to the statute. "Expressio unius est exclusio alterius." As to complaints for misdemeanors, in justices' and police courts at least, the common-law rule has been changed. The complaint in this case complies with the requirements of the law, and states a cause of action against the defendant. Wherefore it is ordered that the writ be discharged, and the petitioner remanded.

We concur: BEATTY, C. J.; HARRISON, J.; VAN FLEET, J.; GAROUTTE, J.; McFARLAND, J.

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106 Cal. 381

## LEWIS v. BURNS et al. (No. 18,418.)

(Supreme Court of California. March 13, 1895.)

EVIDENCE—DECLARATIONS—RES GESTAE.

In an action to quiet title to land which plaintiff's wife conveyed without consideration to defendant,—the contention of plaintiff being that, though D. had procured conveyance to plaintiff's wife, and paid for it, and afterwards built houses thereon, it became the community property of plaintiff and his wife, and not her separate property, for the reason that D. was acting as their agent, and used their money, in such purchase and building,—declarations of D., made when he purchased the land and constructed the houses, as to the character in which he made the purchase, and the terms and conditions on which he was building, though made in the absence of plaintiff's wife, are admissible as part of the res gestae.

Commissioners' decision. Department 2. Appeal from superior court, San Joaquin county; Joseph H. Budd, Judge.

Action by S. T. Lewis against Thomas Burns and another. Judgment for defendants. Plaintiff appeals. Reversed.

James A. Louttit, for appellant. Baldwin & Thompson and Minor & Ashley, for respondents.

SEARLS, C. This is an action to quiet title to two certain lots of land situate and being in Stockton, Cal. Defendants had judgment, from which, and from an order denying his motion for a new trial, plaintiff appeals.

At the trial, the evidence showed without contradiction that the plaintiff and Bridget Burns intermarried in 1873, and remained husband and wife until 1892, when the latter died. About 1877, plaintiff and his wife removed to Stockton, where they lived and kept house, the plaintiff having at the time several horses, a couple of wagons, etc., with which he labored. Probably about 1881, plaintiff and his wife were both employed by one De Blainville, a merchant, the former clerking in the store, and the latter doing housework and cooking. In 1882, De Blainville procured lot No. 15 in block No. 33, east of Centre street, Stockton, to be conveyed to the wife of plaintiff. The consideration mentioned in the deed was $250. De Blainville also had a house built upon the lot, for which he paid. In 1885, De Blainville had another lot (No. 10 in block 24) purchased for $1,656.05, and conveyed to the wife of said plaintiff, upon which a house was also built by him, he advancing the entire expense. On the 16th day of October, 1890, Bridget Lewis, wife of the plaintiff, conveyed the two lots above mentioned to Thomas Burns and Mary Hearlihy (her brother and sister), reserving to herself during her life the rents, issues, and profits thereof. There was no valuable consideration for this conveyance. Plaintiff was a dissipated man, and was finally discharged by De Blainville, but at what precise time does not appear. It may be inferred, however, that he was in the service of the latter a year or two. His wife continued in the service of said De Blainville until the death of the latter, which probably occurred about 1889, although the date is not fixed, except inferentially.

The vital question at the trial was as to whether the lots were a gift from De Blainville to the wife of plaintiff, or whether, in purchasing them, De Blainville acted as the agent of the plaintiff and his wife, and as their adviser, and was reimbursed by them for the advances made. Upon this question the conflict occurred in the evidence. The testimony of plaintiff was, in substance, that, while they lived with De Blainville, he was their friend and adviser, retained their wages, and advised them as to investments, and acted for them in the purchase of the lots; that the first lot purchased was paid for with the proceeds of his horses, wagons, etc., sold from time to time, and from their wages; that, by the advice of De Blainville, the deeds were taken in his wife's name, but for and as community property; that the second lot purchased was in fact paid for by De Blainville, who was repaid a few days later by the proceeds of a mortgage for $1,500 upon both lots, executed by himself and wife, and such mortgage was in evidence, as well as a deposit to De Blainville's bank account, the day after the date of the mortgage, for $1,500. In corroboration of plaintiff's testimony, De Blainville being dead, plaintiff's counsel sought to prove, by sundry witnesses, declarations of said De Blainville, about the dates of the purchases and when he was building the houses on the lots, as to the character in which he made such purchases and the terms and conditions upon which he was building the houses. These declarations, not having been made in the presence of the deceased wife of plaintiff, were objected to by counsel for defendants, the objections sustained by the court, to which several rulings counsel for plaintiff excepted, and the rulings are assigned as error.

Section 1849 of the Code of Civil Procedure provides that the declarations, acts, or omissions of a grantor of real estate made while an owner shall be admissible against his grantee. Section 1850 is as follows: "Where also the declaration, act or omission forms part of a transaction, which is itself the fact in dispute, or evidence of that fact, such declaration, act or omission is evidence as part of the transaction." This section of the Code is little more than declaratory of a rule of evidence long previously recognized. "The declarations of a party while engaged in the performance of an act, and illustrating the object and intent of its performance, are admissible in evidence." Tait v. Hall, 71 Cal. 149, 12 Pac. 391. It would be more accurate to say that, where the act may have been prompted by one of two or more motives or objects, the declarations of the actor made at the time, and illustrative of the motive or object, are admissible in evidence. In Scott v. Bank, 140 Mass. 157, 2 N. E. 925, where the question was whether one who made deposits in a savings bank in the name of another, and kept the books, meant to make a gift of the deposit, it was held that evidence of her declarations while so holding the books was competent on the question whether she intended to make a gift. In the present case the ultimate fact to be reached did not differ materially from that sought in the case last above referred to, and the declarations of De Blainville as to his intentions in the premises, made at the time when he purchased the lots and constructed houses upon them, illustrative of his intent, formed a part of the res gestae, and were admissible in evidence.

It follows that the court erred in striking out evidence, and in refusing to admit evidence, upon the point indicated, for which errors the judgment and order appealed from should be reversed, and a new trial had.

We concur: BELCHER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, and a new trial had.

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(106 Cal. 377)

## YOUNGER v. YOUNGER. (No. 15,782.) [1]

(Supreme Court of California. March 12, 1895.)

DIVORCE—CUSTODY OF CHILD—ADOPTION.

1. Since Civ. Code, § 224, provides that the consent to the adoption of a child is not necessary from a father or mother adjudged guilty of adultery or of cruelty, and "for either cause divorced," where, after a decree awarding the custody of a child to its mother on a divorce from its father for cruelty, the mother consents to its adoption, the court awarding the divorce cannot, under section 138, modify the decree so as to give the custody of the child to its father.

2. The fact that a child is under the jurisdiction of a court, under Civ. Code, § 138, in divorce proceedings between its parents, does not prevent another court from having jurisdiction of the same child in proceedings for its adoption on the consent of the parent to whose custody it has been given.

Department 1. Appeal from superior court, Santa Clara county; W. G. Lorigan, Judge.

Action by Georgie A. Younger against Edward Younger for a divorce. Subsequent to a decree for plaintiff awarding her the custody of their child, defendant petitions for a modification of the decree, awarding him the custody of the child. There was a judgment for defendant, and plaintiff appeals. Reversed.

R. Clark and Chas. W. Thomas, for appellant. D. W. Burchard, for respondent.

VAN FLEET, J. The parties hereto were husband and wife, and had issue of their marriage one child, a son, Hiatt Tisdale

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[1] Rehearing denied.

Younger. In February, 1891, by a decree of the superior court of Santa Clara county rendered in an action brought for that purpose by appellant here against the respondent, the parties were divorced, upon the ground of respondent's extreme cruelty; and by the decree the custody of said child, then an infant about one year of age, was awarded to the mother. Immediately after the divorce, the mother removed with the child to Yolo county, and took up her residence in that county in the family of her grandfather, one G. W. Hiatt. Subsequently, on July 31, 1891, by a proceeding had before the judge of the superior court of Yolo county, the said child was, by the consent of the mother, duly and regularly adopted by said G. W. Hiatt, in accordance with the provisions of the Civil Code, and assumed the family name of Hiatt. In April, 1893, respondent filed a petition in the superior court of Santa Clara county, in said divorce proceeding, asking a modification of the decree therein with reference to the custody of said child, and praying that the custody thereof be awarded to him, upon the ground that the mother had abandoned the child to the control of others, and had since married again. Appellant answered said petition, setting up, among other things not necessary to mention, the facts above recited as to the divorce and adoption, and denying the jurisdiction of the court to make any order in the premises. The court found the facts with reference to said divorce and adoption in all respects as alleged, but, nevertheless, made an order modifying the divorce decree in so far as the same related to the custody of the child, by requiring that the respondent be permitted to see said child at all reasonable times, without limitation as to date, and that he be "permitted to bring said child to Santa Clara county * * * in the month of June of each year," and retain its custody during said month. From this order the appeal herein is prosecuted. The validity of the order is challenged upon various grounds, only one of which, however, need be noticed.

It is contended by appellant, and, we think, correctly, that the Santa Clara court had no jurisdiction to make the order appealed from, for the reason that its jurisdiction over the child had ceased and determined absolutely upon its adoption. The Civil Code provides for the adoption of minor children and the circumstances and conditions under which such adoption may be had. Section 224 of that Code provides that "a legitimate child cannot be adopted without the consent of its parents, if living, * * * except that consent is not necessary from a father or mother deprived of civil rights or adjudged guilty of adultery or of cruelty, and for either cause divorced." The proceedings for adoption in this instance seem to have been in strict accordance with this and the other provisions of the Code upon the subject, and, in fact, their regularity or sufficiency are in no respect questioned. The jurisdiction of the court in Santa Clara county over the child in the divorce proceeding grew out of and depended solely upon the fact that it was the child of the parties to that action. As such, the law gave that court jurisdiction to award the custody of the child as it might deem for its best interest, and to direct provision for its maintenance and support. By the adoption proceeding, however, the status of the child was wholly changed. It became ipso facto the child of another, and ceased to sustain that relation, in a legal sense, to its natural parents. "A child, when adopted, may take the family name of the person adopting. After adoption the two shall sustain towards each other the legal relation of parent and child, and have all the rights and be subject to all the duties of that relation." Civ. Code, § 228. "The parents of an adopted child are, from the time of the adoption, relieved of all parental duties towards, and all responsibility for, the child so adopted, and have no right over it." Id. § 229. Under these provisions of the law, the fact which alone gave the divorce court jurisdiction of the fruit of the marriage ceased to exist. In other words, the child ceased to sustain any such relation to the parties or the cause as warranted any further exercise of jurisdiction over it. It was withdrawn as a part of the res of that proceeding, and the jurisdiction of the court, so far as it was concerned, was as absolutely extinguished as though death had removed it.

Respondent, as suggested, does not question in any way the regularity of the proceedings for adoption, but he contends that, the court having obtained jurisdiction of the child of the parties in the divorce proceeding, by virtue of section 138 of the Civil Code the court retains such jurisdiction for the purposes specified in that section, notwithstanding the adoption. That section provides that "in an action for divorce the court may, before or after judgment, give such direction for the custody, care and education of the children of the marriage as may seem necessary or proper, and may at any time vacate or modify the same." It is obvious that the jurisdiction and powers conferred by this section must be read and construed with, and in view of, the rights conferred by the provisions of the Code with reference to adoption. So construed, the jurisdiction conferred by section 138 subsists so long only as the status of the child remains that of a child of the parties,—"of the marriage." This, as we have seen, it has ceased, in legal contemplation, to be. It would hardly be contended that the jurisdiction of the divorce court would continue after the death of a child, or after the attainment of its majority, or after the death of its parents. In the first two instances jurisdiction would wholly cease, and in the last it would devolve upon the court sitting in probate for the care of orphans. By the adoption the child is as entirely removed from the jurisdiction as in either of the instances suggested. The various provisions of the Code are to be construed in harmony, and so as to give all their appropriate and intended effect. To give to section 138 the effect contended for would be to abrogate or render nugatory the provisions for adoption as to one of the very instances specially provided for by section 224. And, for these reasons, there is nothing in the point that the superior court or judge in Yolo county was without jurisdiction in the adoption proceedings by reason of the fact that the jurisdiction of the Santa Clara court in the action for divorce had first obtained. The jurisdiction of the judge of Yolo county was as exclusive and complete in the one instance as that of the superior court of Santa Clara in the other. The one was in no way dependent upon or subject to the other. The authorities cited by respondent are not in conflict with these views. It follows that, upon the fact of adoption appearing, the latter court should have desisted from further action in the premises for want of jurisdiction, and should have dismissed the proceeding.

The order is reversed, and the cause remanded, with directions to dismiss the proceeding, at the cost of respondent.

We concur: GAROUTTE, J.; HARRISON, J.

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4 Cal. Unrep. 983

## MILLER v. PRICE. (No. 15,815.)

(Supreme Court of California. March 12, 1895.)

CONSIGNMENT FOR SALE — LIEN FOR ADVANCES— DISCHARGE—COMMISSIONS.

1. Recovery for property consigned to defendant for sale cannot be defeated on the ground that he had a lien thereon for advances and expenses, where, before action, plaintiff tendered the amount of these; Civ. Code, § 2905, declaring that redemption from a lien is made by offering to do that for which the property is a security.

2. Commissions cannot be had for making a sale which the person was not authorized to make, and which the owner rescinded.

Department 1. Appeal from superior court, city and county of San Francisco; Eugene R. Garber, Judge.

Action by Miller against Price. Judgment for plaintiff, and defendant appeals. Affirmed.

D. L. Smoot, for appellant. M. C. Hassett, for respondent.

HARRISON, J. The plaintiff was the owner of certain fruit which he consigned to the defendant for sale, and upon its arrival in San Francisco the defendant stored it in a warehouse. Shortly after its arrival, the defendant sold the fruit at a price which was not satisfactory to the plaintiff, and the sale was rescinded. The court finds that "said sale was not made in pursuance of the authority given by the plaintiff to the said defendant." Afterwards the plaintiff brought the present action for the recovery of the fruit or its value. The plaintiff's ownership of the fruit is not denied by the defendant, but in his answer he alleges that he had made certain advances and expenditures thereon, by reason of which he had acquired a lien upon the fruit, and the right to retain the possession from the plaintiff until these advances were paid; and also until he should be paid a commission for the sale which had been rescinded. The action was tried by the court without a jury, and judgment rendered in favor of the plaintiff. The defendant moved for a new trial, which was denied, and the present appeal is from this order. No appeal was taken from the judgment.

Upon an appeal from an order denying a new trial, only the action of the trial court upon the grounds for which the new trial was asked can be reviewed. Whether a demurrer to the complaint was properly overruled, or whether the findings of fact support the conclusions of law, or the judgment thereon, can be considered only upon an appeal from the judgment. Brison v. Brison, 90 Cal. 323, 27 Pac. 186. The court finds that before the commencement of the action the plaintiff tendered to the defendant, and offered to pay him, all of his advances and expenditures, but that the defendant refused to accept the same. There is no finding of the amount of these advances and expenditures, nor is there any direct finding that any were made by the defendant. As the statement does not show that any evidence in reference thereto was given at the trial, there was no error in failing to make a finding thereon. Himmelman v. Henry, 84 Cal. 104, 23 Pac. 1098. The plaintiff's tender and offer to pay to the defendant the amount of these advances deprived him of the right to claim a lien thereon (Civ. Code, § 2905); and, as the sale of the fruit was made without the authority of the plaintiff, the defendant was not entitled to any commission for such sale. The order is affirmed.

We concur: GAROUTTE, J.; VAN FLEET, J.

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106 Cal. 352

## WARREN et al. v. RIDDELL et al. (No. 15,793.)

(Supreme Court of California. March 11, 1895.)

STREET IMPROVEMENTS — VALIDITY OF ASSESSMENTS—PARTIAL PERFORMANCE OF WORK —REMEDY OF ABUTTING OWNER.

1. Where the resolution of intention passed by the board of supervisors for the grading of a street provides and the contract requires the street to be graded "to the official line and grade," the fact that the board, before the passage of the resolution, unsuccessfully attempted to change the grade of the street, and that the street was only graded to the line then attempted to be established as the grade, is no defense to an action to enforce the assessments levied therefor,

the property owners not having appealed to the board of supervisors upon the acceptance of the work by the superintendent, as required by section 12 of the street improvement act.

2. The fact that the board, in the passage of the resolution, acted on the assumption that the official grade had been changed, does not invalidate the assessments as being for grading the street to another than the "official grade."

Department 1. Appeal from superior court, city and county of San Francisco; James M. Troutt, Judge.

Action by one Warren and others against one Riddell and others to enforce a street-assessment lien. There was a judgment for plaintiffs, and defendants appeal. Affirmed.

Mullany, Grant & Cushing, for appellants. J. C. Bates, for respondents.

HARRISON, J. Action to foreclose the lien of a street assessment in San Francisco. The resolution of intention for the work for which the assessment was issued, as well as all the subsequent proceedings taken by the board of supervisors, provided for the grading of Santa Clara street, between Kansas and Utah streets, "to the official line and grade"; and the contract entered into by the plaintiffs with the superintendent of streets specified that the street was to be graded "to the official grade and line." The grade of Santa Clara street had been officially established, and a few months prior to the inception of the present work the board of supervisors had attempted to change this grade, but their action proved abortive, by reason of not having acquired jurisdiction to pass the order for the change. The plaintiffs did not grade the street to the official grade, but graded it to the line that had been proposed for a change of the official grade, and this is made the ground of the defense to the present action. The court finds, however, that the plaintiffs performed all the terms and conditions of the contract to be performed on their part under the direction and to the satisfaction of the superintendent of streets, and that the work was approved and accepted by him prior to the issuance of the assessment. If the defendants would claim that the work required by the contract had not been fully performed, and that the act of the superintendent of streets in approving and accepting the work was erroneous, they were required, by section 12 of the street-improvement act, to appeal to the board of supervisors; and upon such appeal the error could have been remedied. The objection to the work which is here presented is one which is eminently within the functions of the board of supervisors to remedy under the provisions of this section; and, unless such appeal is first taken, the owner is precluded from raising the objection in an action to enforce the assessment. Whether, if an appeal had been taken, and the board of supervisors had refused to direct the plaintiffs to complete the work according to the terms of their contract, the owner would be precluded from making this defense to an action upon the assessment, does not arise in the present case. The statute requires that he shall first seek relief from that body, and we cannot assume that, if such appeal had been taken, the board of supervisors would have disregarded the appeal, or that the plaintiffs would not have performed their contract according to its terms. The appeal in cases where the decision of the city council is not conclusive upon the owner is to be regarded in the nature of a condition precedent to the right to maintain the defense upon the grounds for which the appeal is authorized. In Fanning v. Leviston, 93 Cal. 186, 28 Pac. 943, it was claimed that the street had been graded to some distance below the line of the official grade, with the effect of greatly increasing the amount of the assessment; but it was held that the correction of such error, if it existed, should have been sought by an appeal to the board of supervisors.

The court also found "that in the resolution of intention referred to in the plaintiff's complaint, and in all proceedings subsequent thereto had in relation to the grading of said street, the board of supervisors and the superintendent of streets and the plaintiffs acted upon the assumption that the grade was changed by the pretended resolution of October 12, 1891"; and it is contended by the defendants that this finding is equivalent to a finding that the resolution of intention was for grading the street to a grade different from the official grade, and that, as the board of supervisors had no jurisdiction to authorize a street to be graded to any other grade than the official grade, its acts were without authority, and the contract of the plaintiffs could not be the basis of any assessment. We cannot assent to this view. The contract, as well as the resolution of intention, is clear and unambiguous in its terms. There is but one official grade for a street, and that is specifically defined in the records of the board of supervisors. The plaintiffs, by their contract, agreed to grade the street to the line of this official grade. This contract was not varied by reason of the fact that the plaintiffs "assumed" a different line as the official grade from that which was in fact the official grade, or that the board of supervisors or superintendent of streets "acted upon the assumption" that the official grade had been changed. Whether this "assumption" was based upon an erroneous construction of the proceedings taken for the change of the grade, or resulted from ignorance caused either by a reliance upon the statement of another or by a failure to make an examination of the proceedings, is immaterial. As between the city and the plaintiffs, the contract of the latter bound them to grade the street to the official grade, and in any attempt to enforce this contract it would be no defense for them to say that their understanding of the contract was different from the plain import of its terms. Neither is it to be assumed, after the work has been completed and accepted without any objection on the part of the defendants, that, if they had made this objection upon an appeal to the supervisors, the plaintiffs would have made such contention, or that they would not have completed their contract according to its terms.

The other objections to the proceedings require no special consideration. The judgment is affirmed.

We concur: VAN FLEET, J.; GAROUTTE, J.

4 Cal. Unrep. 984

## McMAHON v. THOMAS et al. (No. 15,699.)

(Supreme Court of California. March 13, 1895.)

TRANSFER OF NOTE—BONA FIDE HOLDER.

A regularly authorized insurance agent, to whom is forwarded by his company a policy to be delivered to the assured, together with the latter's note for collection or discount, and who discounts it without any knowledge of the soliciting agent's alleged fraudulent representations in procuring the policy, and who has no interest in the insurance or connection with the soliciting agent except an agreement that he will discount notes taken by the latter, is a bona fide holder of the note, and the soliciting agent's misrepresentations are not available as a defense against him.

Department 2. Appeal from superior court, San Benito county; N. A. Dorn, Judge.

Action by Thomas McMahon against John Thomas and Agnes C. Thomas on a promissory note. From an order granting plaintiff's motion for a new trial after verdict and judgment in favor of defendants, defendants appeal. Affirmed.

D. W. Burchard and Montgomery & Jefferson, for appellants. Briggs & Hudner, for respondent.

HENSHAW, J. Appeal from an order granting plaintiff a new trial. The action was on a promissory note, and was tried with a jury. Defendants pleaded fraud in the procurement of the instrument, setting up that one Burns, as agent of the Mutual Life Insurance Company of New York, represented to them that his company would upon application issue to John Thomas a policy of life insurance, under which, by making annual premium payments of $366 for 15 years, he would then be entitled to $5,000, "death or no death," and that should he pay such premiums for three or any greater number of years, and then decide to abandon his insurance, he would receive on demand the amounts paid, with interest at the rate of 4 per cent. per annum. Upon these representations, he signed an application for a "15 Pay Ins. Life W. R. O. R. 15, whole Prem." policy. He did not understand these figures and abbreviations, and did not ask their meaning, but was informed by Burns that his signature to the application would bring the specified policy. Burns further informed him that, to bind the company at that time and day, it would be necessary for him to execute the promissory note, but that, if the policy was not as represented, the note would be returned. These charges are supported by the evidence of defendants, and denied by Burns. Plaintiff was indorsee of the note, and, to bind him, it is pleaded that he took it with full knowledge of the acts and facts constituting the fraud. Plaintiff was a resident agent of the insurance company. Burns seems to have been a visiting or traveling agent. As to his connection with the matter, plaintiff testified (and the evidence is uncontradicted and corroborated) that he had nothing to do with the procurement of the application or note; that the agents took notes from applicants or policy holders at their own risk; that he received from the general office in San Francisco a policy for delivery to Thomas, and delivered it; that he received also from the general office this note and another for collection or discount, and believing the makers to be good, and knowing nothing of any difficulty or disagreement, he discounted the notes himself, and thus became owner of the one in suit; that he had no interest in the insurance of defendants when he purchased the note, and was not jointly interested with Burns in the profits of insurance Burns might obtain, but merely had an arrangement whereby he was to receive a specified discount on any notes which Burns might take, and which plaintiff should cash after acceptance of the application; and, finally, that he first heard of defendants' dissatisfaction and charges after he had bought and paid for the note.

The court granted a new trial upon the ground, among others not necessary to consider, that there was no evidence that plaintiff, at the time he purchased or discounted the note sued on, was cognizant of any fraud in its procurement, or any dissatisfaction on the part of defendants with the policy received by them. The ground of this ruling is fully supported by the record. No evidence therein contained raises even a conflict upon the proposition that plaintiff was an innocent, bona fide holder for value and before maturity. The order appealed from is affirmed.

We concur: TEMPLE, J.; McFARLAND, J.

108 Cal. 250

## CARDENAS v. MILLER. (No. 19,412.)[1]

(Supreme Court of California. March 13, 1895.)

ATTACHMENT—PRIORITY—UNRECORDED MORTGAGE.

The lien of an attachment is prior to that of a chattel mortgage executed before, but not recorded until after, the issuance of the attachment, although the attaching creditor had actual knowledge of such mortgage, under Civ. Code, § 2957, providing that an unrecorded mortgage shall be void as against creditors and incumbrancers in good faith.

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[1] Rehearing granted.

Commissioners' decision. Department 2. Appeal from superior court, Santa Barbara county; W. B. Cope, Judge.

Action in claim and delivery by Fernando Cardenas against John F. Miller to recover a quantity of barley, or its value, and damages. From a judgment in favor of defendant and order denying a new trial, plaintiff appeals. Affirmed.

B. T. Thomas, for appellant. A. Leslie and Richards & Carrier, for respondent.

SEARLS, C. This is an action in claim and delivery, to recover a quantity of barley, or its value, and damages. The cause was tried by the court without a jury, and findings in writing made and filed, upon which judgment was entered in favor of defendant. Plaintiff appeals from the judgment, and from an order denying his motion for a new trial. The complaint is in the usual form in claim and delivery. The answer denies many of the allegations of the complaint, and justifies the taking and holding the barley as the assignee in insolvency of one A. J. Drennan, who is alleged to have been the owner thereof. At the trial it was shown that in 1892 A. J. Drennan raised a crop of barley upon certain land in Santa Barbara county, which he leased from two several individuals, giving one-fifth of the crop to the owners of the land in lieu of rent. On the 11th of March, 1892, Drennan executed in due form a chattel mortgage to Fernando Cardenas, the plaintiff and appellant herein, upon his share of the growing crop of barley, to secure the payment of $200, with interest at 1 per cent. per month. The mortgage contained the affidavit of the parties, and was duly acknowledged, but was not recorded until the 28th day of June, 1892, when it was duly recorded. John F. Miller, the defendant and respondent herein, brought suit against Drennan to recover money due upon a promissory note dated in 1891, issued an attachment, etc., which was levied upon the interest of Drennan in the growing crop on the 23d day of June, 1892. The levy was made by the sheriff by leaving personally with the defendant Drennan a copy of the writ of attachment, together with a notice, etc, as provided by subdivision 5 of section 542, Code Civ. Proc., and by placing a keeper in charge of the growing crop. Defendant Miller had actual notice of the chattel mortgage at the time of suing out and service of his writ of attachment. On the 30th day of June, 1892, A. J. Drennan filed his petition in insolvency in the superior court in and for the county of Santa Barbara, and on the same day an order adjudicating him an insolvent, directing the sheriff to take possession of his estate, staying all proceedings against said insolvent, directing publication, etc., was duly entered. The sheriff took possession of the property, and placed B. F. Nosser in possession in place of S. C. Tyler, who had acted as keeper for the sheriff under the attachment. Such proceedings were thereafter had in the insolvency proceedings that on the 13th day of August, 1892, John F. Miller, the defendant herein, was appointed assignee of the estate of said insolvent, and on the same day received an assignment of all the property of the estate from the clerk of the superior court. The barley was harvested, threshed, and sacked by plaintiff in the latter part of August. There is testimony tending to show that this was done by consent of the sheriff or his keeper. Plaintiff, however, claimed the right so to do under his mortgage. About the 1st of September, 1892, defendant, as assignee, took possession of the barley, and removed it, offering to pay plaintiff his expenses for harvesting and threshing, amounting to about $300, but refusing to pay $200, claimed by the plaintiff as due on his mortgage. The attachment having been levied June 23, 1892, and, the chattel mortgage not having been recorded until five days thereafter, viz. June 28, 1892, the question arises, has the lien of the attachment priority over that of the mortgage in favor of an attaching creditor who had actual notice of the existence of such chattel mortgage? If this question be answered in the affirmative we are of opinion the judgment of the court below should be affirmed, and, if a negative answer be returned, such judgment should be reversed. There are some minor points made by counsel for appellant, but upon examination it is believed that they are either not sustained by the record or do not call for a reversal.

Under the doctrine enunciated in Beamer v. Freeman, 84 Cal. 554, 24 Pac. 169, the lien of the attachment, if prior to that of the mortgage, though such attachment was dissolved by the proceedings in insolvency taken within one month after the attachment lien attached, did not inure to the benefit of the holder of the chattel mortgage, but to the benefit of general creditors of the insolvent; and the assignee in insolvency was, as the trustee of the creditors, entitled to possession of the property in dispute. The contention of appellant is that the defendant, having had actual notice of the existence of plaintiff's chattel mortgage, was bound by it as effectually as if it had been placed on record before he instituted his suit and caused the writ of attachment to issue and be levied upon the mortgaged property, and in support of this contention we are referred to section 1217 of the Civil Code, which is as follows: "An unrecorded instrument is valid as between the parties thereto and those who have notice thereof." The term "instrument," in its broad sense, includes formal or legal documents in writing, including contracts, deeds, wills, bonds, leases, mortgages, etc.

In the law of evidence it has a still wider meaning, and includes not merely documents, but witnesses, and things animate or inanimate, which may be presented for inspection. 1 Whart. Ev. § 615; Black, Law Dict. tit. "Instrument." It is a familiar rule, however, that in construing a statute, words used therein, and their meaning, are to be construed with reference to the subject-matter embraced in such statute. Chapter 4 of the Civil Code, in which section 1217 occurs, relates to the recording transfers of real property, what may be recorded, mode of recording, proof and acknowledgment of instruments, and effect of recording, or the want thereof. The first section of the chapter (section 1158, Civ. Code) provides that "any instrument or judgment affecting the title to or possession of real property may be recorded under this chapter." The entire chapter deals with real property, and the recording of instruments relating thereto. It follows that section 1217, the last section in the chapter, must be held to relate to the same subject-matter. This intention is made more manifest by section 1164 of the same chapter, which provides that "transfers of property in trust for the benefit of creditors, and transfers or liens on property by way of mortgage, are required to be recorded in the cases specified in the titles on the special relation of debtor and creditor, and the chapter on mortgages respectively." This last section tends to show the understanding and intent of the lawmakers to relegate the manner of recording in the specified cases to the several statutes pointed out and which provide therefor.

Turning to the chapter on mortgages, and we find that, as to chattel mortgages, or mortgages on personal property, the method of their execution is provided, as well as the effect of nonrecordation, differing essentially from cases of mortgages on real property. Section 2957 is as follows: "A mortgage of personal property is void as against creditors of the mortgagor and subsequent purchasers and incumbrancers of the property in good faith, and for value, unless (1) It is accompanied by the affidavit of all the parties thereto, that it is made in good faith and without any design to hinder, delay, or defraud creditors. (2) It is acknowledged or proved, certified and recorded in like manner as grants of real property." It will be perceived that under the section quoted the mortgage, unless it is recorded, "is void as against the creditors of the mortgagor and subsequent purchasers and incumbrancers of the property in good faith and for value." The defendant was a creditor of the mortgagor. In order for the mortgage to be void against subsequent purchasers and incumbrancers, it is requisite that they be such in good faith; that is to say, with an honest intention to obstain from taking any unconscientious advantage of another, together with an absence of all information or belief of facts which would render the transaction unconscientious. The terms "good faith" and "bona fide" purchasers are borrowed from equity jurisprudence, and it is said must be interpreted accordingly. Wells, Fargo & Co. v. Smith, 2 Utah, 52; Alden v. Trubee, 44 Conn. 459; De Mott v. Starkey, 3 Barb. Ch. 406; Spicer v. Waters, 65 Barb. 231. The foregoing remarks apply to chattel mortgages under the statutes, and where no delivery of possession of the property mortgaged to the mortgagee has been made.

The contention of appellant is that the term "creditors," as used in the statute quoted supra, is modified by the terms "in good faith and for value," equally with the words "subsequent purchasers and incumbrancers." In other words, the position of appellant is that creditors, like mortgagees and subsequent purchasers, must be such in good faith, and that there can be no good faith in such a case where the creditor, as here, has actual notice. Chattel mortgages, in this state, which are not recorded, are absolutely void, except in the cases provided for in the statute. Recording the instrument takes the place of the delivery of possession of the mortgaged chattels. Berson v. Nunan, 63 Cal. 550. Their validity depends as much upon their proper acknowledgment and registration as upon their execution and delivery. Under the law of this state as it formerly existed, such mortgages, unless recorded, were void as to all the world except the parties thereto. Now they are valid as to all the world except the two enumerated classes, viz. creditors, and subsequent purchasers and incumbrancers of the property in good faith and for value. The term "creditor" signifies "a person to whom a debt is owing by another person called the debtor." Black, Law Dict. In the general and extensive sense of the term, he is a creditor who has a right by law to demand and recover of another a sum of money on any account whatever. Stanly v. Ogden, 2 Root, 261. The term "good faith," as applied to a purchaser, ex vi termini, means one who purchases without notice and for value. Black, Law Dict. This term has no natural application to a creditor who is of necessity such for value; and without value, either express or implied, he is not a creditor. No sufficient reason is discerned for supposing that the "lawmakers" intended to modify the term "creditor" by the language naturally applying to subsequent purchasers and incumbrancers. The term "creditors" is general, and applies to creditors existing prior to the mortgage as well as subsequent. A prior creditor could not have had notice, at the time of advancing his money or other value to a debtor, of a mortgage which did not then exist, and as against him the equities which may be invoked against a subsequent purchaser or incumbrancer with notice and for value have no existence. Non constat, but that the creditor may have trusted his debtor upon the faith of the property sought to be mortgaged. This is not urged as a reason as against the statute if it has in fact included the creditor, but rather as a solution in his favor, where the most that can be said is that a doubt is created by the language used. The adjudicated cases in the several states seem at first glance to involve a marked difference of opinion on the subject; but upon more careful examination it is believed the divergence is mainly attributable to the different wording of the statutes of the several states, and in those jurisdictions where their statutes are precisely or practically similar to our own we find it usually held that an unrecorded mortgage is void as against a creditor of the mortgagor, although he have actual notice. Thus, in New York, where the statute provides that, upon failure to record, the mortgage "is void as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith," it is held that, as against creditors of the mortgagor with notice, the mortgage is void. Trust Co. v. Hendrickson, 25 Barb. 484; Stevens v. Railroad Co., 31 Barb. 590; Karst v. Gane, 136 N. Y. 316, 32 N. E. 1073. In South Dakota, with a statute almost identical with our own, the supreme court in W. W. Kimball Co. v. Kirby, 55 N. W. 1110, held that the lien of an execution takes precedence of an unrecorded chattel mortgage, irrespective of whether or not the judgment creditor had actual notice of the unrecorded chattel mortgage. New Jersey, Texas, Nebraska, and Ohio, with similar statutes, have held similarly. Williamson v. Railroad Co., 29 N. J. Eq. 336; Sayre v. Hewes, 32 N. J. Eq. 656; Brothers v. Mundell, 60 Tex. 246; Earle v. Burch, 21 Neb. 702, 33 N. W. 254; Cooper v. Koppes (Ohio Sup.) 15 N. E. 662. In Iowa the language of the statute is: "No * * * mortgage of personal property * * * is valid against existing creditors or subsequent purchasers without notice, unless," etc. And the supreme court of that state held in Allen v. McCalla, 25 Iowa, 464, that a mortgage of personal property duly executed, though not recorded, etc., was valid as against existing creditors with notice of the mortgage. In this last case the court, in alluding to the different construction given to the statutes of Ohio, New York, Massachusetts, and other states, said this difference "grows out of the different, not to say peculiar, language of the statutes of those states." Jones, in his work on Chattel Mortgages, at section 318, uses the following language: "Under the statutes of some states notice of a mortgage not filed does not affect creditors, but does affect subsequent purchasers and mortgagees. Good faith is not required of creditors in order to enable them to avoid such a mortgage. This distinction is founded upon the terms of the statutes. Thus in New York the statute declares that such a mortgage is 'void as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith.' Subsequent purchasers and mortgagees are not protected unless they take their conveyances in good faith, and they cannot take them in good faith if they have actual knowledge of the existence of an antecedent mortgage. But as against creditors such a mortgage is declared void without qualification. And, therefore, mere knowledge on the part of a creditor that his debtor has executed a mortgage which has not been duly filed does not preclude him from availing himself of the objection that it is for this reason void. * * * The statute of New Jersey makes a similar distinction between creditors and subsequent purchasers and mortgagees. Such is also the law of Ohio and Texas." California and several other states may be mentioned as having statutes similar in structure with those mentioned. We are in accord with the rulings of other states having like statutes in holding as we do that our statute has created two classes of persons, of which creditors are one and bona fide purchasers and incumbrancers the other, and that the expression "in good faith and for value" modifies the latter, and not the former. It follows that the actual knowledge on the part of the defendant of the existence of the unrecorded mortgage of the plaintiff did not, as against said defendant, validate the mortgage, or prevent the priority of his attachment lien. The judgment and order appealed from should be affirmed.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

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106 Cal. 385

## HENDERSON v. O'CONNOR. (No. 19489.)

(Supreme Court of California. March 13, 1895.)

BANKS—COLLECTIONS—INSOLVENCY—TRUST FUND.

A bank which, upon a draft being deposited with it for collection, refuses to accept it as a deposit, but advances a small amount to the payee on her check, and charges her therewith on its books as an overdraft, and sends it for collection to its correspondent, and, upon receiving notice of its collection, credits the payee's account therewith, is the payee's agent, and the proceeds constitute a trust fund, which the payee is entitled to recover from the receiver.

Commissioners' decision. Department 2. Appeal from superior court, San Diego county; George Puterbaugh, Judge.

Action by Mary K. Henderson against A. J. O'Connor, receiver of Consolidated National Bank of San Diego, to recover the proceeds of a draft deposited with such bank for collection. From a judgment for plaintiff, defendant appeals. Affirmed.

V. E. Shaw and Chas. Wellborn, for appellant. Trippet and Boone & Neale, for respondent.

VANCLIEF, C. On June 7, 1893, the Consolidated National Bank, incorporated under the national banking laws of the United States, was doing a general banking business in the city of San Diego, in this state, but on June 21, 1893, failed and suspended payment; and on July 23, 1893, the defendant was appointed receiver of said bank. On said 7th day of June, 1893, the plaintiff deposited with that bank for collection a draft in her favor drawn by the Mutual Benefit Life Insurance Company of Newark, N. J., on the National State Bank of Newark, N. J., for the sum of $1,521.42. The bank of San Diego refused to accept the draft as a deposit, but advanced to plaintiff on her check, at the time the draft was taken for collection, $21.42, and charged her with this sum on its books as an overdraft. At the same time the plaintiff directed the bank of San Diego to deposit the proceeds of the draft when collected in the Savings Bank of San Diego County, whose place of business was in the same rooms as that of said Consolidated National Bank, but later, on the same day, countermanded this order, and directed said bank to wait until she returned from a visit she intended to make to Oceanside, from which she expected to return in about three weeks, and that she would then give definite instructions as to what should be done with the proceeds of the draft. Said bank immediately forwarded the draft by mail to its correspondent, Kuntze Bros., bankers in New York, for collection, with instructions to collect and place to its credit. On June 14, 1893, Kuntze Bros. collected the draft, and credited the proceeds as instructed, and immediately notified said bank thereof by mail; and the notice was received by the bank on June 20, 1893, when it placed to the credit of the plaintiff on its books the sum of $1,521.42, and on the following day (June 21st) failed and suspended payment. The plaintiff had no notice that the draft had been collected, nor that the bank had credited her on its books with the sum collected by Kuntze Bros., until after the failure of said bank. For a long time before the failure, said Consolidated Bank, including all the times of the transactions above stated, had a running account with Kuntze Bros., in which it was credited with collections made for it by the latter, and charged with its drafts against such collections, some of which drafts were paid and charged after the collection of the draft in favor of plaintiff; but at all times after the collection of this draft said Consolidated Bank was credited in said account by a sum largely in excess of the amount of this draft, and also largely in excess of the total amount of drafts drawn by said bank on Kuntze Bros. Since the failure of said bank, the defendant, as receiver thereof, has collected from Kuntze Bros. the balance of said account to the credit of said bank, amounting to about $6,000, which, among other items, included that of $1,521.42, the proceeds of the draft in favor of plaintiff, and mingled the same with the funds of the bank which came into his hands as receiver. This action was brought to recover the sum of $1,500 as the proceeds of said draft, on the theory that defendant held in trust for the plaintiff; and, having found the facts substantially as above stated, the court below rendered judgment in favor of plaintiff for the sum demanded.

The defendant brings this appeal from the judgment on the judgment roll, without a bill of exceptions, and contends that, upon the facts found, the judgment should have been in favor of defendant. I think, however, the judgment is clearly right. The relation between the plaintiff and the bank resulting from the original contract for the collection of the draft was that of principal and agent, giving the bank no title to the draft or to the proceeds thereof; and that relation continued to exist until after the failure of the bank, because the obligation of the bank to collect the money on the draft had not been completely discharged at the time of the failure. The receipt of the money on the draft by the bank's subagent, Kuntze Bros., was not a collection of it by the bank; and the bank had no right to credit plaintiff with the money proceeds of the draft on its books and thereby to change its relation to the plaintiff from that of agent to that of debtor, until after it had actually received the money from Kuntze Bros. At the time of the failure of the bank the cash proceeds of the draft in the hands of Kuntze Bros. was the property of the plaintiff, and as such came directly from Kuntze Bros. to the hands of the receiver, who holds it in trust for plaintiff, it being sufficiently distinguishable from the funds of the bank; and therefore it is not a part of the assets of the bank to be distributed to its creditors. The rule of law applicable to the facts of this case is stated and exemplified by Mr. Morse in his work on Banking (section 568, subd. d), as follows: "A bank, upon receiving from L. a draft indorsed 'For collection on his account,' provisionally credited him with it, presented it for payment, and surrendered it to the drawee on receiving his check for the amount, but, instead of demanding the money thereon, had the check certified as good, and on the same day suspended payment. The next day the check was collected, and the money mingled with other money in the hands of the receiver. It was decided that he held it in trust for L. The bank had no authority to take anything but money. Receiving a check and having it certified was not a completion of its agency to collect. That duty terminated only with payment of the check, and only then did the authority to credit arise if the bank was a going concern. But the bank became insolvent before the agency was completed and the money received, so that no authority existed to credit the money on general account; and it was still trust money at the time it went into the hands of the receiver, and, being clearly traced into his hands, may be recovered." Citing Levi v. Bank, 5 Dill. 104; First Nat. Bank of Crown Point v. First Nat. Bank of Richmond, 76 Ind. 561; and German Am. Bank v. Third Nat. Bank, 2 Tex. Law J. 150. The following cases are also more or less directly in point: Armstrong v. National Bank, 90 Ky. 431, 14 S. W. 411; Bank v. Peters, 123 N. Y. 272, 25 N. E. 319; Bank v. Beal, 50 Fed. 355; McLeod v. Evans, 66 Wis. 401, 28 N. W. 173, 214; Beal v. Bank, 55 Fed. 895, 5 C. C. A. 304; Jones v. Kilbreth, 49 Ohio St. 401, 31 N. E. 346; First Nat. Bank v. Armstrong, 36 Fed. 59; Commercial Bank v. Armstrong, 148 U. S. 50, 13 Sup. Ct. 533. I think the judgment should be affirmed.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

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(4 Cal. Unrep. 986)

## REGENSBERGER v. QUINN. (No. 15,824.)

(Supreme Court of California. March 13, 1895.)

DEFECTS IN PLEADING—CURE BY VERDICT.

A complaint alleging that a certain note has not been paid, but omitting the alternative "or any part thereof," no special demurrer being interposed, is good after judgment.

Department 2. Appeal from superior court, San Francisco county.

Action by Melville M. Regensberger against Annie M. Quinn. Judgment for plaintiff, and defendant appeals. Affirmed.

Geo. W. Monteith, for appellant. Beatty & Fowler and Marcus Rosenthal, for respondent.

TEMPLE, J. This action is based upon two promissory notes, and the appeal is upon the judgment-roll. Appellant makes two points:

1. There is no allegation in the complaint that, at the time of the commencement of the action, the notes were unpaid in whole or in part. This objection is based upon the fact that as to the first note the allegation does not contain the alternative "or any part thereof." After judgment, there being no special demurrer, this would not be a fatal defect, even if the complaint contained no equivalent language, which in this case it does. It is averred that, aside from the sum of $7 which defendant paid plaintiff, defendant has wholly failed to pay principal or interest, and the sum of $412.07 is due thereon for principal and interest.

2. The other point is that the judgment is defective because $50 was allowed for attorney's fees, and was added to the principal and interest, and $66.57 allowed for costs besides. If this were so, no injury would result to defendant. But the judgment expressly states the amount of principal and interest due, and that $50 was allowed for an attorney's fee, and also the sum taxed as costs. In the note the defendant stipulated to pay the attorney's fee.

The appeal is frivolous, and the judgment is affirmed, with $50 damages.

We concur: McFARLAND, J.; HENSHAW, J.

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(106 Cal. 434)

## In re HEYDENFELDT'S ESTATE. (Nos. 15,885, 15,886.)[1]

Appeal of HELLINGS.

(Supreme Court of California. March 15, 1895.)

CONSTRUCTION OF WILL—PAYMENT OF MORTGAGE ON DEVISED LAND—ORDER OF COURT.

1. Testator left deeds of real estate to all his children, including petitioner, to be delivered at his death. The deed to one child covered land worth $65,000, mortgaged for $40,000, with a covenant against incumbrances. In his will he directed the payment of all his debts from the proceeds of the sale of his unproductive property, and then recited that he had provided for his children by said deeds, and therefore devised the residue, both real and personal, to his wife. At his death testator owed scarcely anything above the mortgage debt, and his unproductive real estate sold for $43,000. *Held*, that the mortgage debt should be paid out of the proceeds of the sale.

2. The probate court has jurisdiction to compel the executor to pay a mortgage on land devised, when it appears that the testator intended that it should be paid out of his estate.

Department 2. Appeal from superior court, city and county of San Francisco; J. V. Coffey, Judge.

Petition by Mrs. E. A. Heydenfeldt for distribution of the estate of Solomon Heydenfeldt, deceased, and petition by Zelia O. Hellings, devisee, to compel the payment of a mortgage debt. From an order refusing her petition, and from the decree of distribution, the devisee appeals. Reversed.

T. M. Osmont, H. I. Kowalsky, and Jos. P. Kelly, for appellant. Craig & Meredith, Pierson & Mitchell, and Knight & Heggerty, for respondents.

TEMPLE, J. Solomon Heydenfeldt died testate, September 15, 1890, leaving a widow and ten children. The widow was the mother of five of the children, all minors. The deceased had been the owner of much real estate in San Francisco. In anticipation of his death he conveyed portions of his real estate to his children, but the deeds were placed in the hands of one Charles Ashton by the grantor, to be recorded at his death. The record does not show expressly whether the grantees named in the respective deeds were let into possession upon the execution of the deeds, or whether the grantor continued to receive the rents and profits until his death. Presumptively the latter was the case, for there would seem to be no other reason for retaining the deeds, and certainly for some purposes the grantor continued after the execution of the deeds to treat the property as his own. One of these deeds, executed October 10, 1887, conveyed to appellant and her brother, Thomas O. Heydenfeldt, a lot in San Francisco worth about $65,000. At the time the deed was executed and left with Ashton, as above stated, there was a mortgage upon it to secure the payment of the sum of $40,000, borrowed by the testator from the German Savings & Loan Society. It covered not only the lot conveyed to Hellings, but also a lot conveyed to three other children. April 12, 1889, the mortgage being about to become barred by the statute of limitations, Heydenfeldt executed a new mortgage for the same amount, and charging the same real estate. October 9, 1889, deceased made his will, which contained the following provisions: "Item 1. I direct my executors to pay all debts which I may owe at my decease from proceeds of sale of my unproductive property. * * * Item 3. I have already made such provision for each and all of my children as I deem consistent with the value of my estate by deeds executed and delivered to Charles Ashton, of San Francisco, for their benefit; and I therefore give and devise and bequeath all of the rest and residue of my estate, both real and personal, to my wife, Elizabeth Angeline Heydenfeldt," etc. None of the children received anything under the will, nor was it shown that they received at any time any part of their father's estate, except by the deeds aforesaid. It is certain they received nothing else in anticipation of the death of their father and in the final distribution of his estate. The executors named in the will were duly appointed and duly qualified. It is shown that they sold the unproductive property, realizing from such sales about $43,000, of which, after payment of the debts, they still have more than $40,000. October 6, 1893, Mrs. E. A. Heydenfeldt—the widow of deceased—filed a petition in the probate court asking for a distribution of the estate. In her petition she states that all the debts and expenses of the estate have been paid, and that petitioner is entitled "to all of the estate of said deceased, and the profits thereof." October 20, 1893, appellant, who is a daughter of the testator, filed her petition, in which she set out most of the facts above recited, and that the debt secured by mortgage upon the property conveyed to her and Thomas O. Heydenfeldt had not been paid; that the unproductive property had been sold as directed by the will, and that from the proceeds the executors had in their hands sufficient money to pay said mortgage debt and all other debts of the estate; that the mortgagee had duly presented the debt secured by the said mortgage to the executors, and the same had been allowed, and that the mortgagee had commenced an action to foreclose the same, which action was then pending; that it was the intention of the testator to exonerate the property conveyed to herself and brother, and charge his estate with the payment thereof. The petitions were set for hearing at the same time, as was also the application to settle the final account of the executors. At the appointed time the application of appellant was first taken up. A reply to the petition was interposed by Mrs. Elizabeth A. Heydenfeldt and by her children, and all appeared by attorney. Evidence was also taken and submitted. She was denied the relief asked. The final account was settled. The application for distribution was then taken up, and appellant objected to the distribution being made until the mortgage debt was paid. The court, however, proceeded to distribute all the property to Mrs E. A. Heydenfeldt.

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[1] Rehearing denied.

Appellant has brought two appeals to this court,—one from the order refusing her petition, and the other from the decree of distribution. They were submitted together, and do not require separate consideration. Upon these facts counsel for appellant contends that the provisions recited from the will constitute a testamentary assumption of the mortgage debt, and the lot conveyed to her and her brother is thereby exonerated. On the other hand, the respondents argue that the effect of item 1 in the will is simply to provide that the debts shall be paid from the unproductive real estate rather than from the personalty, which is given to the widow; that the lot conveyed to appellant at the time of the execution of the will and of the death of the testator was no part of the estate of the testator, and by law constituted the primary fund for the payment of the mortgage debt; that the estate was only liable for the deficiency, if any, after applying the proceeds from the sale of the mortgaged premises; that it is such debts as could have been proven under the law, and could have been made a charge against the estate of the deceased, that are provided for in the will. Furthermore, if appellant had any grievance arising from the fact that her property was wrongfully charged with the incumbrance, or from the covenant in her deed, she should have presented her claim against the estate; that she did not do so, and now has no remedy.

Appellant bases her rights entirely upon the claim that the will exonerates her property. If the will does not provide for the payment of the debt, her appeal must fail. If the provision in regard to the payment of debts stood alone, and we knew nothing of the condition of the estate and the circumstances under which the deed was made, the construction given it by respondents would be very plausible. Directions for the payment of debts are found in nearly every will, and it has been said that they are as formal and meaningless as the pious phrases with which many wills are prefaced. They, of course, have greater significance where the personalty descends to the personal representative and the realty to the heir, and where real estate is devised to the executor with which to pay debts, than here, wnere the entire estate is liable for all the indebtedness. And yet, while caution should be exercised not to give such formal words too much importance, if the circumstances indicate that they express a special testamentary intent, the fact that nearly all wills contain such directions should not render them ineffectual. The testator executed and left as escrows deeds to all his children. When he executed this deed to appellant, the debt was not only due, but within about two years of becoming barred by the statute of limitations. It does not appear that he thought death then imminent. In form the deed contained a covenant against incumbrances created by the grantor. He expressed a desire during his life to sell property to pay his debts. It does not appear that he owed any debts at the time or when he made his will except the mortgage debt. When he died, which was within a year after the date of his will, he owed scarcely anything except the mortgage debt. Mr. Ashton testified that he was trying to sell the Post street property to pay his debts. He did not succeed in selling it. Ashton knew of no debts save the mortgage debt. He could not have owed much besides. Since all the property was given to the widow, with full power to incumber or to dispose of it absolutely, there was no occasion to require his unproductive real estate to be sold to pay his debts, unless the intent was thereby to exonerate the mortgaged premises. It would have been better to leave the widow, who was to be practically absolute owner of the property, free to take advantage of opportunities.

Aside from the mortgage debt, the trifling sum owed could have been easily managed. It will be noticed that he does not direct or authorize the executors to pay the expenses of administration from the fund thus created. It is devoted solely to the payment of his debts, and, if the contention of appellant is sustained, she is entitled to have it all, if necessary, so applied, undiminished by the payment of expenses. And the unproductive property, as sold by the executors, produced a sum surprisingly near the amount of the debts of the testator if he intended that the mortgage should be paid from the fund, but 20 times as much as was required if this debt was not to be paid from it. The amount of the fund created is a strong circumstance tending to show the intent of the testator. The conclusion that the testator intended that his executors should pay the mortgage debt becomes irresistible, when we add the evidence of the other provision of the will above set out. By it he declares that by those deeds he has made provision for his children in view of death. They are in the nature of and were intended as effecting the succession to his estate by his children; and, recognizing the deeds as such, he therefore gives the residue to his widow. The residue is expressed as what will be left after deducting the property conveyed to make provision for his children, and after payment of all his debts. This is a distinct recognition of the deeds then held by Ashton as escrows as a part of his testamentary disposition of his estate. It would make no difference if the deeds had been actually delivered to the grantees named. This provision would still constitute them part of the testamentary purpose, nor is it necessary to say that the provisions of the Civil Code marshaling assets to pay legacies and devises apply ex vi termini. The rule there prescribed is older than the Code, and is based upon the presumption of intent by the testator from the nature of the gifts. So we see all presumptions, whether arising from the circumstances or the rules of law, point the same way. Appellant is only seeking to have the fund created by the testator applied to exonerate her property. She is certainly entitled to that much.

There can be no doubt of the power of the probate court to grant the relief. That court has jurisdiction to determine all questions which can arise as to the succession, and all questions between heirs, legatees, and devisees in regard to their rights as such. The practice is precisely the same as it would have been had the purpose of the testator, as here declared, been plain. It cannot be doubted that in such case the devisee could ask the court to compel the executors to so execute their trust as to secure to her the benefits conferred by the will. The court could take into consideration the condition of the estate, and compel the executor to take steps to get the money or to pay at once, according to circumstances. The decree of distribution was erroneously entered. The objections of the appellant were submitted in due time. The subsequent effort to have the objections appear more formally, that a proper exception could be taken, was not unreasonable. The matter is now, however, of little consequence, as all the proceedings can be reviewed on the appeal from the first order. The order and the decree are reversed, and the cause remanded.

We concur: McFARLAND, J.; HENSHAW, J.

106 Cal. 420

## HOLLEY v. ORANGE COUNTY et al. (No. 19,444.)

(Supreme Court of California. March 14, 1895.)

DRAINAGE DISTRICT — CONSTITUTIONAL LAW—ASSESSMENTS—REPEAL OF STATUTE.

1. The powers and duties authorized by Act March 3, 1881, to be conferred by the board of

supervisors upon the county surveyor to survey the line of a proposed drainage ditch, and report the grades, and the lands to be affected thereby, are ministerial; and the act is not unconstitutional, as delegating judicial powers vested in the board of supervisors.

2. Assessments upon lands benefited by the drainage for swamp lands, fixed in proportion to the benefits received, are not a "tax," within proviso to Act 1883, § 25, subd. 13, that no tax shall be levied upon any district until the proposition shall have been approved by the qualified electors; and such proviso did not repeal the act of March 3, 1881, providing a system of drainage, in so far as it authorizes a levy of the assessment without first submitting the question to popular vote.

Department 2. Appeal from superior court, Orange county; J. W. Towner, Judge.

Action by J. L. Holley against the county of Orange and others to recover money paid under protest as a tax or assessment for the establishment of a drainage system for agricultural, swamp, and overflowed lands. From a judgment dismissing the complaint, plaintiff appeals. Affirmed.

Victor Montgomery and H. A. Pierce, for appellant. Jas. G. Scarborough, for respondents.

SEARLS, C. This action was brought to recover money paid under protest by the plaintiff, pursuant to section 3819 of the Political Code, as added in 1893. St. 1893, p. 32. The complaint avers that the plaintiff was at all times mentioned therein the owner of certain lands in what is known as the "Bolsa Drainage Ditch District," county of Orange, state of California, which lands are described in apt terms; that on the 17th day of November, 1890, a petition signed by two or more landowners in the vicinity of plaintiff's land was presented to the board of supervisors of said Orange county, asking for a ditch under the provisions of an act entitled "An act to provide a system of drainage for agricultural, swamp and overflowed lands," approved March 3, 1881. The various steps thereafter taken by the board of supervisors in establishing a "district" are then particularly set out, and the assessment of lands within said district to pay the costs of locating a ditch, etc. The payment of the sum assessed under protest, as prescribed in section 3819 of the Political Code aforesaid; the presentation of the claim for the tax so paid under protest to the board of supervisors; its rejection and nonpayment. The complaint also contains two other causes of action for like taxes, paid by others, and assigned to plaintiff. A general and a special demurrer was interposed by defendant to each of the causes of action. The general demurrer was sustained, and the special demurrer overruled, to each of said causes of action. Plaintiff declined to amend his complaint, whereupon, upon motion of defendants, judgment of dismissal was entered, from which judgment plaintiff appeals.

The cause comes up on the judgment roll. The question for determination is, does the complaint state facts sufficient to constitute a cause of action? The objections of appellant to the validity of the assessments may be grouped under two general heads: (1) The act of the legislature under which the board of supervisors proceeded to levy and collect the tax was unconstitutional, being in violation of section 1, article 3, of the constitution of this state. (2) The act of March 3, 1881, entitled "An act to provide a system of drainage for agricultural, swamp and overflowed lands," or at least so much thereof as authorized the board of supervisors to levy an assessment or tax without first submitting the question to a vote of the electors of the district, was repealed by the county government act of 1883, and particularly by subdivision 13 of section 25 thereof, and by section 184 thereof. St. 1883, pp. 304, 365.

The act of March 3, 1881 (St. 1881, p. 15), under which the proceedings were had leading up to this action, provides that when two or more landowners shall petition the board of supervisors for a ditch, drain, or other water courses, defining the place of beginning, and the lands through which the same pass, and their estimated course, and shall give bonds for the payment of all the costs which may accrue if the petition shall be denied, said supervisors shall set a day for the hearing, and give notice thereof, etc. The second section requires the board to direct the county surveyor to make a survey of the line of the proposed ditch, and report the descent, if any, between the head and outlet of said ditch, with the intermediate grades, and the lands or interests to be affected thereby, and such other information as may come under his observation, etc. If, at the hearing, the board shall find that the construction of the ditch would be conducive to the welfare of the landowners petitioning, and not inconsistent with the rights and privileges of other contiguous territory to construct ditches, and if the surveyor report sufficient fall to make the ditch available, then the supervisors shall, in their discretion, grant the prayer of the petitioners, "and shall proceed to examine the land affected by it, and shall cause said ditch to be surveyed," stakes set, and a journal made of the width and depth at each stake. The fifth section requires the board, after notice to all resident land owners, and a hearing, to apportion the excavation of the ditch to the lands affected thereby, according to the benefits received. The costs of locating, including the right of way, are to be apportioned in like manner, and a day is to be set for hearing exceptions to the apportionment. The remaining portions of the act provide that owners of land may construct their portions of the work, or, failing so to do, it shall be let by contract to the lowest bidder. The cost of the work is to be reported to the county auditor, who shall cause it to be entered upon the tax books of the county; and thereupon it becomes a tax upon the land of the delinquents, etc., to be collected as other taxes, and paid to the party performing the work. This statement, although not full in detail as to all the provisions of the statute, is sufficient to illustrate the point made by appellant, which is that, under the act, powers are conferred upon the county surveyor, whereby he alone determines what lands are to be affected by the proposed work, and that the delegation of such power to an executive officer is in contravention of that provision of the constitution (section 1, art. 3) which provides that: "The powers of the government of the state of California shall be divided into three separate departments—the legislative, the executive and judicial; and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any functions appertaining to either of the others, except in the cases hereinafter expressly directed or permitted." Article 3 of the constitution relates to the state government, and has no application to the local governments provided for by article 11 of the constitution. People v. Provines, 34 Cal. 520. It does not follow, however, that the authority conferred upon the board of supervisors by statute can be delegated to others. We understand the rule to be that the power of delegation by local boards is confined to the discharge of duties ministerial in character, and not calling for the exercise of discretion or judgment; or, to put it more accurately, ministerial powers may generally be executed by deputy, but judicial powers may not. Cooley, Const. Lim. 204; Scollay v. County of Butte, 67 Cal. 249, 7 Pac. 661; Abrams v. Ervin, 9 Iowa, 87; Page v. Hardin, 8 B. Mon., at page 662; Lewis v. Lewis, 9 Mo. 182; People v. Bank of North America, 75 N. Y. 547. Where an officer's powers are partly ministerial and partly of a judicial nature, the exercise of the former may be given to a deputy, but not that of the latter. Powell v. Tuttle, 3 N. Y. 396. A perusal of the statute fails to convince us that any duties other than ministerial are devolved upon the county surveyor. Briefly stated, the supervisors are required to direct the county surveyor to survey the line of the proposed ditch or water way, to note and report the grades or fall of the land, and to report the lands or interests to be affected thereby, and such other information as may come under his observation. This is but a preliminary suvey, and consists in collecting such facts and data as may serve to inform the supervisors, and is in no sense more a judicial act than is the preliminary survey of a route for a railroad. The surveyor simply furnishes evidence to be submitted to the board, upon which their judgment and discretion, after a full hearing, is to be exercised. Judgment must often be exercised by ministerial officers, in determining whether or not the facts exist which authorize them to act. Election officers afford a fair example. They must judge as to the existence of the facts which entitle an elector to cast his ballot, yet they are but ministerial officers. People v. Van Slyck, 4 Cow. 297; Ex parte Heath, 3 Hill, 42; People v. Pease, 27 N. Y. 45. It follows that appellant's first point cannot be maintained.

2. Does the act of 1883 have the effect of repealing the act of 1881 in relation to "a system of drainage for agricultural, swamp and overflowed lands"? Section 25 of the act of March 14, 1883 (County Government Act), enumerates the general permanent powers of the board of supervisors. Subdivision 13 of the section authorizes the board "to levy taxes upon the taxable property of their respective counties for all county purposes, and also upon the taxable property of any district for the construction and repair of roads and highways and other district purposes; provided that no tax shall be levied upon any district until the proposition to levy the same has been submitted to the qualified electors of such district and received a majority of all the legal votes cast upon such proposition." Section 184 of the same act repeals all acts and parts of acts inconsistent therewith. Is the charge imposed upon the lands benefited by the construction of a ditch as provided for under the act of 1881 (St. 1881, p. 15) a tax, within the purview of the term as used in the county government act? If this question is answered in the affirmative, then the act in question is so far repealed by the latter act that no tax could be levied by the supervisors until the question was first submitted to a vote of the electors of the district. The term "assessment" is often popularly used as a synonym for "taxation," but this is not its strict legal significance. The authority to levy an assessment is usually referable to, and an exercise of, the taxing power. An assessment, as distinguished from a tax, is a special and local charge or imposition upon property in the immediate vicinity of municipal improvements, predicated upon the theory or principle of equivalents or benefits from such improvements, and levied as a charge upon land or property specially benefited thereby. It is a charge upon property, in theory at least, upon the principle of apportionment according to the relation between burden and benefit. A charge imposed by law upon the assessed value of all property, real and personal, in a district, is a tax, and not an assessment, although the purpose be to make a local improvement on a road. Williams v. Corcoran, 46 Cal. 553. The distinction between a tax and an assessment is discussed in Taylor v. Palmer, 31 Cal. 241, and need not be repeated here. We are of opinion that the

proviso "that no tax shall be levied upon any district until the proposition to levy the same has been submitted to the qualified electors," etc., contained in the thirteenth subdivision of section 25 of the county government act, applies only to such taxes as are levied upon property upon the ad valorem principle, as prescribed by the constitution, and has no application to assessments for local purposes, where the charge is upon the property benefited, and is fixed in proportion to the benefits received, as in cases of street improvements and many others, including the case at bar. It follows that the act in question was not repealed by the county government act, and the judgment of the court below, appealed from, should be affirmed.

We concur: VANCLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

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106 Cal. 365

## DIRECTORS OF FALLBROOK IRRIGATION DIST. v. ABILA. (No. 19,386.)

(Supreme Court of California. March 11, 1895.)

IRRIGATION BONDS — VALIDITY OF ISSUE — HOURS FOR VOTING—RESULT OF ELECTION—ENTRY IN RECORDS.

1. Under St. 1887, p. 32, requiring that in elections called to vote upon the issue of bonds by an irrigation district the polls shall be opened at sunrise and closed at sunset, an election for such purpose, held the 28th day of November, at which the polls were kept open until 5 o'clock, was void.

2. The burden of proof of the validity of proceedings to support a proposed issue of bonds by an irrigation district is upon the district itself.

3. Where an error or omission appears in the proceedings to issue irrigation district bonds, the corporation must affirmatively show that such error, irregularity, or omission has not affected the substantial rights of the parties.

4. Where the board of directors of an irrigation district have canvassed the vote of an election held to determine the question of issuing bonds, but have made no entry in the records declaring the result, such an entry inserted without authority by the secretary does not become a part of the record.

5. The action of the board of directors of an irrigation district relative to the issue of bonds is not invalid because taken at an adjourned session of a regular meeting of the board.

In bank. Appeal from superior court, San Diego county; E. S. Torrance, Judge.

Action by the directors of Fallbrook irrigation district against H. B. Abila, trustee. From an order denying defendant's motion for a new trial, he appeals. Reversed.

Lee & Scott, for appellant. Aitken & Smith and John R. Aitken, for respondent.

HARRISON, J. Upon motion for a new trial herein the court made an order that said motion be granted "as to the issue whether or not the petition for the organization of Fallbrook irrigation district, mentioned in the findings, was signed by fifty freeholders owning land in said district, and that upon said new trial said issue only be re-examined; and it is further ordered that said motion be denied as to all other issues raised by the pleadings." From that portion of the order denying the motion for a new trial the defendant, Abila, has appealed.

By the fourth section of the statute, under which the present proceedings were taken (St. 1889, p. 213), it is declared that "the order granting a new trial must specify the issues to be re-examined on such new trial, and the findings of the court upon the other issues shall not be affected by such order granting a new trial." That the "issues" thus referred to are those which the statute authorizes the court to determine, and are distinct from the subordinate and evidentiary findings of the court, is clearly indicated by the provision that "the findings of the court upon the other issues" shall not be affected by the order. These "issues," in the present proceeding, are the validity of the organization of the district, and the validity of the proceedings for the issuance of the bonds. The court has made numerous findings of fact relative to these issues, but they are evidentiary of either one or the other of these issues or ultimate facts authorized by the statute to be determined by the court. Upon the present appeal we are called upon to consider the action of the court upon that issue only which involves the validity of the proceedings of the board of directors for the issuance of the bonds.

1. Section 15 of the "Wright Act," so called, as amended March 20, 1891 (St. 1891, p. 147), provides that the bonds can be issued only upon a vote therefor by the electors of the district at a special election called for that purpose, and that "said election must be held and the result thereof determined and declared in all respects as nearly as practicable in conformity with the provisions of this act governing the election of officers." In the provisions governing the election of officers it is declared, in section 6 of the act (St. 1887, p. 32): "The polls must be opened one hour after sunrise on the morning of the election, and be kept open until sunset, when the same must be closed." In the present case, in the order for the election by the directors of the district, as well as in the notices therefor which were afterwards posted and published, it was declared that "the polls shall be opened at sunrise on the morning of the day of election, and shall be kept open until five o'clock of the afternoon of the same day, when the polls shall be closed"; and the court finds "that the polls at said election were kept open from sunrise until five o'clock p. m. on the 28th day of November, 1891 (the day of said election), and persons were allowed to vote at said election, on the day of holding the same, during all of said time." We are of the opinion that the effect of this departure from the provisions of the statute rendered the election nugatory. People v. Seale, 52

Cal. 71. How many votes were cast after the hour when the statute declared that the polls should close is not shown, but it is readily perceived that it would be within the power of interested parties, especially at an election where the vote is light, to change the result by procuring electors to visit the polls, and cast their votes after this hour, and after others had gone to their homes at the hour fixed for closing, in reliance upon the result as it then existed. See Varney v. Justice, 86 Ky. 596, 6 S. W. 457. It must be borne in mind that the corporation is itself the actor in the proceedings taken under this statute, and itself tenders the issues upon which it asks that its proceedings providing for the issuance and sale of bonds may be approved and confirmed by the judgment of the court. The burden of proof of the issues upon which it asks the judgment of the court is upon the corporation. In re Madera Irr. Dist., 92 Cal. 330-339, 28 Pac. 272, 675. The presumptions and rules of construction which would be applicable in a collateral attack upon the bonds after they had been issued have no application to proceedings taken under the statute. The defendants in the proceeding are not required to show the absence of any fact essential to the establishment of the issues for determination, but the failure of the corporation to make proof of such facts requires the court to deny its petition. The statute provides (section 6): "The court in inquiring into the regularity, legality, or correctness of said proceedings, must disregard any error, irregularity or omission which does not affect the substantial rights of the parties to said special proceeding." But this does not authorize the court to dispense with proof of the several acts which the statute has made requisite, or to assume that the omission of such acts, or any other error, was harmless. It is not sufficient that such error or omission may not have affected the substantial rights of the parties interested in the issuance of the bonds. It must clearly appear that it has not affected them, and, if there is a contingency by which these rights may have been affected by such omission or error, the corporation must make the contrary to appear.

2. Section 15 of the statute also requires that after the election has been held the result of such election shall be declared and entered of record, which record is by section 10 of the act (St. 1887, p. 33) to be made by the secretary of the board. At the time that the board of directors canvassed the votes of the election, no entry was made in its records declaring the result, but merely a recital of the votes that had been cast; and the record that was made was at its next meeting approved by the board. Subsequently, at the hearing of the present proceeding, on the morning that the record was offered in evidence, the clerk of the board, of his own accord, and without any direction from the directors directing him to amend the minutes, inserted in the records of the session of the board at which the vote had been canvassed these words: "The board hereby declares that the proposition to issue bonds in the sum of $400,000 carried." This act of the clerk was unauthorized, and did not make the inserted words a part of the records of the board. In Dyer v. Brogan, 70 Cal. 136, 11 Pac. 589, a resolution for certain street work had been adopted by the board of supervisors, in which a portion of the work had been erased prior to its adoption; and afterwards the clerk, without any authority from the board, inserted in the record of the resolution the work that had been erased. It was held that this act of the clerk did not make the inserted matter a portion of the record, the court saying: "The deputy clerk of the board of supervisors was not clothed with any power to correct a record, even had it been shown,—as it was not,—that he made the correction in accordance with the true state of the facts."

The other exceptions to the findings of the court do not need special consideration. It was competent for the directors to rescind a previous resolution by them for the issuance of bonds for the amount of $360,000. That resolution was, moreover, ineffective, by reason of noncompliance with the provisions of the statute. It is not required by the statute that the directors shall specify the amount of bonds that may be required for the several purposes for which they are to be issued. The meeting at which the election for the bonds was ordered was regularly adjourned from the day on which the board held its regular meeting, and it was not necessary that the matter of issuing the bonds should itself have been presented on the day fixed for a regular meeting, and its consideration postponed or adjourned from that date. The adjourned meeting was a part of the regular meeting, and the matter could be then presented with the same effect as if it had been presented on the day fixed for its regular meeting. That portion of the order appealed from by the defendant is reversed.

We concur: McFARLAND, J.; VAN FLEET, J; GAROUTTE, J.

106 Cal. 355

## DIRECTORS OF FALLBROOK IRRIGATION DIST. v. ABILA. (No. 19,368.)

(Supreme Court of California. March 11, 1895.)

IRRIGATION DISTRICT—PETITION FOR FORMATION—REQUIREMENTS AS TO SIGNATURES—"FREEHOLDERS OWNING LANDS."

1. A married woman, having no interest in land other than that of a wife in community property, is not a "freeholder owning lands," within the meaning of section 2 of the Wright act of 1887, requiring a petition to organize an irrigation district to be signed by 50 such freeholders.

2. Nor is one holding a certificate of pur-

chase from the state of school lands, upon which he has paid 20 per cent. of the price, a freeholder owning lands, within the meaning of the act.

In bank. Appeal from superior court, San Diego county; E. S. Torrance, Judge.

Action by the directors of Fallbrook irrigation district against H. B. Abila, trustee. From an order granting a new trial, plaintiffs appeal. Affirmed.

W. J. Hunsaker and Wm. Darby, for appellants. Lee & Scott, for respondent.

McFARLAND, J. This is an action brought by the directors of an alleged irrigation district to have the court approve and confirm all the proceedings of said district, including the form of certain proposed bonds, in accordance with the provision for such an action to be found in the "confirmation act," which is supplemental to the statute generally known as the "Wright Act." The court below rendered judgment for the plaintiffs, but on motion of defendant Abila, who was a landowner in the district, a new trial was granted, and plaintiffs appeal from the said order granting the new trial.

The motion for a new trial was based upon several grounds, but it appears that it was granted upon the sole ground that the petition for the organization of the district was not signed by 50 "freeholders owning lands" in said district, as required by said Wright act (section 1). It is not contended by appellants that more than 51 qualified persons signed said petition, and therefore, if any 2 of said persons were not qualified, the order must be affirmed. Respondent attacks the validity of the petition upon various grounds, but his main objections to the qualifications of certain signers are: (1) That eleven were merely owners of small town lots in the village of West Fallbrook; (2) that several were merely owners of undivided interests in certain tracts of land in the district as tenants in common; and (3) that two of the signers—A. J. Foss and Mrs. M. J. Woodbury—were not qualified, for reasons hereinafter stated. Under the view which we take of the third objection above stated it will not be necessary for us to determine definitely the first two; and, as they present important questions in which, no doubt, the people of other irrigation districts are interested, we deem it best to reserve them for further argument and consideration. It may be said, however, that the case of Board v. Tregea, 88 Cal. 334, 26 Pac. 237, is not to be taken as an absolute adjudication that holders of small residence lots in towns and cities are such "owners of lands," within the meaning of the Wright act, as makes them qualified signers of original petitions for the organization of districts. That case merely holds that "in a proper case" the board of supervisors may include a town or city lot within the boundaries of an irrigation district. How far the reasoning of that case would support appellants' contention must be considered as an open question. It must also be left as an open question whether or not a tenant in common is to be considered as an owner of land within the meaning of the Wright act. The legislature, when enacting a statute, must be presumed to act with knowledge and in view of general and well-established principles of law; and whether or not the legislature, when passing the Wright act, intended to abrogate the fundamental principle that one tenant in common cannot create a charge upon the common land, is certainly a very grave question. It is evident that if one tenant in common can overrule all his other cotenants, or if, of a large number of tenants in common of one tract, each is individually a qualified signer of the petition, many complications might arise under which much injustice would come to other owners of land. See Mulligan v. Smith, 59 Cal. 206, and Pfeiffer v. Regents, 74 Cal. 156, 15 Pac. 622. But these questions, as before stated, are reserved.

With respect to the signer Mrs. Woodbury, the facts are that she was a married woman, and had no interest in the land for which she signed, other than that of a wife in community property. It is true that the conveyance of the land for which she signed was made to her, but the deed was made for a money consideration, and, presumably, the land conveyed by it was community property. Schuyler v. Broughton, 70 Cal. 282, 11 Pac. 719. There was no attempt to show that she purchased it with her separate funds, and the evidence shows that it was not so purchased. (The deed was before the amendment of 1889 to section 164 of the Civil Code.) Appellants contend that respondent is estopped from denying that she was the owner of the land by a certain stipulation which appears in the record, but we do not think so. By the stipulation it was evidently only intended to admit that the title to this particular piece of land had passed through several mesne conveyances to her, not that she took it as her separate property. The latter clause of the stipulation gives wide latitude to contest questions of ownership. Moreover, when respondent introduced evidence for the avowed purpose of showing that this land was community property, no objection was made by appellants that he was estopped on this point by the stipulation; and appellants themselves introduced some evidence on the point. The case was therefore tried in the lower court by consent, upon the theory that the stipulation did not preclude a showing that the land was community property. That the interest which a wife has in community property does not constitute her an owner of land within the meaning of the Wright act is beyond doubt. During the continuance of the community it is a very impalpable interest and difficult of definition. It has sometimes been defined as "a mere expectancy, like the interest which an heir may possess in the property of his ancestor"

(Van Maren v. Johnson, 15 Cal. 312; Greiner v. Greiner, 58 Cal. 119; People v. Swalm, 80 Cal. 49, 22 Pac. 67); although it is, no doubt, more tangible than the mere expectancy of a general heir. In Platt on Property Rights of Married Women it is said: "The wife has no voice in the management of these affairs, nor has she any vested or tangible interest in the community property. The title to such property vests in the husband, and for all practical purposes he is regarded by law as the sole owner." But, however difficult it may be to define or describe the peculiar relation which a married woman bears to community property during the existence of the coverture, it is clear that she cannot be properly said to own it in any legal sense, or in any other sense. She has none of the powers of an owner over it. She cannot control or sell or mortgage or pledge it. But all these things the husband can do without her consent. It would, therefore, be a great abuse of language to call a married woman the "owner" of community property, either in the general or limited meaning of that word.

With respect to A. J. Foss, the facts are that he merely held a certificate of purchase from the state for certain school land within the proposed district, upon which he had paid only 20 per cent. of the purchase money. This did not make him a "freeholder owning land," within the meaning of the Wright act. Words used in a statute are to be given their general and unrestricted meaning, unless the context or the apparent scope and purpose of the statute indicate a limited meaning. "Owner," in its general sense, means one who has full proprietorship in and dominion over property. In Bouvier's Law Dictionary it is said that "the word 'owner,' when used alone, imports an absolute owner." In Johnson v. Crookshanks, 21 Or. 339, 28 Pac. 78, which was an action of ejectment, the point was as to the meaning and sufficiency of an averment in the complaint that plaintiff was "the owner" of the demanded premises. The court held it sufficient, and said: "This is undoubtedly an allegation of title in plaintiff. The word 'owner' has a definite meaning, and is one who has dominion over a thing which he may use as he pleases, except as restrained by law or by agreement. And. Law Dict. tit. 'Owner.' The precise meaning, perhaps, depends upon the nature of the subject-matter, and the connection in which it is used; but, when applied to real estate, without any qualifying words, in common as well as legal parlance it prima facie means an owner in fee." Authorities cited. It is clear that Foss was not such an owner. He had merely a contract to purchase a piece of land from its owner, having paid a small amount of the purchase money. The state was the owner. He had merely a contingent possibility of becoming owner at some future time, upon his performance of certain acts. Even his right to purchase is not absolute, for any other applicant to purchase the land from the state may contest his right, and "the certificate of purchase is not of itself a bar to inquiry as to the rights of the person to whom the certificate was issued." Taylor v. Weston, 77 Cal. 534, 20 Pac. 62. It is said that he can sell the land. But he cannot sell the land. He can sell or assign only the certificate of purchase, and the right acquired thereunder; and such sale or assignment must be reported to the registrar of the land office. Pol. Code, §§ 3515, 3516. If he does not make deferred payments as required, there is a strict foreclosure, the certificate of purchase is annulled, and "the land is again subject to entry and sale." Id. 3548, 3554. It is true that the certificate is declared to be evidence of title, but that only protects him against a mere intruder. When he is confronted by one who has the right to inquire into his title and ownership, the latter must be determined upon the real facts. In this case there was no patent for the land. In Manly v. Howlett, 55 Cal. 94, it was said that "the statute of limitations cannot be held to have commenced running prior to the date of the patent." Certificates of purchase under the United States land system are not issued until the entire purchase money has been paid, and cases arising under that system are not in point. McFaul v. PfanKuch, 98 Cal. 403, 33 Pac. 397. Of course, there are certain kinds of qualified ownerships (sometimes so called) arising out of peculiar relations and necessities. For instance, bailees have some kind of property in the goods bailed, may maintain replevin for them, and their interest in the goods is sufficient proof of the averment of ownership in prosecutions for larceny or robbery. So tenants for years of land are, under certain circumstances, and for the purposes of certain special statutes, considered as qualified owners. They may maintain ejectment or trespass, are entitled to proportionate shares of condemnation money, are subject to certain lien laws, etc. But there is nothing in the language of the Wright act, or in its scope, purpose, and intent, to intimate that the words "owning lands" were used in any other than their general sense as above stated. On the other hand, when we consider the character and purpose of the Wright act, and the great importance which attaches under it to the execution of a valid petition, many obvious reasons are suggested why the said words should not be taken in a limited or qualified sense. The act contemplates the raising of large revenues by the issuance of bonds which are to be satisfied, not by general taxation, but by assessments and liens upon the lands of the district; and, after the filing of a valid petition, the amount of these bonds and liens is to be determined by the qualified electors of the district, whether landowners or not. The petition is the initial and jurisdictional point, and, when that has been passed, landowners as such have no more power in the premises. To those, therefore, who refuse to sign the petition, and who are to have their lands incumbered against their will if the petition be perfected, it is of the highest importance that those who do sign are owners of land in the general and unqualified sense of the term, so that they may fully appreciate the responsibilities which they are about to incur. Counsel for appellants have placed the stress of their argument on the word "freeholders," but the words "owning lands" cannot be ignored. For instance, a tenant for the life of another person, however apparently valueless his estate may be, is a "freeholder"; but it is doubtful if he be an owner of land within the meaning of the Wright act, with power, by signing the petition, to bind the reversioner or remainderman, upon whom the real burdens imposed under the act must fall. (The legislature has since changed the words "freeholders owning lands" to "holders of title or evidence of title." St. 1891, p. 142.)

We gather from the briefs that the court below granted the new trial upon the point of the disqualification of said Woodbury and Foss, and, as we agree with the court on that point, the order must be affirmed. The order granting a new trial is affirmed.

We concur: HARRISON, J.; GAROUTTE, J.; VAN FLEET, J.

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(4 Cal. Unrep. 982)

## BLACKBURN et al. v. ABILA. (No. 19,299.)

(Supreme Court of California. March 11, 1895.)

DISMISSAL OF APPEAL—COSTS.

1. Where an appeal is taken before the determination of appellant's motion for a new trial, on account of a statute requiring appeals to be taken within a certain time after the rendition of the judgment, and a new trial is afterwards granted by the trial court, the appeal will be dismissed.

2. In such a case appellant is entitled to costs on the appeal.

In bank. Appeal from superior court, San Diego county; E. S. Torrance, Judge.

Action by B. T. Blackburn and others, directors of Fallbrook irrigation district, against H. B. Abila. There was a judgment for plaintiffs, and defendant appeals. Dismissed.

Lee & Scott, for appellant. Aitken & Smith and John R. Aitken, for respondents.

PER CURIAM. Judgment was rendered for plaintiffs, and defendant, Abila, made a motion for a new trial, which was granted by the court below. From the order granting a new trial, plaintiffs appealed, and on that appeal this court affirmed the order granting the motion for a new trial. See Directors v. Abila (No. 19,368; this day decided,) 39 Pac. 794. This present appeal was taken by the defendant, Abila, from the original judgment in favor of the plaintiffs. He was required by the statute to take the appeal within 10 days after the rendition of the judgment, and it was accordingly taken before the motion for a new trial had been determined. The appeal was properly taken. As, however, the effect of the affirmance of the order granting a new trial has been to set aside the judgment, the only appropriate order that can now be made in the present appeal is to dismiss it. But under these circumstances the appellant is entitled to the costs of the appeal. The appeal from the judgment is dismissed, with costs to appellant.

BEATTY, C. J., did not participate.

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(106 Cal. 373)

## SHERMAN et al. v. SANDELL et al. (No. 15,508.)[1]

(Supreme Court of California. March 12, 1895.)

CREATION OF TRUST—STATEMENTS OF GRANTEE IN DEED—EVIDENCE.

1. In an action to have lands held under a deed absolute on its face, declared to be held in trust, plaintiff must establish by a preponderance of evidence an agreement trust in pursuance to which the deed was executed.

2. In an action by children to have a trust declared in their favor in lands conveyed by their father to their mother, one of plaintiffs testified that she was present at the execution of the deed, and heard declarations by her father and mother that the property was to be held in trust for the children, but defendant, the mother, contradicted this, and testified that this plaintiff was not present at the execution of the deed, and the notary who took the acknowledgment testified that there was no conversation at that time, and that the only parties present were defendant, her husband, and himself. Evidence that defendant stated that the land had been conveyed to her in trust was contradicted by her. Defendant and her husband, after the execution of the deed, made conveyances of part of the property without any recognition of any trust, and without objection on plaintiffs' part, and, after the death of the father, plaintiffs, in a verified petition for the appointment of a guardian for their mother, alleged that she was the owner of the property. *Held*, that a finding adverse to the trust was justified.

3. When a main issue fails, errors in reference to dependent issues, which fail with the main issue, become immaterial.

Department 1. Appeal from superior court, city and county of San Francisco; James M. Troutt, Judge.

Action by one Sherman and others against Catherine Sandell and others. From a judgment for defendants, and an order denying a new trial, plaintiffs appeal. Affirmed.

Ash & Matthews, W. H. L. Barnes, and W. J. Tuska, for appellants. Geo. E. Lawrence and Daniel Titus, for respondents.

HARRISON, J. Plaintiffs are the daughters of the defendant, Catherine Sandell, formerly Catherine Bornheimer, and seek by this action a judgment declaring that certain lands were conveyed to and are held by her in trust for them; that she be restrained from making any conveyance or other disposition of said lands; and that the court remove her from her office as trustee of said lands, and appoint another trustee in her place. Judgment was rendered in favor of the defendants, from which and an order denying a new trial the plaintiffs have appealed.

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[1] Rehearing denied.

In December, 1871, Francis Bornheimer was the husband of the defendant Catherine Sandell, and, being sick and in the belief that he would not recover, executed to her a conveyance of several tracts of land in San Francisco, including those described in the complaint. The deed of conveyance is absolute in form, and purports to have been made in consideration of the love and affection of the grantor for his wife. Bornheimer, however, recovered from his illness, and continued to live with his wife until his death, upward of 18 years afterwards, in February, 1890; and during this time he and his wife sold and disposed of a large amount of the land described in the deed of December, 1871. The present action was commenced in November, 1892. No writing evidencing the alleged trust is shown to have been made by either Bornheimer or his wife, but the plaintiffs sought to show the creation and existence of the trust by means of oral testimony only, consisting of declarations made by the parties to the instrument at the time of its execution, as well as before and subsequent thereto. The court found that the conveyance was not made upon any trust for the benefit of the plaintiffs, or either of them, and this finding is attacked by them as unsupported by the evidence.

It is well established that although a conveyance of lands is absolute in terms, and on its face purports to convey an estate in fee, it may, nevertheless, be shown that the lands are held by the grantee in trust, and that the terms of such trust may be shown by oral testimony. In order, however, that the lands so conveyed may be impressed with a trust, the trust must be created and its terms agreed upon by the parties to the instrument at the time of its execution, or the instrument must be executed in pursuance of such previous agreement. An absolute conveyance of lands cannot, after its execution, be turned into a trust by any oral declarations of the parties thereto. The statute of frauds forbids the creation of a trust in real property by simple verbal declarations of its owner, and a grantor cannot by any subsequent declarations defeat the effect of his deed. It is also well established that the evidence which will authorize a court to find that a conveyance of lands which is absolute in terms was in reality made upon a trust must be clear, satisfactory, and convincing; that the parties to an instrument which is clear and unambiguous in its terms must be presumed to have intended the legal effect of those terms, unless it is clearly and satisfactorily shown that it was their mutual intention that those terms should have a different effect. Mahoney v. Bostwick, 96 Cal. 58, 30 Pac. 1020; Ensign v. Ensign, 120 N. Y. 656, 24 N. E. 942. The burden of proof to thus vary the terms of the instrument is upon the party who claims contrary thereto, and he must establish his allegations by a preponderance of evidence. If the verbal declarations are contradictory or uncertain. the presumption that the instrument correctly expresses the agreement between the parties is not overcome. This issue is purely one of fact, and is to be determined by the trial court; and to the extent that its determination rests upon the mere preponderance of evidence, or upon the consideration of conflicting or contradictory evidence, the finding of the trial court is not open to review in this court. Brison v. Brison, 90 Cal. 334, 27 Pac. 186.

The only direct evidence in support of the plaintiffs' claim that the instrument was executed upon the agreement that it should be held in trust for them is that of Mrs. Broder, one of the plaintiffs, who testifies that she was present at its execution, and heard declarations of her father and mother to the effect that the property was to be held in trust for the children. Her testimony was, however, contradicted by her mother, who also testified that Mrs. Broder was not present at the execution of the deed; and the notary who took the acknowledgment was unable to recall any conversation between the parties at the time the deed was executed, and also stated that, to the best of his recollection, the only parties present at its execution were Mr. and Mrs. Bornheimer and himself. There was also testimony to the effect that, after the execution of the deed, Mrs. Bornheimer had made statements regarding the property corroborative of the proposition that it had been conveyed to her in trust; but in her testimony she denied the making of these statements. It was also shown that Mr. and Mrs. Bornheimer had, after the execution of the deed, and during the lifetime of the former, mortgaged and made conveyances of different portions of the property covered by the deed, without any recognition of a trust therein, and that neither of the plaintiffs ever questioned their right to make such disposition; that neither of the plaintiffs had ever asserted an interest in the property until the institution of the present action; that in the year 1891, after the death of their father, in a verified petition to the superior court for the appointment of a guardian of their mother, on the ground of her incompetency, they had alleged that she was the owner of the property. Inasmuch as it was incumbent upon the plaintiffs to overcome the express terms of the instrument by such a preponderance of evidence as would satisfy the trial court that the agreement of trust contended for by them had in fact been made, we cannot say, in view of the foregoing facts, that the court was not justified in finding that they had failed to sustain their averment. The plaintiffs' right of action depends wholly upon the existence of the trust alleged by them; and, when the court found that this trust had not been created, the issues whether the property was at the date of the instrument community or separate property, or whether the defendant is improperly managing the property, or is under the undue influence of her husband, became irrelevant, and any error in the findings of the court upon these issues, or in the admission of evidence in their support, became immaterial. The judgment and order are affirmed.

We concur: GAROUTTE, J.; VAN FLEET, J.

4 Cal. Unrep. 988

## AUSTIN v. PULSCHEN et al. (No. 15,835.)

(Supreme Court of California. March 18, 1895.)

MORTGAGES—PRIORITY OF LIEN.

Title to land in suit was in B., who agreed to convey to H. on payment of balance of price, and H. agreed to convey to plaintiff on same condition, and gave her possession. Plaintiff agreed to sell to P. for $5,500, and to convey on payment of $3,200, but was to retain possession until full payment. P. applied to defendant for $3,000,—$2,700 to pay balance to B., and $300 to pay plaintiff, of whom he informed defendant he was purchasing. Defendant procured an abstract to the land which showed the agreements to convey between B. and H., and H. and plaintiff, and was informed by counsel that plaintiff should convey to P. in order to perfect the latter's title; and he sent men to inspect the premises, who found plaintiff's husband in "apparent" possession, cultivating the land as an employé of P. Thereafter, and on the day before the deeds were executed to P. by B. and plaintiff, defendant loaned P. the money as requested, and took a mortgage of the land. *Held*, that defendant was not a mortgagee without notice of plaintiff's lien for the unpaid price.

Commissioners' decision. Department 2. Appeal from superior court, Santa Clara county; John Reynolds, Judge.

Action by Mary A. Austin against Gustav Pulschen, R. H. McDonald, Jr., and Isador Rosencranz. From a judgment refusing her a preference of lien, plaintiff appeals. Reversed.

J. R. Welch, for appellant. Dorn & Dorn and Morehouse & Tuttle, for respondents.

VANCLIEF, C. Action to enforce a vendor's lien. On March 28, 1891, plaintiff and defendant Pulschen entered into an agreement whereby the former was to sell to the latter a lot of land containing 10 acres, situate in the county of Santa Clara, at the price of $5,500, of which price $3,200 was to be paid upon delivery of the deed, and the balance to be secured by two promissory notes of Pulschen, —one for $1,000, payable 8 months after date; and the other for $1,300, payable 18 months after date. And, as further security for the payment of these notes, the plaintiff was to retain possession of the lot until they should be paid. At the time of the agreement (March 28, 1891) the legal title to the lot was in Bruce and Kent, who had given a bond for a deed of the same to Charles Henderson, upon payment to them by Henderson of a balance of purchase money. Under these circumstances, Henderson agreed to sell the lot to plaintiff for $5,000, of which she paid $2,500 at the time of the agreement, and Henderson gave her a bond for a deed to be executed upon her payment of the balance, and also gave her possession of the lot. While plaintiff was thus in possession, she agreed to sell the lot to defendant Pulschen, as above stated. On April 1, 1891, three days after his agreement with plaintiff, Pulschen applied to the defendant McDonald for a loan of $3,000, and at the same time told McDonald that he was about to purchase said lot from plaintiff, and that he wanted the loan of $3,000 to pay Bruce and Kent the balance of purchase money due them from Henderson, then amounting to $2,700, and to pay to plaintiff $300. At the time of his application for the loan, Pulschen was indebted to McDonald or to the Pacific Bank in the sum of $1,500, secured only by his promissory note; and he offered to secure both this existing debt and the loan of $3,000 by a mortgage on said lot. Thereupon McDonald procured an abstract of title, upon examination of which his counsel advised him that Pulschen's title would be made perfect by conveyances to him from Bruce, Kent, and the plaintiff, and also from certain other persons who, it is admitted, had no title to or interest in the lot; and such deeds were completely executed on April 17, 1891. One day prior to the delivery of the deed of Bruce, Kent, and plaintiff, to wit, on April 16th, Pulschen made his promissory note to McDonald for $4,500, and, to secure payment thereof, executed a mortgage of said lot. It does not expressly appear, however, that Pulschen received the $3,000 loaned to him before April 17th, when the deed of Bruce, Kent, and plaintiff was delivered. When Pulschen applied for the loan, McDonald turned him over to Mr. Tomblin, who was then in the employ of the Pacific Bank, and who transacted the business of making the loan and taking the mortgage to secure both the loan and his prior debt of $1,500. The foregoing is an outline of the principal facts as found by the court. Other facts considered material will be stated in connection with the points to which they are relative.

The court decided, as matter of law, "that the plaintiff, Mary A. Austin, took, had, and now has, a lien upon said premises as security for the payment of the sum of $2,300, the balance of said purchase price, together with interest thereon from April 17, 1891"; but further found that McDonald is a subsequent mortgagee of the premises for $4,500 in good faith, and for value, and without notice of the vendor's lien or claim of lien; and, therefore, that the mortgage lien is superior to that of the plaintiff, and must be first satisfied; and so adjudged. The plaintiff brings this appeal from that part of judgment which is in favor of the defendant McDonald, preferring his mortgage lien to her vendor's lien.

Appellant contends that the findings of fact do not support the conclusions of law nor the judgment in favor of defendant McDonald; and so it appears to me. The court found that the bond of Bruce and Kent to Henderson, and that of Henderson to plaintiff, were duly recorded long before McDonald obtained the abstract of the record title, upon which he took the advice of counsel as above stated; that the plaintiff took actual possession of the lot on the 25th day of October, 1889, and continued in such possession until July 14, 1891; and that it was a part of the agreement between plaintiff and Pulschen that she should retain the possession until he paid her the balance of the purchase price. From these facts the court correctly drew the conclusion of law that plaintiff "took, had, and now has, a lien upon the premises as security for the payment of the sum of $2,300, the balance of said purchase price," but erred in the conclusion that McDonald was a mortgagee in good faith, without notice of plaintiff's prior lien. Plaintiff's possession of the premises at the time he took the mortgage was, under the then existing circumstances, sufficient to put McDonald upon inquiry as to her rights, and whether Pulschen had fully paid the purchase money, knowing, as he did before he took the mortgage, that Pulschen was about to purchase the premises from her; and, in the absence of diligent and unavailing inquiry on his part as to her rights, he must be presumed to have taken his mortgage with full notice of all her legal and equitable rights (Pell v. McElroy, 36 Cal. 268; Scheerer v. Cuddy, 85 Cal. 270, 24 Pac. 713; Montgomery v. Keppel, 75 Cal. 128, 19 Pac. 178); and of such inquiry the burden of proof was upon him (Long v. Dollarhide, 24 Cal. 218; Landers v. Bolton, 26 Cal. 419; Withers v. Little, 56 Cal. 370; Eversdon v. Mayhew, 65 Cal. 163, 3 Pac. 641); yet there is no finding nor evidence of any effort or inquiry by or on behalf of McDonald to ascertain whether the purchase money had been paid, or by what right the plaintiff remained in possession of the premises.

Counsel for respondents contend that the presumption of such notice is rebutted by the following findings: "That said McDonald, Jr., sent to Santa Clara county two different persons to grade and examine said property, and report the value thereof; that said persons reported that said property was good security for said $4,500 note. * * * But said McDonald, in the course of his inquiries of said property and title, discovered no fact sufficient to give him any notice whatever of any rights on the part of the plaintiff herein to any lien or claim in and to said lands or any part thereof; and the agents who visited the property found the husband in the apparent possession of said premises, who was cultivating the land for and as an employé of said Pulschen." In all this there is nothing indicating that any inquiry was addressed to the plaintiff, who was in actual possession of the lot, claiming to own it, and proposing to sell it to Pulschen. McDonald had actual notice from Pulschen that the latter was to purchase the lot from plaintiff, and was advised by his attorneys that she must convey to Pulschen in order to perfect his title. Of course, plaintiff's husband resided with her on the lot, and may have appeared, to the "two different persons" whom McDonald sent to estimate and report the value of the lot, to be in possession, since it does not appear that either of those unnamed persons made any inquiry as to who was in the actual possession. They were sent to estimate and report the value of the property, and not to interview the plaintiff or her husband as to who was in actual possession, or when the purchase money would be paid. They reported the value of the property before the mortgage was executed, but it does not appear when, if ever, they reported that the husband was apparently in possession, cultivating the lot as employé of Pulschen, nor does it appear that the husband was ever employed by Pulschen; and, even if the husband had been so employed, such employment would not have been inconsistent with the admitted fact that plaintiff alone was in possession, claiming to be sole owner, and that the unpaid purchase money was coming to her.

The finding that "McDonald, in the course of his inquiries of said property and title, discovered no fact sufficient to give him any notice," etc., is but a conclusion of law, not warranted by the findings of facts. The findings do not show what facts McDonald discovered, nor, indeed, what inquiries, if any, he made. As before remarked, the onus was upon him to prove that he diligently inquired of all persons in possession, or apparently in possession. He should have inquired of the plaintiff, who is admitted to have been in possession, and also of her husband, if he was apparently in possession. Had he done so, the presumption is that he would have been fully informed of plaintiff's lien on the land to secure payment of purchase money, which in legal effect is equivalent to actual notice of such lien. It follows that the vendor's lien of the plaintiff is prior to that of the mortgage to McDonald, and is entitled to preference in payment from the proceeds of the sale of the mortgaged property.

I therefore think that part of the judgment appealed from should be reversed, and the cause remanded, with instruction to the court below to modify the judgment in accordance with this opinion.

We concur: BELCHER, C.; BRITT, C.

PER CURIAM. For the reasons stated in the foregoing opinion, that part of the judgment appealed from is reversed, and the lower court is instructed to modify the judgment in accordance with said opinion.

106 Cal. 509

## LOVEREN v. LOVEREN. (No. 15,836.)

(Supreme Court of California. March 20, 1895.)

DIVORCE—COLLUSIVE AGREEMENT—EFFECT ON ACTION.

1. An agreement between husband and wife, executed pending divorce proceedings, in regard to the division of their property and the custody of their children, based on the consideration that the husband withdraw his counter charges, and make no defense to the action, is void as against public policy.

2. In an action for divorce, the court, in making disposition of the community property, may disregard an agreement between the parties as to a division of the property, and a separate suit to set aside the same is not necessary.

3. When the court, in an action for divorce, is informed, before the issues are tried, of the existence of a collusive agreement between the parties, and the pleadings are not changed but the issues are vigorously contested, the execution of the agreement does not render void the decree granting the divorce.

Department 2. Appeal from superior court, Humboldt county; G. W. Hunter, Judge.

Action by Mary J. Loveren against S. S. Loveren for divorce. There was a judgment for plaintiff, and defendant appeals. Affirmed.

E. W. Wilson, for appellant. Frank McGowan and Chamberlain & Wheeler, for respondent.

McFARLAND, J. This is an action for divorce, brought by the wife against the husband. Judgment was rendered for plaintiff, and defendant appeals. The points made by appellant for reversal relate entirely to that part of the judgment which deals with the property of the parties, and the question to be determined is whether or not the court erred in disregarding a certain written instrument executed by the parties, in which they undertook to provide for the division of their property and the custody of four children.

In the complaint the appellant is charged with extreme cruelty, desertion, habitual intemperance, and adultery. In his answer the appellant denied these charges, and, by a cross complaint, recriminated with charges of adultery against respondent. During the pendency of the action, after issue joined, and before the trial thereof, viz. on August 13, 1892, the parties and their attorneys signed and delivered a written instrument or stipulation, by which they agreed upon the manner in which their property should be divided, the main feature of which was that the property should be appraised by three appraisers, and that appellant should pay one-third of the appraised value to respondent, and she should make conveyances to him of all her interest in the property. Afterwards respondent became dissatisfied with this instrument, and on October 1, 1892,—before any of the issues in the case had been tried,—she filed a petition asking the court to set aside and disregard said instrument. This petition was based upon alleged misconduct of the appraisers. On October 13th appellant filed an answer to the petition, denying its averments, and on that day, the matter coming on to be heard, the court inquired if the instrument was founded upon any understanding as to the divorce, whereupon respondent's counsel, in open court, fully informed the court of the circumstances under which said instrument was executed (as hereinafter mentioned), and the court continued the matter until November 12th, on which day the court, of its own motion, continued the hearing until after the trial of certain issues touching the alleged grounds for a divorce, which were to be submitted to a jury. On December 27, 1892, the trial of those issues commenced, and was prosecuted continuously until January 10, 1893. All the issues made by the pleadings as to causes for divorce were vigorously contested by both parties, and the jury found in favor of respondent upon all her said charges against appellant, and also found in her favor upon the charge of adultery made against her by appellant. The questions as to the property rights of the parties and the custody of their children were reserved, and were afterwards, on March 24, 1893, taken up for adjudication. Evidence as to the circumstances under which said written instrument of August 13th was executed was introduced by both parties. From this evidence the court found that on said August 13th the attorneys for the parties executed another written instrument, which was "part of the same transaction and agreement hereinbefore set forth"; that is, part of the said instrument providing for the division of the property. In this second instrument it was stipulated that "the defendant will destroy, in the presence of the plaintiff, all letters and photographs of letters written by her, or by any person addressed to her, upon the plaintiff's executing deeds and bills of sale of property as provided for in a certain stipulation signed by said parties on this date." The court further found that at the time of the execution of said two instruments it was agreed by and between the parties to the action, as a part consideration therefor, that they were "to entirely settle the whole cause and causes of action set forth in the complaint and cross complaint herein; that defendant would withdraw his defense and his allegations against plaintiff; that plaintiff would withdraw all her charges against defendant except the charge of desertion; and that defendant would make no defense, and permit the charge of desertion to be proven by plaintiff unchallenged." And for these reasons the court found, as matter of law, that the said written instrument was against public policy, and void, and determined the property rights of the parties and the custody of the children without considering said instrument.

We think that the evidence fully warranted the above findings of fact, and also that the said conclusion of law was correct. As before stated, the original petition of respondent to set aside the said stipulation was based upon misconduct of the appraisers, and the suggestion of its invalidity for the other reasons was first made by the court; but upon the hearing counsel for respondent urged that the instrument was void as against public policy. The instrument in question was clearly against public policy, and void. Beard v. Beard, 65 Cal. 354, 4 Pac. 229; 2 Bish. Mar. & Div. pp. 702, 885; Greenh. Pub. Pol. pp. 490, 491. In Phillips v. Thorp, 10 Or. 494, the subject is fully considered, and many authorities cited; and the court say, quoting from another case, that "the authorities are uniform in holding that any contract between the parties, having for its object the dissolution of the marriage contract, or facilitating that result, such as an agreement by the defendant in a pending action for divorce to withdraw his or her opposition, and to make no defense, is void, as contra bonos mores"; and that courts "will esteem it their duty to interfere upon their own motion whenever it appears the dissolution is sought to be effected by the connivance or collusion of the parties.

Appellant contends that the court had no jurisdiction in this action to set aside the said written instrument, and that an independent action should have been brought for that purpose. But the court clearly had jurisdiction to make disposition of the community property (Civ. Code, §§ 146, 147); and when appellant insisted upon said instrument as providing how said property should be divided, the court necessarily had jurisdiction to consider it, and to disregard it if found to be void. Indeed, appellant asked for findings upon the subject of said instrument, thus acknowledging the jurisdiction. Whenever a void contract is relied on, no matter what the form of the action is in which it is presented, a court will disregard it. In Speck v. Dausman, 7 Mo. App. 165 (quoted in Greenh. Pub. Pol. supra), the court say: "Such pretended agreements, if they are to have any force, must be subjected to the examination of the divorce court, and derive their sanction from a decree made by the court with a knowledge of the facts."

Appellant contends that, if the agreement was void, then the whole decree of divorce should be set aside. But the court was not imposed upon. While the pretended agreement was yet wholly executory, and before any further proceeding was taken in the case, the respondent repudiated it, and disclosed all the facts to the court. The court was thus put upon its guard, and the intended fraud was frustrated. Appellant introduced the letters and photographs referred to in the stipulation; the pleadings were not withdrawn or changed; and all the issues were vigorously contested under the watchful eyes of the judge, who had been informed of all the facts touching the void stipulation.

Appellant objects to the allowance to respondent of a certain sum for attorneys' fees, upon the ground that it was for past services. But the record does not show that it was for past services. It rather shows that the allowance was made for the purpose of enabling respondent to prosecute her suit to final judgment. The application for the allowance was made some time before the order granting it was entered. It affirmatively appears that respondent was entirely "without property, money, means, or credit to prosecute her said action."

The foregoing views are determinative of all the points made by appellant. The judgment and order denying a new trial are affirmed.

We concur. HENSHAW, J.; TEMPLE, J.

106 Cal. 409

## SHENANDOAH MINING & MILLING CO. v. MORGAN et al. (No. 19,503.)

(Supreme Court of California. March 14, 1895.)

WATERS—ACTION TO ENJOIN INTERFERENCE WITH RIGHT TO USE—PLEADING—EVIDENCE.

1. That the water of certain springs was liable to appropriation, and that plaintiff appropriated it, is sufficiently averred in a complaint to enjoin defendant from interfering with plaintiff's right to use the water from his mine and mill, where it alleges that the land on which the springs were situated was government land; that no one was in actual possession thereof; that plaintiff took possession of the water and springs by entering on the land, and constructing the necessary ditches, reservoirs, and pipe line to conduct the water to his mill; and that he has used it adversely for more than five years.

2. Under a complaint to restrain the interference with plaintiff's alleged right to the use of water, alleging appropriation by entry on public land, and a prescriptive right by use for five years, evidence is inadmissible that he acquired a right to take the water by the permission of persons who had previously applied to purchase the land from the state, and whose application had been approved.

3. Public lands selected by the state in lieu of school lands is not lands belonging to the United States, in such a sense that a water right by appropriation may be acquired thereon at any time before the issuance of a patent, notwithstanding its occupancy by one who has made application for its purchase from the state.

Commissioner's decision. Department 2. Appeal from superior court, San Diego county; George Puterbaugh, Judge.

Action by the Shenandoah Mining & Milling Company against A. C. Morgan & Co. to enjoin them from interfering with plaintiff's alleged right to take water from certain springs for the use of its mine and mill. From a judgment for plaintiff, and an order denying a motion for a new trial, defendants appeal. Reversed.

H. S. Utley, for appellants. Conklin & Hughes, for respondent.

HAYNES, C. This suit is prosecuted by the Shenandoah Mining & Milling Company, a corporation, against A. C. Morgan, Sarah L. Morgan, and Fred. Schoulder, to enjoin them from interfering with plaintiff's alleged right to take water from certain springs for the use of its mine and mill. Findings and judgment were for the plaintiff, and defendants appeal from the judgment, and from an order denying their motion for a new trial.

The second amended complaint alleged that in 1882, for the purpose of securing a water supply for their quartz mill, plaintiff took possession of certain springs known as the "Sycamore Springs," situated upon certain described lands about a mile from its mine and mill; that, at the time it took possession of said water and springs, the land upon which the springs were was government land belonging to the United States; that plaintiff, at the time it so took possession, began the construction of the necessary ditches, reservoirs, and pipe lines to conduct the water to the mill, and that the same were completed and in full use the same year; that from that time the plaintiff has been continually using the water for said purposes, and has been in the open, notorious, continuous, and adverse possession of said springs and the waters flowing therefrom; and, that at the time of the completion of said works, neither of the defendants nor any other person was using or in any way occupying said springs, or the water flowing therefrom; and that no one was then in the actual occupation of the land on which the springs are. The complaint contains no allegation of title or ownership of said springs or water, or of its right to use the water other than as above stated. The defendants interposed a general demurrer to this complaint, and now contend that it was improperly overruled.

The complaint is, to say the least, peculiar. It indicates a state of uncertainty in the mind of the pleader as to the particular ground upon which to base the claim of the plaintiff, and a demurrer upon that ground might properly have been sustained. The allegation that the land on which the springs are was then government land of the United States, and that no one was then in the "actual" possession thereof, indicates that it was intended to rely upon an appropriation of the water, but does not clearly allege that the water was subject to appropriation, or that there was not some sort of prior right to the water in some one else. The word "appropriated," or "appropriation," is nowhere used, but it is alleged "that plaintiff took possession of the water and springs by entering upon the land," and constructing the necessary ditches, reservoirs, and pipe line, and thereby conducted the water to the mill. This, I think, is sufficient as against a general demurrer, followed, as it is, by an alleged adverse possession of more than five years.

The first witness called for the plaintiff was the superintendent of the mine and mill, and upon his examination in chief he testified that "defendant Schoulder was present at the time the pipes were laid and reservoir constructed, and he made no objection and made no claim to the land." Upon cross-examination, he testified that Schoulder gave permission to take the water from the large spring and use it; that was in the spring of 1883, a short time before the pipes were laid; that Schoulder consented to the taking of the water; that "he went with us, and located the place for water reservoirs," etc. Mr. Morse, for the plaintiff, testified that Schoulder "agreed to let us have the use of the water." M. A. Luce, Morse, Gordon, and Conklin were the owners of the mine prior to the formation of the corporation; and Mr. Luce, called by the plaintiff, on cross-examination testified that in November or December, 1882, he had "some conversation" with Schoulder, which he reduced to writing, and which was signed by Schoulder. Upon redirect examination the writing was produced and offered in evidence, to which defendants objected that it was irrelevant, incompetent, and immaterial, as the pleadings only set up a title by appropriation. Counsel for plaintiff then asked the witness: "You state that your rights under that were transferred to the company?" A. "Yes, sir." Defendants objected that it was incompetent, and not the best evidence. Both objections were overruled, and the writing referred to was admitted in evidence, and reads as follows: "I hereby grant to M. A. Luce, J. S. Gordon, E. W. Morse, and N. H. Conklin the right to take not to exceed three inches of water from the Sycamore Springs, situated on my premises, where I now reside, on Mesa Grande, in San Diego county, and the right to lay and maintain piping on my premises for the purpose of collecting the water and conveying the same to the Shenandoah mine and mill. Witness my hand, this 25th day of November, 1882. Fred. Schoulder." Defendants excepted to the above rulings.

To illustrate the effect and character of the evidence so admitted, it may be stated that the court found substantially, in the language of the complaint, that plaintiff took possession of the springs, constructed the reservoirs and pipe line, used the water, etc.; that, at the time the plaintiff took possession and constructed its works the land on which the springs were was land belonging to the United States; but that Schoulder had made application to purchase it from the state of California as lieu lands, and obtained a certificate of purchase in September, 1883, and his patent in October, 1883; and that Schoulder on December 6, 1882, "granted to Gordon, Luce, Morse, and Conklin the right to take and use from the said Sycamore Springs water for the use of the Shenandoah mine and mill, to the amount not to exceed three miners' inches, which said right was by the said parties transferred to the plaintiff in this action." The court also made the further general finding that all the allegations of the complaint were true, and that those of the answer were untrue. The evidence showed that the land in question was selected by the state in lieu of a school section, and listed to the state, as early as May 6, 1882; and the location was approved by the surveyor-general, and the county treasurer directed to receive the 20 per cent. of the purchase money from Schoulder July 13, 1882. It is therefore clear that it was not "government land belonging to the United States," as alleged in the complaint, either in November, 1882, the date of the paper received in evidence, nor in May, 1883, when the reservoirs and pipe line were constructed; and hence the act of congress of 1866 can have no application. Not only was Schoulder's application to purchase made before any of the transactions in this case occurred, but his application had been formally approved; and the court finds as a fact that Schoulder completed his purchase and received a patent from the state in due time, and his title therefore relates back to the date of his application to purchase. Under these circumstances, no right of appropriation existed in the plaintiff, and none could be acquired unless by grant or adverse possession and use. The testimony of the witnesses, however, negatived an adverse possession, since it was clearly shown that the use was by permission of Schoulder; and therefore, without evidence of a grant, the plaintiff must have failed to establish any title which would support an injunction against the defendants.

Counsel for respondent assume that, until the state patent issued to Schoulder, it was public land of the United States, and that a water right by appropriation might be acquired thereon at any time before the patent issued, notwithstanding it was occupied by a claimant who had made application to purchase, and cite Osgood v. Mining Co., 56 Cal. 571. The opinion in that case supports this contention, but it is not clear that it was necessary to the decision. It was not accepted as the law in Lux v. Haggin, 69 Cal. 255, 10 Pac. 674. See that case, at page 348, 69 Cal., and page 727, 10 Pac. But in Howell v. Slauson, 83 Cal. 539, 23 Pac. 692, it was held that where, by reason of the loss of school sections, a selection is made by the state of other lands in lieu thereof, the listing of such lands to the state conveys the legal title as effectually as a patent would have done, and that the title so transferred relates back to the date when the selection was made and reported to the local land office, and cuts off all subsequent claimants.

The complaint contains no allegation of ownership or title to the water, but pleads the facts upon which it relies to show title, and which are inconsistent with a claim of title by grant from the owner of the land, springs, and water. Having thus pleaded a particular right or title not resting in grant, the paper writing, which the court finds to be a grant conferring a title, was improperly received. "The plaintiff must recover, if at all, upon the cause of action as set out in his complaint, and not upon some other which may be developed by the proofs" (Mondran v. Goux, 51 Cal. 151); or, as said in Bryan v. Tormey, 84 Cal. 126, 130, 24 Pac. 319: "The judgment of the superior court cannot be sustained, because the case proved and found is not the case made by the complaint;" and the judgment was reversed, though it was further said that the facts proved showed a good cause of action. If, therefore, the complaint would not justify a finding of a grant based upon the paper received in evidence, it is clear it should have been excluded, and for this error the judgment should be reversed. Whether the paper in question should, in the light of all the evidence, be construed as a grant, is a question upon which we express no opinion; for if it should be construed not to be a grant, but a mere lease, license, or agreement, then the finding that Schoulder did grant to the plaintiff the right to the water is not supported by the evidence, and reversal in that case would also follow.

Appellant has specified many particulars in which it is claimed that the evidence does not support the findings. Enough has been said to show that the findings, which follow the allegations of the complaint as to appropriation by entering upon land belonging to the United States and taking possession of the springs, are not justified by the evidence; that, while the court found that plaintiff had been in the continual use of the water, there was no finding that the use was adverse, or of any fact from which an adverse use could be implied, unless from the finding that the springs were on government land of the United States, or the finding of a grant from Schoulder, neither of which was justified by evidence admissible under the plaintiff's complaint.

The question, argued by appellant, as to whether the springs were of such character as to be the subject of appropriation, need not be considered, since, if they were not, they might still be used under a license or grant.

It is also contended by appellants that Mrs. Morgan, Schoulder's grantee, was a bona fide purchaser without notice. As plaintiff did not sustain the right to the water upon which it relied in its complaint, it is immaterial whether Mrs. Morgan purchased with notice of that claim or not; and whether she is chargeable with notice of some other claim of right on the part of the plaintiff, which was not alleged in this action, need not now be considered.

Many other questions are made and discussed, but, as we cannot anticipate what changes may be made in the pleadings, we cannot reasonably determine whether these questions will again arise. In view of the facts appearing in the evidence, without contradiction, that for six or more years plaintiff's mill and mine have been practically idle,—that is, have not been operated more than a few days each year,—if the plaintiff should, upon a new trial, be found entitled to a decree, the interests of the defendants should be more carefully guarded than they are in the decree before us. Any reasonable construction of the grant, license, appropriation, or other right which the plaintiff may claim can only extend to a necessary or proper use for the purposes of the mill and mine, and is not an absolute right to the water for any other purpose, or which the plaintiff may waste to the detriment of the defendants. The decree as rendered enjoins the defendants from using or diverting the water that "would flow" through the pipes, or interfering with the use, management, and control of it by the plaintiff. It gives the plaintiff all the water that would flow through the pipes with the present head, all the time, for any purpose, or for no purpose, and is not confined to the necessary and proper uses of the mine and mill. It is true some evidence was given on behalf of the plaintiff to the effect that the constant use of the water was necessary to the preservation of the mill, at least for the preservation of the boiler, plates, and tanks. An inquiry would probably have revealed the fact that, when idle, the boiler is kept empty and the plates dry; and, if the tank were so out of repair as to require the full flow of the water to keep it full when the mill was not running, it would not supply the boiler and battery when it was, and so scarcely worth preserving. If the tank is in proper repair, it would require little water to keep it full. Having found that defendants are entitled to the excess of the water, its use by the plaintiff should be carefully restricted to that which is necessary.

The judgment and order appealed from should be reversed, and a new trial granted.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, and a new trial granted.

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(106 Cal. 427)

### In re WELCH'S ESTATE (two cases. Nos. 15,889, 15,890).[1]

(Supreme Court of California. March 15, 1895.)

Special Administrator—Powers—Right of Appeal—Payment of Family Allowance—Validity of Order—Laches of Widow.

1. A special administrator, as the "party aggrieved," may appeal from a decree directing the payment by him to the widow of family allowance money, and from one directing a partial distribution.

2. An order for the payment by an administrator of family allowance money is not invalid for failure to especially find that the property exempt from execution, and already set apart for the support of the widow, is insufficient.

3. A special administrator appointed pending proceedings for the removal of the general administrator, the estate being solvent, may be directed to pay the amount which has become due the widow, under an order directing the payment to her of a certain sum for family allowance.

4. A delay by the widow for four years to demand payment from the special administrator, appointed pending proceedings to remove the general administrator, of the sum directed to be paid by the latter for family allowance, does not per se deprive her of the right to payment of the accumulated allowance.

5. Partial distribution of a decedent's estate, while in the hands of a special administrator, appointed pending proceedings to remove the general administrator, cannot be decreed.

Department 2. Appeal from superior court, city and county of San Francisco; J. V. Coffey, Judge.

In the matter of the estate of Henry Welch, deceased, appeals by the special administrator from an order directing the payment of arrearages of family allowances, and from a decree ordering a partial distribution. Former affirmed. Latter reversed.

Sumner & Moses, for appellant. Garret W. McEnerney, for respondent.

HENSHAW, J. Two separate appeals are brought to this court by the special administrator of the estate, but they may advantageously be considered and determined together. In the first (No. 15,889) the special administrator appeals from an order directing him to pay the arrearage of family allowance which has accrued since the suspension of the general administrator. In the second (No. 15,890) he appeals from a decree of partial distribution, by which he is directed to pay $5,000 to the widow. All of the proceedings leading to this decree were had while there was no general administrator, and while appellant was in charge of the estate.

In each appeal a motion to dismiss is made, upon the ground that the appellant is not a party aggrieved, and in support of the motions are cited the numerous cases which decide that an executor or administrator has in general no such interest in the conflicting claims of heirs and devisees as will warrant his appeal from adjudications fixing their rights, and distributing the estate accordingly. Bates v. Ryberg, 40 Cal. 465; Estate of Wright, 49 Cal. 551; Estate of Marrey, 65 Cal. 287, 3 Pac. 896; Roach v. Coffey, 73 Cal. 282, 14 Pac. 840; Estate of Jessup, 80 Cal. 625, 22 Pac. 260; In re Sanborn's Estate, 98 Cal. 104, 32 Pac. 865. The rule as declared by these cases does not admit of question. It is a sound proposition that administrators, general or special, like receivers and other trustees or custodians of funds for designated purposes, are not ordinarily affected by orders in reference to their disposition, and therefore will not be heard on appeal from such orders. But this rule has its well-defined limitations. Wherever an order or decree involves a construction of the proper exercise of the duties of the officer, wherever it presents a question as to the right or power of the trustee to comply with it, wherever obedience to it might subject him to liability, the rule does not operate. Even where the order is one merely for the payment of funds, if any of these questions arise under it, and personal liability may attach, the right of the officer to appeal is recognized and upheld. Beach, Rec. §§ 286, 757; How v. Jones, 60 Iowa, 71, 14 N. W. 193; Hinckley v. Railroad Co., 94 U. S. 467; High, Rec. § 8196. The authorities above cited deal more particularly with a receiver's right to appeal. But the principle is the same in the cases of all trustees, while special administrators whose powers are here under consideration are little else than receivers in chancery, with such limited powers as may be conferred or authorized by statute. Schouler, Ex'rs, § 134; Croswell, Ex'rs, § 228; Williams, Ex'rs (7th Am. Ed.) p. 587 et seq.; In re Moore, 88 Cal. 3, 25 Pac. 915.

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[1] Rehearing denied.

In both of these appeals the adjudication involves the question of the powers of the special administrator. By each order or decree he is required to disburse and distribute funds. By a compliance with either personal liability may attach. The one is claimed by appellant to require him to pay a debt or claim against the estate; and the other is a decree of partial distribution. Each is appealable by a party in interest, and the special administrator, under the circumstances, we hold to be such a party. The preliminary motions to dismiss are therefore denied.

1. In the matter of the first appeal the court had made, during the incumbency of the general administrator, an order for the payment of a family allowance. No appeal was taken from it, and the time to appeal had expired long before any of the proceedings here attacked had been initiated. It is asserted that this order is invalid for lack of a finding that the property exempt from execution, and already set apart to the support of the widow, was insufficient for the purpose. Code Civ. Proc. §§ 1464–1466. The fact that the court, after setting aside exempt property, made its order for family allowance, involved, of necessity, the decision that the amount originally set apart was insufficient. The order for additional allowance in itself was a declaration of that insufficiency. Estate of Luther, 67 Cal. 319, 7 Pac. 708, in no wise conflicts with this view. The probate court had there set apart farming land and personal property to the family, and refused to make an extra allowance. This court declined to review that order in the absence of a finding that the property set apart was insufficient. In other words, it treated the order of the court refusing family allowance as equivalent to a finding that the amount already set aside was sufficient, which is the same proposition in a different form as that here declared. During the life of the order for the payment of the family allowance, Purcell, the administrator, was suspended. This was in March, 1889. Protracted litigation followed as to Purcell's right to administer. Upon appeal to this court, the order of suspension was reversed; but he was again suspended by another order, and he again appealed. For the years consumed in this litigation, a special administrator was in charge of the estate, and the widow received no part of her allowance. At last, in 1893, she made demand upon the special administrator for the arrearage, and, upon refusal, applied to the court, in probate, for an order directing him to pay it. The estate is solvent. The time for presenting claims had expired before the removal of the general administrator. There was but one claim presented which was in dispute, and the amount of this was inconsiderable as compared with the value of the estate. Under these circumstances, the court held that its original order for family allowance was in full force and effect, and directed the special administrator to pay the amount accumulated under it. This latter order was not one for the payment of a claim or debt against the estate (In re Estate of McCausland, 52 Cal. 568); nor did the fact of the application for it convert the widow's statutory right into such a debt or claim. In Stuttmeister v. Superior Court, 72 Cal. 487, 14 Pac. 35, the attorney's fee was treated by all parties as a claim against the estate, was regularly presented and allowed as such. This court said that, since it had been so treated, the order for its payment was appealable, under subdivision 3, § 963, Code Civ. Proc. But it also declared that the liabilities of an executor or administrator in the management of an estate or in administering the trust stand upon a different footing from that of claims proper. The powers of a special administrator in this state are drawn from the statute. Adjudications from sister states under varying laws can aid little in determining their scope. They are specified in section 1415, Id. In particular they have to do with the collection and preservation of the estate. This generally is the province of the administrator pendente lite, and herein lies the similarity between his functions and those of a receiver. By our law he has the powers enumerated by statute, each and all of which pertain to the collection and preservation of the estate, and "such others as are conferred upon him by his appointment." Though the language above quoted is broad, its limitations are apparent. It is no general grant. It does not authorize the court to obliterate the distinctions between general and special administrators. The additional powers are only such as are incident to those designated, or in line with them.

The right of a widow to family allowance is not only statutory, but it is one strongly favored. In re Lux, 100 Cal. 603, 35 Pac. 345. She is entitled to her allowance even before letters of administration are granted. Code Civ. Proc. § 1464. After issuance of such letters in a solvent estate, she is entitled to it during the progress of the settlement of the estate. Id. § 1466. The contention that, because the estate is in the hands of a special administrator, no progress is being made towards its settlement, and that, therefore, the widow's right is suspended, is too refined. If there is delay in granting letters of administration, or an administrator is suspended or removed, the court must appoint a special administrator. Id. § 1411. The widow's right to an allowance before the issuance of letters is not affected by this delay; and, upon reason, it is not easy to see why it should be different in case of suspension. The widow unquestionably has her right to an allowance before letters issued, and to have it paid by the special administrator. The power to pay this allowance is one of the additional powers contemplated by Id. § 1415. That the widow's right is equally good when a special administrator has been appointed after suspension or removal of the general administrator would, as has been said, seem to rest upon sound principle. But, additionally, it has the sanction of the statute. Code Civ. Prov. § 152, provides: "At any time after receiving letters the executor, administrator or special administrator may apply to the court or judge and obtain an order to sell perishable * * * and so much other personal property as may be necessary to pay the allowance made to the family." By express contemplation of this statute, the special administrator is expected to pay the family allowance, and we will not put so strained and narrow a construction upon it as to hold that it refers only to allowance before letters issued.

Nor will we hold that the widow's delay in demanding the accumulated allowance forfeits her right to it. Some authority is cited in support of the proposition, but the doctrine does not commend itself, and the general rule in this state is as laid down in the Lux Case, supra. Cases may arise where the special facts show a waiver by the widow,—for, the statute being in her interest, she may waive her right,—but these cases would be tested by the principles of waiver and estoppel, which principles do not apply here.

2. Something of what has been said upon the first appeal is applicable to the second appeal from the decree of partial distribution. No express authority for decreeing partial distribution of an estate in the hands of a special administrator is found in the statute. If partial distribution can be decreed under section 1415, so also may general distribution, and all the distinctions between general and special administrators be thus swept aside. This was not the design of the lawmakers. Even in England, where by the statute of Victoria (20 & 21 Vict. c. 77) the administrator pendente lite is given most of the powers of a general administrator, the right of distribution is withheld. 1 Williams, Ex'rs (7th Am. Ed.) p. 587.

The order directing payment of family allowance is affirmed. The decree of partial distribution is set aside.

We concur: TEMPLE, J; McFARLAND, J.

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106 Cal. 392

## UTT v. FREY. (No. 19,530.)

(Supreme Court of California. March 13, 1895.)

WATER RIGHTS—PUBLIC LANDS — APPROPRIATION —ABANDONMENT.

1. One desiring to appropriate the water of a stream on vacant public land of the United States may take possession of and use a ditch already constructed on the land, and not in the actual possession of another.

2. On an issue as to the title to a water right and ditch, a finding that plaintiff's grantor had been the owner of the ditch since 1874, while the evidence showed that he appropriated the ditch and the water right in 1882, is harmless as against defendant, claiming by reason of riparian ownership obtained in 1887.

3. Evidence that the owner of an irrigation water right had for several years used but little water for irrigating, though using it continuously for domestic purposes, and had allowed the ditch to become so obstructed that it would convey but little water, does not show an abandonment.

Commissioners' decision. Department 2. Appeal from superior court, San Diego county; W. L. Pierce, Judge.

Action by Lee H. Utt against John Frey to quiet the title to a water right and ditch. From a judgment for plaintiff, defendant appeals. Affirmed.

Z. Montgomery, for appellant. Gibson & Titus, for respondent.

SEARLS, C. This is an action to quiet the title of plaintiff to the water of the San Luis Rey river and its tributaries, and more particularly the water of Paubal creek, a branch of said river, and of a certain water ditch taking water therefrom, known as the "Ardillo Ditch," and formerly known as the "Paubal Ditch," situate in the county of San Diego, and used by plaintiff to conduct the water of said Paubal creek to certain land and premises of plaintiff described in the complaint. The answer denied most of the material allegations of the complaint; admitted plaintiff's ownership of the land described in the complaint, riparian to said stream; and by way of cross complaint set up ownership of certain land, riparian to said stream, and ownership of all the water of Paubal creek, etc. The cause was tried by the court without a jury, written findings filed in favor of plaintiff, establishing his title to 25 inches of the water of Paubal creek, upon which judgment was entered, establishing the right of plaintiff to the Ardillo ditch, and to the prior right to the use of 25 inches of water of said Paubal creek during the irrigation season of each year, viz. from April 1st to November 1st of each year, etc. Defendant appeals from the judgment and from an order of the court denying his motion for a new trial.

The first error assigned by appellant is predicated upon the admission in evidence of a deed of conveyance of the Paubal water right and ditch, dated July 15, 1887, by Luis Ardillo to the plaintiff herein. Its admission was objected to upon the ground that it was "irrelevant, immaterial, and incompetent." The following statement is essential to a comprehension of the point made and other questions raised by appellant: There was testimony tending to show that as early as 1874 (all the lands now owned by plaintiff and defendant being then vacant, unoccupied, public lands of the government of the United States) one Samuel Paubal settled upon the tract of land now owned by the plaintiff, known as the "Paubal Tract," and constructed a ditch from Paubal creek to said tract of land, through which he diverted the water of said creek, and conducted the same to his house and land, where he used it for domestic purposes and for the irrigating of a small vineyard, fruit trees, and several acres which he cultivated in corn, peas, etc. Paubal continued to own and occupy the ditch until 1882 or 1883, when he died. Thereupon Luis Ardillo, a son-in-law of Paubal, without acquiring the legal title thereto by any conveyance, took possession of said land and ditch, and continued to possess, occupy, and use them, including the water of said Paubal creek, through said ditch, until 1887, when he conveyed the land to one Magee, and the ditch and water right to plaintiff. Magee homesteaded the place in 1887, commuted the same April 18, 1889, and received a patent therefor from the United States, dated January 19, 1891. Magee conveyed the Paubal tract of land to plaintiff October 2, 1889. Defendant owns land upon Paubal creek above the land of plaintiff, upon which he filed his declaratory statement February 11, 1890, and entered the land at the United States land office as a pre-emptor January 6, 1891, and received a patent therefor dated December 26, 1891. The head of plaintiff's ditch for say 240 feet is upon the land patented to defendant. In April, 1892, defendant commenced the construction of a ditch from Paubal creek to his land, completing it in the month of May following, which was capable of carrying 40 inches of water, measured under a 4-inch pressure, and since that time has diverted the water of the creek therein, whereby plaintiff has been deprived thereof. The theory of appellant is that, as Ardillo never succeeded to the title of Paubal, the owner and constructor of the ditch, he had no title which he could convey to plaintiff, and therefore that his deed was inadmissible.

It is true that upon the death of Paubal the legal title to his estate vested in his heirs, subject to administration, and the rights and incidents connected therewith; and the fact that the wife of Ardillo was the daughter and heir, or one of the heirs, of Paubal, did not give to her husband, Ardillo, a right to convey the ditch and water right. We are not, however, called upon to consider the rights of the heir or heirs of Paubal, or any rights derived from or through them. Prior possession of real property is evidence of ownership, and as against those who do not connect themselves with the title such prior possession gives a superior right, although the true title may be outstanding in a third person, or, as in the present case, in the government of the United States. One who, in California, desires to appropriate the water of a stream upon the vacant and unappropriated public lands of the United States for a useful purpose, may do so by the construction of a ditch or other medium of conduit, and actually appropriating the water and conducting it to some point where it can be utilized in fulfillment of such useful purpose; and by so doing he acquires, as against all subsequent appropriators and riparian proprietors acquiring title from the United States subsequent to such appropriation, the right to the quantity of water thus appropriated, and an easement of right of way into and over the public land traversed by his ditch or conduit so constructed and used for such purpose. If one animated by a like desire to appropriate water under like circumstances finds a ditch already constructed to hand, takes peaceable possession thereof, and appropriates the water for a like or similar useful purpose, he thereby acquires a like right as against all the world, except the true owner, or those holding under or through him. If nature or art has furnished the medium of appropriation, he may avail himself of the gift or labor without being held liable to those having no interest therein, and in no wise connected therewith. To the owner of a ditch thus possessed and used such appropriator must account until his possession and user ripens into a title by prescription or adverse user. His right in such case will depend for priority, as against other appropriators of water from the same stream, upon the date of his possession and appropriation, and not upon the date of the original construction of the ditch and appropriation by some other person under whom he does not hold, and between whom and himself there is no privity of estate. His appropriation in such a case is a new and independent one, and must stand or fall upon its own merits. It follows that when Luis Ardillo, in 1882 or 1883, upon the death of Paubal, entered into possession of the Paubal ditch and land, appropriated the water of Paubal creek therein, and used the same for domestic purposes and for irrigating the land, and continued such user until 1887, he thereby acquired a right thereto which he could convey to the plaintiff, and which, unless lost by voluntary abandonment, was prior in time and superior in right to the claim of defendant to such water, which did not vest in him as a riparian proprietor until 1890, and as an appropriator until 1892. It follows that the deed from Ardillo to plaintiff was properly admitted in evidence. It also follows, for like reasons, that the evidence objected to by defendant, touching the taking of possession and user by Ardillo of the ditch and land of Paubal, without a conveyance, was pertinent and proper. In this connection it is proper to state that the finding of the court (No. 2), in which it is found that the plaintiff and his predecessors in interest have been the owners of the ditch in question since and during the year 1874, is erroneous. The evidence showed that the ditch was constructed by Paubal as early or earlier than 1874, but, as Ardillo did not connect himself with the Paubal title, his right to the ditch cannot receive any support therefrom, and had its inception in his possession and user commencing in 1882 or 1883. The error is technical, could not harm the defendant, and is not cause for reversal, for the reason that a finding that plaintiff and his predecessors have been the owners of the ditch since and during 1874 is tantamount to a finding that they have been such owners at every moment of time during such period; and, as the evidence supports such finding since 1882 or 1883, it fixes such ownership at a period anterior by some seven years to the inception of any right in defendant.

### Abandonment.

Appellant contends that, if the plaintiff or his predecessors in interest ever had any irrigation water right in said ditch, it was lost by abandonment. The right which is acquired to the use of water by appropriation may be lost by abandonment. To abandon such right is to relinquish possession thereof without any present intention to repossess. To constitute such abandonment, there must be a concurrence of act and intent, viz. the act of leaving the premises or property vacant, so that it may be appropriated by the next comer, and the intention of not returning. Judson v. Malloy, 40 Cal. 299; Bell v. Mining Co., 36 Cal. 214; Moon v. Rollins, Id. 333; St. John v. Kidd, 26 Cal. 272; Richardson v. McNulty, 24 Cal. 345; Willson v. Cleaveland, 30 Cal. 192. The mere intention to abandon, if not coupled with yielding up possession or a cessation of user, is not sufficient; nor will the nonuser alone, without an intention to abandon, be held to amount to an abandonment. Abandonment is a question of fact to be determined by a jury or the court sitting as such. Yielding up possession and nonuser is evidence of abandonment, and, under many circumstances, sufficient to warrant the deduction of the ultimate fact of abandonment. But it may be rebutted by any evidence which shows that, notwithstanding such nonuser or want of possession, the owner did not intend to abandon. The finding of the court does not uphold the contention of appellant, and in this respect is correct. The most that can be said in favor of an abandonment is that for several years after the sale by Ardillo of the land to Magee, and the conveyance of the ditch and water right to plaintiff, but little water was used from the ditch for irrigation, and that the ditch became so obstructed by debris and vegetable matter that it would conduct but a small quantity of water. It was used, however, all along to convey water for domestic purposes and to some extent for the purposes of irrigation. The intention of the plaintiff to retain his right was made plainly manifest by requesting the defendant, who for some time was in the occupancy of the Paubal tract of land, to keep the water running in the ditch; by his effort to sell the water right, and later, when he succeeded to the ownership of the Paubal tract, by planting some 14 acres to olive trees, which could not be nurtured without the water from this ditch; and by his clearing out the ditch and running the water through it, except when prevented by the acts of defendant. No question of adverse possession or adverse user for a period sufficient to constitute a right arises in the case, and under the adjudications of this court in the cases cited, and many others of like tenor and effect, it is not perceived how the court below could with any propriety have found in favor of an abandonment. The declaration of plaintiff in his letter to defendant of April 20, 1893, in which he stated that "the difference between us is only one-sixth of the stream, worth about $200," and which is relied upon by appellant as proof that the plaintiff only claimed one-sixth of the water, was fully explained by plaintiff, where he said he and defendant were trying to compromise; that he had offered to take two-thirds of the water, and in response defendant had proposed that each take one-half of the water. This would leave a one-sixth over which they differed, and thereupon he suggested the folly of a suit at law which would cost $1,000, over a one-sixth which was worth but $200. Nothing seems to have come of the attempt to compromise, and the evidence, if admissible, was entitled to no weight. No estoppel was pleaded, and none was proven. The evidence as to the quantity of water appropriated through plaintiff's ditch ranged from 1 inch to 100 inches. The court found 25 inches as the quantity to which Utt was entitled, and this finding cannot be disturbed. The judgment and order appealed from should be affirmed.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

(106 Cal. 586)

## CITY & COUNTY OF SAN FRANCISCO v. MOONEY et al. (No. 15,686.)

(Supreme Court of California. March 25, 1895.)

STATUTE — RATIFICATION OF INVALID ORDINANCE.

Act March 11, 1858, ratifying and confirming a void ordinance providing for the laying out of streets in a city, and which took effect by relation as of the date of the passage of the ordinance, is not nugatory and ineffectual as to a map embraced in the same act of ratification because such map was prepared and adopted after the time limited for its preparation and adoption by the ordinance.

Department 2. Appeal from superior court, city and county of San Francisco; J. F. Sullivan, Judge.

Action by the city and county of San Francisco against Thomas Mooney and others to recover lands claimed and held by defendants adversely to the city. From a judgment for plaintiff, defendant Delaney appeals. Affirmed.

S. W. & E. B. Holladay and Sawyer & Burnett, for appellant. Sullivan & Sullivan, and Craig & Meredith, for respondent.

HENSHAW, J. Appeal by the defendant Delaney from the judgment and from the order denying him a new trial. The action was commenced by the city and county of San Francisco against the defendants named and many others to recover certain lands claimed and held by the defendants adversely to the city. The land claimed by appellant is part of the so-called "Lafayette Park." Lafayette Park was delineated and described as a public park or square upon the Van Ness map. The facts of this case are identical in all essential particulars with those in the case of Hoadley v. San Francisco, 50 Cal. 265, and Sawyer v. San Francisco, 50 Cal. 370. The later cases of People v. Holladay, 68 Cal. 442, 9 Pac. 655; Hoadley v. San Francisco, 70 Cal. 324, 12 Pac. 125; San Francisco v. Holladay, 76 Cal. 18, 17 Pac. 942; and People v. Holladay, 93 Cal. 244, 29 Pac. 54,—follow and reannounce the rule of construction given to the act of the legislature ratifying Ordinances Nos. 822, 845, and the Van Ness map, first declared by the cases reported in volume 50 of our Reports. Moreover, the soundness of the construction put by this court upon the ratifying act of the legislature of March 11, 1858, has been subjected to review by the supreme court of the United States, which court, after quoting the opinion in Hoadley v. San Francisco, 70 Cal. 324, 12 Pac. 125, says: "To this we agree. * * * In short, the state refused to confirm the ordinance so far as it had reference to the grant by the city of any part of these squares; and congress in its conveyance followed in this particular what had been done by the state." Hoadley's Adm'rs v. San Francisco, 124 U. S. 645, 8 Sup. Ct. 659. It would seem, therefore, that not only is the interpretation put upon the ratifying act by this court sound and correct, but that the question of that interpretation is no longer an open one. Yet the essential contention of appellant is that the court was in error in these cases. It is strenuously insisted that when the legislature ratified Ordinance 822, which ratification took effect by relation as of the date of the passage of said ordinance, it exhausted its power, and the ratification of the Van Ness map, though a part of the same legislative enactment, was nugatory and ineffectual, because the Van Ness map had been prepared and adopted after the time limited for its preparation and adoption by Ordinance 822; or, at least, that the ratification was nugatory and ineffectual so far as concerned the public parks or squares set apart by said map. This, however, is logically a contention that the legislature, in ratifying the Van Ness map, at the same time and with its ratification of Ordinance 822, did not intend to ratify it so as to give it validity, but ratified and confirmed it in its invalidity. The answer to such a proposition is found in the language used by Chief Justice Story in Wilkinson v. Leland, 2 Pet. 661: "This is a legislative act, and is to be interpreted according to the intention of the legislature upon its face. Every technical rule as to the construction or force of the particular terms must yield to the clear expression of the paramount will of the legislature. The only question, then, is, what is the intent of the legislature? Is it merely to confirm a void act so as to leave it void,—that is, to confirm it in its infirmity? Or is it to give general validity and efficacy to the thing done? We think there is no reasonable doubt of its real object and intent. It is not an act of confirmation by the owner of the estate, but an act of confirmation of the sale and conveyance by the legislature in its sovereign capacity." The judgment and order appealed from are affirmed.

We concur: TEMPLE, J.; McFARLAND, J.

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(106 Cal. 441)

## HEWES v. GERMAIN FRUIT CO. (No. 19,535.)[1]

(Supreme Court of California. March 15, 1895.)

CONTRACT OF SALE—ACTION FOR BREACH—INTEREST—EVIDENCE.

1. A contract for the sale of a crop of raisins, to be cured, and delivered at the packing house, does not require the raisins to be cured before being brought to the packing house, but is complied with where they are properly cured and packed after arriving there.

2. The title to a crop of raisins does not pass to the buyer, under a contract requiring payment on delivery, so as to make it essential to a recovery by the seller for the buyer's failure to accept the raisins that he shall have resold them as pledged property, where the raisins were refused by the buyer on account of delay, after having been previously refused by him because not properly packed; but a private sale at the highest price obtainable is sufficient.

3. Under Civ. Code, § 3287, making interest allowable on damages certain, or those capable of being made certain by calculation, in the absence of a well-known market price on which to calculate the damages, the seller of fruit is not entitled to interest before suit for a breach of contract by the buyer.

4. In an action for a breach of the purchaser's contract to accept grapes when delivered, a contract between plaintiff and a third person, specifying the weight of the boxes and the grades to be made in packing, to which reference is made by the contract in suit, is admissible in evidence.

5. Admissions by an alleged agent, relating to a past transaction, are inadmissible in evidence as against the principal, in the absence of any showing of authority in the agent to make them.

6. In an action for a breach of contract to purchase raisins, a witness for plaintiff, who states that he examined the fruit, and found it in merchantable condition, and on cross-examination states that he cannot tell the number of boxes he examined, may be asked on redirect examination as to how the examination by him compared with the ordinary examination by experts, to ascertain the value or quality of the raisins.

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[1] Rehearing denied.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Action by David Hewes against the Germain Fruit Company for damages for breach of contract by defendant to purchase a crop of raisins from plaintiff. From a judgment for plaintiff, defendant appeals. Modified and affirmed.

Chapman & Hendrick, for appellant. Allen & Flint, for respondent.

HAYNES, C. This action was brought to recover damages, laid at $1,200, for an alleged breach by the defendant, a corporation, of the following contract: "Tustin, Oct. 29, '86. Agreement between David Hewes and Germain Fruit Co., whereby said David Hewes sells and Germain Fruit Co. buys the crop of raisins owned by said D. Hewes (eight to ten thousand boxes, more or less, said raisins being his entire crop of this season, say 5,000 boxes in warehouse, balance on ground being cured) at one 40-100 dollars per box, packed and delivered; raisins now uncured to be cured, and delivered at packing house in good order; raisins to be packed under existing contract with S. Ana Fruit Packing Co., subject to any mutual agreement made with Germain Fruit Co. as to any alteration thereof. D. Hewes reserves the right to put his stencil upon raisins when packed. Payments to be made as follows: Twenty-nine cents per box to be paid to S. Ana Pkg. Co. upon delivery of each car load, balance of one 11-100 dollars per box to be paid to D. Hewes upon like delivery." The second amended complaint set out this agreement, and proceeded to allege as follows: "The plaintiff duly performed all the conditions of the said contract on his part, and delivered to the defendant, and the defendant received, all the said crop of raisins, excepting 2,905 boxes of the same, which said 2,905 boxes were in due time cured, and delivered in good order at the packing house referred to in said contract, and there properly packed and left in good order and condition, subject to order of defendant, prior to the 3d day of January, 1887, and the defendant duly notified thereof; but the said defendant refused to accept the said goods, or to pay for them, pursuant to said agreement, to the plaintiff's damage in the sum of $1,200." A general demurrer was filed to this second amended complaint, but no ruling thereon appears of record. The complaint is not a model of perspicuity, and possibly a demurrer for uncertainty might have been sustained, but we think a general demurrer could not. The answer denied the performance of the contract, and alleged, for a separate defense, that the 2,905 boxes here in question "were not delivered at the packing house in good order, cured," but that they were so poorly cured as to be unfit for the market, and that defendant refused to accept or pay for the same; that plaintiff afterwards removed them, and, after further treatment in curing and packing, again tendered them to defendant, but, on account of the delay caused by the failure of the plaintiff to perform his contract, the market had depreciated; that they were not delivered at the packing house in good order, within a reasonable time, and defendant refused to accept them. The cause was tried by the court, and findings and judgment were for the plaintiff in $1,095.15, with interest thereon from March 6, 1887; and this appeal is from said judgment, and an order denying defendant's motion for a new trial.

The specifications of error are to rulings upon evidence, and that certain findings are not justified by the evidence. The exceptions to the third and fourth findings cover the same point, and may be considered together. The third is a general finding that plaintiff performed all the conditions of the contract on his part, and the fourth specifically finds that on and prior to the 15th of December, 1885, the plaintiff caused all the raisins to be cured, and packed at the packing house mentioned, in good order, and in strict accordance with the terms of the contract. The contention of appellant is, briefly stated, that when plaintiff brought the raisins here in question to the packing house, they were not sufficiently cured; that they were afterwards removed, and subjected to further treatment, after which they were packed. The evidence upon this point is to the effect that the raisins were taken from the trays in the vineyard and put in "sweat boxes," and brought to the packing house in the usual manner. It was then found that some of them were not sufficiently cured, and these were selected out, put upon trays, and taken outside of the packing house, and exposed to the sun, and, when sufficiently cured, and when all had gone through the sweating process, were assorted and packed. Appellant's contention that they were not delivered at the packing house cured and in good order means, as is clearly disclosed by the special defense in the answer, that at the time they were brought to the packing house they were not properly cured, and in good order. The language of the contract, "raisins now uncured to be cured, and delivered at packing house in good order," was not intended to refer to their condition when brought to the packing house, but the "delivery" there mentioned refers to the delivery to the defendant, which was to to be at the packing house, after they were properly packed. It could make no possible difference to the defendant whether they were cured where they were grown or at the packing house, if they were in fact properly cured, packed, and afterwards delivered to it in good order. That this is the true construction of the contract is further apparent from the fact that the raisins, even if properly cured upon the ground, are not ready for packing when brought to the packing house, but are first put through the sweating process, which occupies from one week to three weeks. The answer of defendant clearly shows that it was the bad condition of the raisins at the time they were brought to the packing house that was relied upon, as the answer proceeds to allege that they were afterwards removed, and subjected to further treatment, and packed, and that it then refused to accept them, because not delivered within a reasonable time, and "the market price of raisins had greatly depreciated." The evidence is quite sufficient to sustain the third and fourth findings.

It is contended that the sixth finding, so far as it finds that said 2,905 boxes of raisins were packed in good order "within a reasonable time after the date of said contract," is not supported by the evidence. The contract fixed no time for the delivery of the raisins then uncured. The time required for curing depended upon the state of the weather, which is not always accurately predicted, even by the weather bureau. Nor does it appear that a longer time was required to cure the selected portion at the packing house than would have been required in the field, and hence it does not appear that the packing was or could have been thereby delayed. The court found, not only that they were cured and packed within a reasonable time, but that they were packed in good order; and this finding is sustained by sufficient evidence. Whether the answer raised an issue as to their condition when packed and tendered to the defendant need not be considered. These remarks also include the exceptions to the ninth, tenth, and eleventh findings.

The exceptions to findings 13, 15, 16, and 17 may be considered together, and a general statement made, instead of reciting the findings. On the 6th of March, 1887, the plaintiff sold the 2,905 boxes in question for $2,971.85 at a private sale, and the court found that that was the full value of them, and the best price at which they could have been sold between the 2d of December, 1886, and the day they were sold, and that the amount due to the plaintiff from the defendant under the contract over the value of the same to the plaintiff at all times between said dates was $1,095.15. There was no evidence contradicting the testimony of the plaintiff that he obtained the highest price for the raisins in question for which they could have been sold, but it is contended that they should have been sold in the manner prescribed by the Code for the sale of pledged property; and cite Civ. Code, § 3049. This contention is based upon the supposition that the title or property in the raisins had passed to the defendant, and that, therefore, he could not dispose of them at private sale, or keep them, and recover of the defendant the difference between the contract price and the value of them to him under subdivision 2 of section 3311 of the Civil Code. But the property in the raisins which were uncured did not at any time pass to the defendant. As to this part of the crop the contract was executory, and "title is transferred by an executory agreement for the sale or exchange of personal property only when the buyer has accepted the thing, or when the seller has completed it, prepared it for delivery, and offered it to the buyer with intent to transfer the title thereto in the manner prescribed in the chapter on offer of performance." Civ. Code, § 1141. By section 1502, Civ. Code, "the title to a thing offered in performance of an obligation passes to the creditor, if the debtor at the time signifies his intention to that effect." I find nothing in the evidence which signified plaintiff's intention, in tendering the raisins in fulfillment of his contract, to pass the title to the defendant. On the 2d of December the defendant, finding the raisins not perfectly cured, notified the plaintiff that it would not accept them. At that time all had not been done by the plaintiff which the contract required him to do, and they were not ready for delivery, and hence the tender after they were packed and ready for delivery. The contract, however, made payment by the defendant upon delivery a concurrent condition, and that condition was not waived. The sale of such property in the manner in which pledged property is required to be sold is not confined, however, to property the title to which has passed to the buyer; but, if the property is sold in that manner where the title has not passed, such sale is conclusive as to the value of the property, while, if it is not so sold, the plaintiff must prove the value of the property to him; and this value was found by the court upon sufficient evidence. Section 3353 of the Civil Code provides: "In estimating damages, the value of property to a seller thereof is deemed to be the price which he could have obtained therefor in the market nearest to the place at which it should have been accepted by the buyer, and at such time after the breach of the contract as would have sufficed, with reasonable diligence, for the seller to effect a resale."

The seventeenth finding is to the effect that by the refusal of the defendant to take and pay for 2,905 boxes of raisins it became indebted to the plaintiff in the sum of $1,095.15, and appellant contends that there was no evidence or allegation proving or tending to prove that defendant was "indebted" to the plaintiff in any sum whatever on account of such refusal, and that the evidence is insufficient to justify any finding of fact or conclusion of law that the plaintiff was entitled to recover interest upon any amount or for any time whatever. Section 3287 of the Civil Code is as follow: "Every person who is entitled to recover damages, certain or capable of being made certain by calculation, and the right to recover which is vested in him on a particular day, is entitled to recover interest thereon from that day, except during such time as the debtor is prevented by law or by the act of the creditor from paying the debt." It is quite clear that payment by defendant to plaintiff at the date of the trial, or even upon the day the action was commenced, of the sum of $1,095.15, would not have been just and full compensation to the plaintiff for the detriment caused by defendant's failure to accept and pay for the raisins on December 20, 1886; but, unless this case can be held to be within the provisions of the section last above cited, interest, eo nomine at least, cannot be allowed, for by section 3311, Civ. Code, which declares the excess of the contract price over the value of the property to the seller, including the extra expense of taking it to market, to be the measure of damages, does not mention "interest," while section 3357, Id., provides as follows: "The damages prescribed by this chapter are exclusive of exemplary damages and interest, except where those are expressly mentioned." In some jurisdictions it is held, in cases of unliquidated damages, that though the jury may, according to their discretion, take into account interest as part of the damages, yet they cannot give it as interest eo nomine; but our Code limits the discretion of the jury in this regard. Section 3288, Id., is as follows: "In an action for the breach of an obligation not arising from contract, and in every case of oppression, fraud or malice, interest may be given in the discretion of the jury." Considering these several Code provisions together, we conclude that where interest can be given it may be given as such; but as section 3311, Id., does not in fixing the measure of damages in cases of this character include interest, it cannot be given, unless it can be held that the damages in this case were "capable of being made certain by calculation"; and this we think could not be done. There are cases which hold that when the measure of damages is the difference between the contract and market prices at the date of the breach, interest is to be added as a necessary item in the estimate. See Van Rensselaer v. Jewett, 2 N. Y. 136; Dana v. Fiedler, 12 N. Y. 40; note to Selleck v. French, 1 Am. Lead. Cas. 511; 1 Suth. Dam. (1st Ed.) 610; Id. (2d Ed.) §§ 347, 348; and Cox v. McLaughlin, 76 Cal. 60, 67, 18 Pac. 100, where some of these authorities are cited. Whether interest could have been allowed if the complaint had alleged the market price at the date of the breach, and demanded judgment for a specific sum, being the difference between the contract and market prices, it is not necessary to consider; but it does not appear from the complaint or finding, unless inferentially, that there was any established or reasonably well-known market price upon which a "calculation" could be based with sufficient certainty to charge the defendant with a knowledge of it; so that it is not clear, even if we were at liberty to follow the New York authorities, that interest could be allowed. The fact that in the findings the damages are called an "indebtedness" does not affect the character of the action.

It was not error to receive in evidence the contract between the plaintiff and the S. A. Fruit Co. It is referred to in the contract between plaintiff and defendant, and specified the weight of the boxes, and the grades to be made in packing, neither of which were stated in the contract between them, and thus became a part of the contract.

Upon re-direct examination the plaintiff was asked if he had a conversation with Mr. Simpson, the agent of the defendant, in the forepart of January, 1887, in relation to the reason for its refusal to receive the raisins, counsel stating that they expected to show that he said the fact that the market had gone down was probably the reason. The court admitted the evidence, over defendant's objection. If this evidence could have any significance, it could only be as an admission made by the defendant, and it was not shown that Simpson had authority to make any admissions as to a past transaction affecting the defendant's liability. But, conceding the error, the judgment should not be reversed for that reason. The fact proposed to be shown by the witness, and to which he testified, is no broader than the admission in the last clause of defendant's answer, to the effect that when the raisins were packed and tendered to defendant on account of the delay occasioned by plaintiff's failure to perform his contract within a reasonable time the market price of raisins had greatly depreciated, and defendant refused to accept them, or pay for them. As the court found upon sufficient evidence that the raisins were cured and packed in good order within a reasonable time, the reason for the defendant's notice, given on the 2d of December, before the raisins were packed or ready for delivery, became wholly unimportant; and, if the conversation referred to the tender of the raisins after they were packed, and the second refusal, it was, in substance, a reiteration of the answer, and harmless.

W. G. McPherson, called by the plaintiff, testified that he examined the raisins in question at the request of the plaintiff, and found them in good, merchantable condition. Upon cross-examination he said he could not tell the number of boxes he examined, but thought as many as half a dozen, taking them from different parts of the pile. Upon a redirect examination he was asked: "How did this examination compare with the usual and ordinary examination by experts to ascertain the value or quality of the raisins?" Defendant objected that it was irrelevant and immaterial. The witness answered that it was the usual method. We do not perceive any error in overruling the objection. Such examination, whatever its character, as is usually made by experts to determine the quality, and upon which they act in matters affecting their own interest, must be held admissible. The weight to be given it is a question apart from its admissibility.

The answer of the witness E. Germain,

which was stricken out on motion of plaintiff, may have tended in some slight degree to show the length of time required to cure raisins, though it could scarcely be said to be responsive to the question. But, in any event, the defendant was not prejudiced, as he was further interrogated, and in reply said he thought it took about two weeks from the time they were spread out. This answer would not have been strengthened by that which was stricken out.

No other specifications are discussed by appellant. The judgment should be modified by striking out the words "sixteen hundred and ten and $^{61}/_{100}$," and inserting "one thousand and ninety-five and $^{15}/_{100}$," the modified judgment to bear interest from the date of the original judgment; and, as so modified, the judgment and order appealed from should be affirmed, without costs upon appeal to either party.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, it is ordered that the judgment appealed from be modified by striking out the words "sixteen hundred and ten and $^{61}/_{100}$," and inserting the words "one thousand and ninety-five and $^{15}/_{100}$," the modified judgment to bear interest from the date of the original judgment; and, as so modified, the judgment and order appealed from are affirmed, without costs upon appeal to either party.

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106 Cal. 506

## DIXON v. GRIES et al. (No. 18,387.)*

(Supreme Court of California. March 20, 1895.)

ACTION BY INSANE PERSON—SUBSTITUTION OF GUARDIAN.

1. Where a plaintiff becomes insane after the action is begun, an amended complaint, bringing in his guardian, must allege plaintiff's insanity, and the appointment of such guardian.

2. The mere appointment of a guardian for one who becomes insane pending suit does not divest the insane person of the right to the cause of action, or entitle the guardian to be substituted as plaintiff.

3. Where an action was properly brought in the name of one who became insane while it was pending, an erroneous order, substituting the guardian of his person and estate as plaintiff, is not cause for dismissal.

Commissioners' decision. Department 2. Appeal from superior court, Fresno county; J. R. Webb, Judge.

Action by H. S. Dixon against Henry Gries and others to foreclose a mortgage. Pending suit, plaintiff became insane, and J. R. Dixon, guardian, was substituted as plaintiff. Judgment for plaintiff, and defendants appeal. Reversed.

Horace Hawes, for appellants. Stuart & Wright, J. P. Meux, and S. N. Griffith, for respondent.

**HAYNES, C.** This action was originally brought by H. S. Dixon to foreclose a mortgage made by Henry Gries. The other defendants were subsequent grantees of the mortgaged premises. After the commencement of the action, the plaintiff, H. S. Dixon, became insane, and J. R. Dixon was appointed the guardian of his person and estate, and upon motion the court made the following order: "It is ordered that J. R. Dixon, as guardian of the person and estate of H. S. Dixon, plaintiff herein, be, and he is hereby, substituted as plaintiff herein in the name, place, and stead of H. S. Dixon." Thereupon a second amended complaint was filed, entitled "J. R. Dixon, as guardian of the person and estate of H. S. Dixon, an insane person, vs. Henry Gries, S. N. Griffith, and Antonio J. Cardozo." To this complaint a general demurrer was filed by defendants, and overruled by the court. This complaint contained no averment of the insanity of H. S. Dixon, nor of the appointment of a guardian. At the conclusion of the trial the plaintiff was permitted to file amendments to said second amended complaint to conform to the proof, and amendments were thereupon filed alleging such insanity, and the appointment of the plaintiff as guardian, and thereupon findings were made for plaintiff, and a decree entered foreclosing the mortgage. Defendants appeal from the judgment upon the judgment roll.

The demurrer should have been sustained to the second amended complaint. Nor were all its defects cured by the amendments to make it conform to the proof. The first error was in the order substituting the guardian as plaintiff. His appointment as guardian did not vest the cause of action in him. It is not sufficient that the complaint states facts showing a cause of action in somebody; it must show a cause of action in the plaintiff, or a general demurrer will lie. H. S. Dixon was not deprived of his right or property in the cause of action by his insanity, nor did it vest in his guardian upon his appointment. The suit should have been prosecuted in the name of H. S. Dixon, an insane person, by J. R. Dixon, his guardian. See Fox v. Minor, 32 Cal. 116; Wilson v. Wilson, 36 Cal. 451; Karr v. Parks, 44 Cal. 48; Emeric v. Alvarado, 64 Cal. 593, 2 Pac. 418; Justice v. Ott, 87 Cal. 530, 25 Pac. 691; O'Shea v. Wilkinson, 95 Cal. 454, 30 Pac. 588. Therefore neither the complaint nor the facts found support the judgment, and it must be reversed.

Appellants contend, not only that the judgment should be reversed, but that the action should be dismissed, and cite Fox v. Minor and O'Shea v. Wilkinson, supra. In Fox v. Minor the suit was begun in the name of Fox as guardian. In O'Shea v. Wilkinson the suit was begun against the incompetent as defendant. She appeared and answered by her guardian. Afterwards the plaintiff filed an amended complaint, and three days later dismissed the action against the incompetent, and the guardian, then standing as sole defendant, demurred, the demurrer was overruled, and plaintiff had judgment. In this court the judgment was reversed, with directions to dismiss the action. In that case there was no alternative but to dismiss, as the plaintiff had voluntarily dismissed the action as to the incompetent, who was the real party, and without whom the action could not proceed. Such a result should be avoided, if possible, not only because of the expense and delay, but because it might result in the entire loss of meritorious claims through the operation of the statute of limitations. In this case I think the action should not be dismissed, and that this result may be reached without raising a conflict with the cases cited. This action was properly commenced by H. S. Dixon in his own name before he became insane, and was not dismissed. The order substituting the guardian as plaintiff was erroneous, but was not intended as a dismissal of the action as to the incompetent, and should not be given that effect. I advise that the judgment be reversed, and the cause remanded, with directions to amend the said order to the effect that, it appearing to the court that since the commencement of the action the plaintiff had been adjudged to be insane, and that J. R. Dixon had been appointed the guardian of his person and estate, it is ordered that in all further proceedings in the action the incompetent plaintiff appear and be represented by his said guardian. The plaintiff should also have leave to reform the complaint so as to conform thereto, and to this opinion, and that a new trial be granted.

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* Rehearing denied.

We concur: VANCLIEF, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, it is ordered that the judgment appealed from be reversed, with direction to amend the proceedings to conform to said opinion, and that a new trial be granted.

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5 Cal. Unrep. 1

## ADAMS v. DE BOOM. (No. 15,818.)

(Supreme Court of California. March 20, 1895.)

HARMLESS ERROR—FINDINGS.

1. Where two actions between the same parties were consolidated, and judgment rendered for plaintiff in one action, it is immaterial, on an appeal by defendant, that the complaint in the other action did not state facts constituting a cause of action.

2. An action to enforce a contract to convey land in consideration of plaintiff's doing certain grading, and an action to recover for the grading in three counts,—First, the reasonable value thereof; second, the price therefor under a written contract; and, third, the value of extra grading,—were consolidated. The court found for defendant as to the first action, and for plaintiff as to the second, on the second count, and for $350 "in addition to said written contract." *Held*, that the finding of the additional sum related to and was supported by either the first or third count of the second action.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; Eugene R. Garber, Judge.

Two actions by Edward Adams against R. C. De Boom. The actions were consolidated, and from a judgment for plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

Gordon & Young, for appellant. Andrew Craig and W. T. Craig, for respondent.

VANCLIEF, C. The plaintiff brought two actions against the defendant on alleged causes of action assigned to him by James McCoy (numbered in the superior court, respectively, 41,597 and 41,598), which, by stipulation of the parties, were consolidated and tried together as one action. No. 41,598 was an action to enforce specific performance of a written contract between defendant and McCoy, whereby the former, on specified conditions, agreed to convey to the latter a lot of land in the city of San Francisco. The consideration for the conveyance was estimated at $700, to be paid as follows: One-half ($350) by grading certain lots for defendant, as specified in the agreement, and the balance in cash. It was alleged in the complaint that the lots had been graded according to the agreement, and that plaintiff, as assignee of the contract, had tendered to defendant the balance of $350, and demanded a deed for the lot, and that defendant had refused to convey, etc. No. 41,597 was an action in three counts: The first to recover $472.50 as the reasonable value of work and labor done by McCoy for defendant in grading certain lots at defendant's request. The second count differs from the first only in that the work is alleged to have been done under special agreement, whereby the defendant promised to pay for the work at a certain price per day's work. The third count is for extra work in furnishing and dumping upon defendant's property, at his request, 5,000 cubic yards of "extra earth," the reasonable value of which was 10 cents per yard, amounting to $500. The court denied the equitable relief (specific performance) asked in No. 41,598, but found for plaintiff on the second count of the complaint in No. 41,597 in full, $472.50, and, in addition thereto, found $350 due plaintiff, but whether on the first or third count of No. 41,597 does not clearly appear, though it does appear that it was not for work done under the written contract of which specific performance was sought by No. 41,598. Upon these findings, judgment was rendered in favor of plaintiff for $822.50. The defendant appeals from the judgment, and from an order denying his motion for a new trial.

Counsel for appellant claims nothing on the appeal from the order, but on the appeal from the judgment contends: (1) That the complaint in No. 41,598 for specific performance does not state facts constituting a cause of action; and (2) that the findings do not support the judgment for a larger sum than $472.50 founded on the second count of No. 41,597, and furnishes no foundation for the additional $350.

1. No relief was granted on the complaint in No. 41,598, and therefore it is immaterial to appellant whether that complaint states a cause of action or not.

2. That the finding of the additional $350 is a sufficient finding that defendant was indebted to plaintiff in that sum in addition to the sum of $472.50 is unquestionable; and the only intelligible objection to it made by appellant is that it is improperly founded on the complaint in No. 41,598. This, however, is negatived by the finding itself, which states that the indebtedness of $350 was for work and labor "in addition to said written contract," on which alone the complaint in No. 41,598 counted. Therefore, the finding in question must be attributed to the complaint in No. 41,597, and is sufficiently supported by either the first or the third count of that complaint. I think the judgment and order should be affirmed.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

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106 Cal. 498

## SAN JOSE IMP. CO. v. AUZERAIS. (No. 15,693.)

(Supreme Court of California. March 20, 1895.)

PUBLIC IMPROVEMENTS—SUFFICIENCY OF RESOLUTION—VALIDITY OF ASSESSMENT.

1. Under St. 1891, c. 147, § 3, providing that, before ordering any improvements, the city council shall pass a resolution of intention so to do, describing the work, a resolution for the improvement of a street, "to consist of the construction therein of granite or artificial stone curbing," does not give the city jurisdiction to order the work done.

2. When the city council fails to acquire jurisdiction to order an improvement because of a failure to describe the same in its resolution of intention, as provided by St. 1891, c. 147, § 3, the defendant, in an action to enforce the assessment, may defend the action without first appealing to the city council.

Department 1. Appeal from superior court, Santa Clara county; John Reynolds, Judge.

Action by the San José Improvement Company against one Auzerais to enforce an assessment. From a judgment for defendant, and an order denying a new trial, plaintiff appeals. Affirmed.

H. V. Morehouse and Hiram D. Tuttle, for appellant. William Matthews, for respondent.

HARRISON, J. The mayor and common council of the city of San José passed a resolution May 18, 1891, declaring its intention to order the improvement of a portion of El Dorado street, "said improvement to consist of the construction therein of granite or artificial stone curbing on both sides thereof to the official curb grade, excepting therefrom any laid upon the grade; also excavating the roadway of said street to a suitable subgrade, and improving the same as follows: [Giving a description of pavement to be laid upon the street.]" The city council having afterwards ordered that the work described in the foregoing resolution be done, a contract therefor was entered into by the appellant. The present action is brought to enforce against certain lands upon the line of El Dorado street an assessment which was issued to the appellant upon the completion of the work. A demurrer to the complaint filed on behalf of the defendant was overruled by the court, and, the cause having been afterwards tried, judgment was rendered in favor of the defendant. From this judgment, and an order denying a new trial, the plaintiff has appealed.

Under the principles laid down in Bolton v. Gilleran (No. 15,397; Cal.) 38 Pac. 881, the city council did not acquire jurisdiction to order the work done. The requirement in section 3 of the street improvement act (St. 1891, p. 196)[1] that, in order to acquire jurisdiction to improve a street, the city council shall pass a resolution of intention "describing the work," was not observed. By this statute the legislature has required the city council to determine the character and extent of any improvement that is to be made upon the public streets; but in the present case that body, instead of itself determining this matter, has not even designated the officer or person by whom the character of the improvement shall be determined. It was the duty of the city council to determine, in the first instance, whether the curbs to be constructed along the line of the street should be of granite or of artificial stone; but, instead of so doing, that body has left this matter undetermined, and in every subsequent step in the proceeding, including the contract for doing the work, the same uncertainty exists. By the terms of the contract, the plaintiff was allowed to place granite curbs along the street at the rate of one dollar per lineal foot, or cement curbs at the rate of sixty cents per foot, without any limitation upon its choice, except the advantage to be derived from using one instead of the other of these materials. The vice of such a proceeding was fully pointed out in Bolton v. Gilleran, supra, and need not be here repeated. It follows that the demurrer to the complaint should have been sustained. As the evidence offered at the trial was in accordance with the averments of the complaint, the judgment in favor of the defendant was the only one that could be rendered thereon.

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[1] Chapter 147, § 3, provides that, "before ordering any work done or improvement made, * * * the city council shall pass a resolution of intention so to do, and describing the work, * * *"

The defendant was not required to appeal to the city council in order to enable him to defend against the assessment. As the city council never acquired any jurisdiction to order the work, the subsequent acts in its performance were not within the authority conferred by the statute, and none of the provisions of the statute can be invoked in support of the acts of the municipality, or of its officers, or to impair any defense that the defendant may have. The judgment and order are affirmed.

We concur: GAROUTTE, J.; VAN FLEET, J.

### SAN JOSE IMP. CO. v. DE SAISSET. (No. 15,691.)

(Supreme Court of California. March 20, 1895.)

Department 1. Appeal from superior court, Santa Clara county; John Reynolds, Judge.

Action by the San José Improvement Company against one De Saisset to enforce an assessment. From a judgment for defendant, and an order denying a new trial, plaintiff appeals. Affirmed.

H. V. Morehouse and Hiram D. Tuttle, for appellant. William Matthews, for respondent.

PER CURIAM. Upon the authority of Improvement Co. v. Auzerais (this day decided) 39 Pac. 859, the judgment and order appealed from are affirmed.

### SAN JOSE IMP. CO. v. PALOMARES. (No. 15,692.)

(Supreme Court of California. March 20, 1895.)

Department 1. Appeal from superior court, Santa Clara county; John Reynolds, Judge.

Action by the San José Improvement Company against one Palomares to enforce an assessment. From a judgment for defendant, and an order denying a new trial, plaintiff appeals. Affirmed.

H. V. Morehouse and Hiram D. Tuttle, for appellant. William Matthews, for respondent.

PER CURIAM. Upon the authority of Improvement Co. v. Auzerais (this day decided) 39 Pac. 859, the judgment and order appealed from are affirmed.

106 Cal. 562

### In re EVANS' ESTATE. (No. 18,414.)

(Supreme Court of California. March 21, 1895.)

ADOPTION—SUFFICIENCY OF ORDER.

Under Civ. Code, § 227, providing, in adoption proceedings, that the judge "must make an order declaring that the child shall thenceforth be regarded and treated as the child of the person adopting," an order, indorsed on an agreement of adoption, reciting that the agreement of adoption is "hereby approved, and ordered to be filed with the clerk," is sufficient to entitle the adopted child to a distributive share of the estate of the person adopting it, especially where it has lived with such person, as his child, for 10 years. Harrison, J., dissenting.

In bank. Appeal from superior court, Tulare county; Justin Jacobs, Judge.

In the matter of the estate of Samuel W. Evans, deceased. Appeal from an order declaring Hattie Evans to be the legally adopted daughter of deceased. Affirmed.

Lamberson & Middlecoff, for appellants. W. B. Wallace and E. O. Larkins, for respondent.

GAROUTTE, J. Upon the hearing of the petition for the distribution of the estate of Samuel W. Evans, deceased, a contest arose as to the right of Hattie Evans to inherit as a child of said deceased. Her status as such child is dependent upon the validity of certain adoption papers, she claiming to be the adopted child of deceased by virtue of these papers. The trial court declared her legally adopted, and entitled to a child's share of the estate, and this appeal is prosecuted from such decree.

As appears by the findings of fact, when Hattie Brown was about nine years of age she became an orphan, and was taken to the household of Samuel W. Evans and wife. That within a few months thereafter said Evans and his wife, Ellen, in company with said Hattie, all being residents of Tulare county, came before the judge of the superior court of said county, at the court room thereof, and thereupon said Evans executed an agreement of adoption, in the following words: "I, Samuel Evans, of Tulare county, state of California, of the age of forty-one years, a married man, and the husband of Ellen M. Evans, have agreed, and by these presents do agree, to adopt, and do adopt, the minor child, Hattie Brown, who is of the age of ten years past, and the child of Charles Brown and —— Brown, both of whom are now dead; and I hereby further agree to treat the said minor child, Hattie Brown, in all respects, as my own lawful child should be treated. Given under my hand, this 16th day of January, A. D. 1882." The findings further state, that upon the aforesaid agreement of adoption Ellen M. Evans, the wife of Samuel W. Evans, attached her written consent to the adoption of said Hattie; that the judge examined said Evans and his said wife, Ellen, and became satisfied that it would be for the best interests of the child that adoption should be declared, and thereupon indorsed upon the agreement of adoption the following order: "County of Tulare—ss.: The hereto-attached agreement of Samuel Evans, adopting the minor child, Hattie Brown, aged about nine years, whose parents are both dead, is hereby approved by me, and ordered filed with the county clerk of said Tulare county, state of California. William W. Cross, Superior Judge. Dated January 16, 1882." It further appears that this agreement was filed in the county clerk's office, and that said Hattie assumed the name of Evans, and thereupon lived with the said Samuel Evans, as his child, for 10 years, and until the date of his death.

In the recent cases of In re Johnson's Estate, 98 Cal. 531, 33 Pac. 460, and In re Williams' Estate, 102 Cal. 70, 36 Pac. 407, it may be said that the entire law bearing upon the question of the adoption of minors has been reviewed, and the principles governing this branch of the law lucidly and forcibly stated. For these reasons, we are not disposed to again enter into a discussion of the general principles bearing upon this class of cases; and, upon an examination of appellant's record, we see nothing to impress us with the contention that the adoption papers here shown are void. Various irregularities in the proceedings are urged, but after these papers were executed before the judge, and this man and this child lived together as father and daughter for 10 years, and down to the day of his death, it requires more than mere irregularities to brush aside and annul a relationship entered into with all honesty of purpose, lived up to for many years, and only severed by the hand of death. Section 227 of the Civil Code provides: "The judge must examine all persons appearing before him pursuant to the last section, each separately, and if satisfied that the interests of the child will be promoted by the adoption, he must make an order declaring that the child shall thenceforth be regarded and treated in all respects as the child of the person adopting." And it is now claimed that no compliance has been had with the provisions of this section, in this: that no order was made by the judge declaring the child to be the child of the person adopting. We think the order indorsed by the judge upon the agreement of adoption fully satisfies this provision of the law, and, in effect, does exactly what is contemplated by the provision. The statute lays down no rules by which the form of the judge's order shall be measured, and its sufficiency tested. The real purpose of the statute, in requiring the parties to come before the judge, is to enable him either to ratify or reject the contract of adoption, as seems best to him, in the interest of the child, and such was the course pursued in the present case. For these reasons, we conclude that the order indorsed upon the contract of adoption by the judge was a sufficient compliance with section 226 of the Civil Code. The order appealed from is affirmed.

We concur: BEATTY, C. J.; McFARLAND, J.; VAN FLEET, J.

I dissent: HARRISON, J.

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5 Cal. Unrep. 3

## DE CAMP v. BRYSON. (No. 19,493.)

(Supreme Court of California. March 20, 1895.)

APPEAL—REVIEW—ORDER GRANTING NEW TRIAL.

Where the evidence is conflicting on all the material issues an order granting a new trial by a judge who did not preside at the trial will not be disturbed, unless there is a clear abuse of discretion.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; J. W. McKinley, Judge.

Action by Charles W. Bryson against C. E. De Camp. There was a judgment for plaintiff, and from an order denying a new trial defendant appeals. Affirmed.

Jay E. Hunter, for appellant. J. T. Rearden and L. H. Valentine, for respondent.

SEARLS, C. This is an action to recover $800 and interest paid by the assignor of plaintiff to the defendant upon a contract for the purchase of real estate from said defendant by plaintiff's assignor, and which contract was alleged to have been rescinded by said assignor by reason of a breach thereof by defendant. Plaintiff had judgment for $871 and costs. Defendant moved for a new trial, which was granted. The appeal is by plaintiff from the order granting the new trial.

The cause was tried before Hon. W. P. Wade, judge of department 3 of the superior court in and for the county of Los Angeles, without a jury; written findings filed in favor of plaintiff upon which judgment was entered. Hon. W. P. Wade died before the motion for a new trial was perfected, and the statement on such motion was settled and the motion granted by Hon. J. W. McKinley, judge of depatmrent 6 of the same court. The motion was based largely upon the insufficiency of the evidence to support the findings. The specifications of insufficiency are quite full and explicit. The errors of law complained of did not warrant the interposition of the court, and it is urged by appellant that as the court granting the motion did not hear the testimony at the trial, or have the witnesses before it, it was in no better position to judge as to the propriety of granting the motion than this court, and hence that on this appeal the question should be passed upon precisely as though the motion for a new trial were submitted here. The evidence involved a substantial conflict upon nearly every important issue in the case, and we are unable to say upon a review of the whole case, that the court below erred in granting the motion. The case was a close one, upon the facts, and we confess some doubt as to the propriety of the action of the court below; but, in the very nature of things, something must be conceded to the discretionary powers vested in courts of original jurisdiction. This consideration suffices to resolve our doubt in favor of the action of such court. The order appealed from should be affirmed.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

(106 Cal. 493)

## In re ROBINSON'S ESTATE. (No. 15,830.)[1]

(Supreme Court of California. March 20, 1895.)

PROBATE OF WILL — PETITION FOR REVOCATION — RIGHT TO JURY TRIAL — REVIEW ON APPEAL — WAIVER OF ERROR.

1. Where, on probate of a will, a person files a written opposition to its probate, to which a demurrer, on the ground that it does not contain facts sufficient to constitute a ground of opposition, is sustained, and no further opposition is made, the probate is "without contest" (Code Civ. Proc. § 1330) so as to entitle a party petitioning to revoke the probate to a trial by jury.
2. In proceedings to revoke the probate of a will, petitioner, by going to trial after his request for a trial by jury was erroneously refused, does not waive the error.
3. In such a case a motion for a new trial is not a condition precedent to the review of such error on appeal.
4. In proceedings to revoke the probate of a will, petitioner's right to sue for its revocation cannot be questioned for the first time on appeal.
5. Documents already matters of record should be excluded from the bill of exceptions.

Department 1. Appeal from superior court, Contra Costa county; Jos. P. Jones, Judge.

Proceedings by James P. Robinson and others to revoke the probate of the will of Lester L. Robinson, deceased. From a judgment denying its revocation, petitioners appeal. Reversed.

Geo. B. Merrill, for appellants. Garret W. McEnerney, for respondents.

HARRISON, J. The last will and testament of Lester L. Robinson and a petition for its probate were filed in the superior court of Contra Costa county May 11, 1892. Prior to the day set for hearing the petition, Sanford Robinson filed a written opposition to its probate, to which the proponents of the will filed a demurrer. Afterwards, and before a hearing upon the demurrer, the contestant filed a stipulation confessing the demurrer as well taken, and upon his consent an order was entered sustaining the demurrer, and giving him additional time within which to file amended grounds of opposition. He did not, however, file any amendment to his opposition, but directed his attorney to abandon further proceedings in reference thereto, and accordingly an order was made that he take nothing by his contest, and the will was admitted to probate October 22, 1892. October 29, 1893, the appellants herein filed in the superior court a petition for the revocation of the probate of the will, which the executors answered, and the court appointed January 6, 1894, as the day for hearing the petition. December 30, 1893, the appellants filed a written demand for a trial by jury, and when the matter was called for hearing on the 6th of January this demand was called to the attention of the court, and, being opposed by the executors, was denied, to which the appellants excepted. The trial of the contest was then had, by the court without a jury, and judgment was rendered denying the petition. From this judgment the present appeal is taken.

Section 1330, Code Civ. Proc., provides: "In all cases of petitions to revoke the probate of a will wherein the original probate was granted without a contest, on written demand of either party, filed three days prior to the hearing, a trial by jury must be had, as in cases of the contest of an original petition to admit a will to probate." It is contended, however, on behalf of the respondents, that, by reason of the opposition to the original probate of the will which was filed by Sanford Robinson, the provisions of this section have no application. Before there can be a "contest" to the probate of a will, the contestant is required by section 1312, Code Civ. Proc., to file "written grounds of opposition" to its probate, and the petitioner and others interested in the will may answer these grounds of opposition; and it is the "issues of fact thus raised" which this section authorizes to be tried by a jury. The "contest" does not arise unless the written grounds of opposition present such issues of fact for determination. There can be no "contest" unless the written grounds of opposition are of such a nature as to form a legal objection to granting the probate of the will; and unless, also, the contestant presents these grounds for the consideration of the court. Unless the grounds of opposition are followed up by an attempt to sustain them, the probate of the will is not contested. If, after filing his opposition, the contestant immediately withdraws it, without invoking any decision of the court thereon, he cannot be said to "contest" the probate; nor can it be held that every document filed by a contestant constitutes a contest, even though it may contain written grounds of opposition, and may be entitled a "contest." The contents and character of the document, and the action taken thereon by the contestant, as well as the action sought by him from the court, must also be considered.

After Sanford Robinson had filed his written grounds of opposition in the present case, he took no further action in support thereof. The proponents of the will demurred to his opposition, upon the express ground "that it did not state facts sufficient to constitute a ground of opposition to the probate of the will," and, also, that it was not in such form or character as entitled it to be considered by the court. His subsequent stipulation confessing the demurrer to be well taken, and the order of the court thereon sustaining the demurrer, rendered his written grounds of opposition ineffective for a contest of the probate of the will, unless he should file an amended opposition; and his subsequent failure to file such amended opposition, together with his directions to his attorney to abandon the contest left the proponents without any opposition to its probate, so that the "original probate was granted without a contest." Upon the trial of the present application for a revocation of this probate, the petitioners were entitled, under section 1330, Code Civ. Proc., to have the issues tried by a jury, and the court erred in refusing their demand. As this was a right conferred upon them by statute, they did not waive it by subsequently going to trial under the order of the court, or by their failure to present evidence sufficient to secure a judgment in their favor. The petitioners were not required to move for a new trial in order to have this error of the court reviewed. It was incorporated in a bill of exceptions, and forms a part of the judgment roll, and, like any other error appearing on the record of the judgment, can be reviewed upon a direct appeal from the judgment.

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[1] Rehearing denied.

The right of the appellants to ask for a revocation of the probate is not involved upon this appeal. The superior court recognized their right by hearing their petition, and rendering judgment thereon. As no objection or exception thereto was taken by the respondents in the court below, they cannot make the objection for the first time upon the appeal.

The appellants have made a motion that costs be imposed upon the respondents on account of the needless matter contained in the transcript. There is much matter in the record which is utterly unnecessary for a consideration of the points presented on the appeal, and many useless repetitions of documents, the will of the testator being set forth at length four times, and the judgment roll upon its admission to probate being twice repeated. But as, by the reversal of the judgment, the respondents are required to pay the expense of printing the same, we do not feel required to impose any further costs upon them. The bill of exceptions contains much unnecessary matter, covering upwards of 40 pages of the transcript, and in settling it the judge failed to observe the provisions of section 650, Code Civ. Proc., which makes it his duty "in settling the bill to strike out of it all redundant and useless matter, so that the exceptions may be presented as briefly as possible." The will of the testator is set forth therein twice at length. Upwards of 25 pages of the bill is made up of the judgment roll upon the admission of the will to probate, viz. the petition for its probate, the opposition thereto of Sanford Robinson, the demurrer to this opposition, the order and judgment thereon, and the order and judgment admitting the will to probate. As these were already a matter of record, they should have been excluded from the bill of exceptions. The remedy for unnecessary matter in bills of exception lies with the judges of the superior court. If they would observe the requirements of the Code, it would greatly facilitate counsel, as well as this court, in the examination of records and the disposition of appeals. The motion to impose additional costs upon the respondents is denied, and the judgment of the superior court is reversed, and a new trial ordered.

We concur: GAROUTTE, J.; VAN FLEET, J.

(106 Cal. 483)

## SHEARMAN v. JORGENSEN et al. (No. 15,868.)[1]

(Supreme Court of California. March 20, 1895.)

DEFAULT JUDGMENT—VACATION—MISTAKE OF LAW—INADVERTENCE.

1. Judgment by default for failure to answer upon receiving notice by mail of the overruling of a demurrer will not be set aside because defendant's attorney was ignorant that service by mail was legal.

2. A motion to set aside a judgment by default on the ground that failure to answer was caused through inadvertence will not be considered if the grounds constituting the inadvertence are not stated.

Department 1. Appeal from superior court, city and county of San Francisco; D. J. Murphy, Judge.

Action by James S. Shearman against Peter Jorgensen and others. There was a judgment by default for plaintiff, and from an order vacating the judgment plaintiff appeals. Reversed.

Brewton A. Hayne, for appellant. W. W. Davidson, for respondents.

GAROUTTE, J. This is an appeal from an order setting aside a default judgment. It is only in exceptional cases that orders of that kind will be reversed by this court, but those exceptional cases do arise, and we pass to an examination of the record. Defendants' demurrer to plaintiff's complaint was overruled, and 10 days given to answer. Plaintiff's attorney, who resided in Alameda county, but had his law office in San Francisco, upon December 8, 1894, sent to defendants' attorney, W. W. Davidson, by mail, a notification of the decision of the court in overruling the demurrer, and further notifying him that he was given 10 days to answer. No answer was subsequently filed, and upon January 6th following plaintiff took a judgment by default. Laying aside without consideration the affidavits of plaintiff introduced at the hearing of the motion to set aside this default judgment, let us see if defendants' showing, standing alone, makes a case for the granting of the motion. The defendants' affidavit sheds no light upon the issue involved, and we are left to the affidavits of W. W. Davidson, defendants' attorney, and E. C. Cordell, his clerk, to furnish materials sufficient to justify the making of the order by the trial court. It is stated in the affidavit of Cordell that Davidson received the letter sent by plaintiff's attorney December 9, 1894, and this testimony is uncontradicted. As an excuse for his laches in not filing his answer, while admitting the receipt of the letter, defendants' counsel says he did not know that plaintiff's attorney was a resident of the county of Alameda; that his letter of notification said nothing as to his residence; and upon the receipt of the letter he examined the statutes concerning the service of notice by mail, and found no provision therein for serving a notice in the manner thus attempted by counsel for plaintiff; that between Christmas Day and the 1st day of January affiant Davidson prepared defendants' answer, and through inadvertency upon his part said answer, as affiant learned for the first time on the 14th day of April, was never served or filed; that affiant thought the said answer was served and filed within three or four days of the 1st day of January, 1894, but was mistaken. There are other matters stated in the affidavits of Davidson and his clerk, Cordell, but nothing which strengthens his showing upon the hearing of the motion.

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[1] Rehearing denied.

Defendants' counsel asks to have the judgment set aside, as appears by the foregoing recitals, taken from the affidavits, upon the grounds: (1) That he did not consider the notice of the overruling of the demurrer a legal notice at the time it was received, and, in effect, admits that he has since ascertained that he was mistaken as to the law. (2) He drafted an answer (long after his time to answer had expired), which he thought had been served and filed, but through inadvertency upon his part it had not been done. The causes for the inadvertency are not stated in the attorney's affidavit. Stripped of unimportant matters, these are the material facts disclosed by his affidavit, and we think they disclose a case barren of any merit, because mistake as to the law bearing upon the question of notice cannot be urged by him with any hope of success. Regardless of his lack of knowledge that plaintiff's attorney was a nonresident of the city and county of San Francisco, he admits that he received the notice through the postoffice December 9th, and this in law amounted to a personal service. Heinlen v. Heilbron, 94 Cal. 636, 30 Pac. 8. Under these circumstances the attorney's plea of ignorance of the law as to the notice would be paralleled by a plea that he did not know that an answer to plaintiff's complaint was required to be served and filed.

The second ground relied upon to support the motion, to the effect that the attorney drafted an answer, but through inadvertence it was not served or filed, is wholly inadequate to meet the requirements of the statute. The reasons and the causes and the excuses for the inadvertence are the matters which concern the court, and these are not stated. Inadvertence in the abstract is no plea upon which to set aside a default. The court must be made acquainted with the reasons for the inadvertence, and, if satisfactory, will act upon them, and relieve from burdens caused by them; but, if the inadvertence is wholly inexcusable, as if it arises from gross negligence, the court will not look upon it kindly, and will have none of it. For the foregoing reasons the order appealed from is reversed, and the cause remanded.

We concur: VAN FLEET, J.; HARRISON, J.

(106 Cal. 458)

## PEOPLE v. GIBSON et al. (No. 21,109.) [1]

(Supreme Court of California. March 19, 1895.)

PROSECUTION FOR MURDER—SUFFICIENCY OF EVIDENCE — PRESUMPTIONS ON APPEAL — INSTRUCTIONS IN RECORD—HARMLESS ERROR—EVIDENCE —CHARACTER OF WOUNDS.

1. It appeared that defendants had trouble with F., the deceased, and his brother, over a mine, and, on the day of the homicide, defendants told another brother of F. that they were going up to take F. out of the mine, and admonished witness not to go near there, or warn F. On the same day, defendants told a witness that they understood F. and his brother Luther were going to jump their claim, and stated that they would see the latter, and "make Lute talk awful pretty that morning, if he got away," and, in a threatening manner, informed witness that he should not go up where F. was. On both these occasions, defendants carried rifles. Later in the day they were seen on the road leading from the mine, each armed with a rifle, and F.'s body was found that night, lying in the door of a cabin near the mine, with a gunshot wound in the head. On a knoll which commanded a view of the cabin, about 36 feet distant, an empty Winchester rifle shell was found, stamped "W. R. A. Co., W. C. F.," and the figures "40-65." The rifle carried by one of defendants that night was also a Winchester, and, when examined after defendants' arrest, was loaded with shells stamped in the same manner as the one found. *Held*, that a verdict of murder in the first degree was justified.

2. It being incumbent upon appellants to show error affirmatively, where an instruction to the jury appears twice in the record,—the form in one instance being unobjectionable; in another, erroneous,—the former will be regarded as the instruction actually given.

3. Where the instructions are in writing, and properly indorsed by the trial judge, they belong in the judgment roll, and need not appear in the bill of exceptions.

4. Although an instruction to the jury in a criminal trial contains verbal inaccuracies, and statements which are erroneous when standing alone, the verdict will not be interfered with if the law was given correctly in other places, and the charge, in its entirety, substantially accurate, and it appears that defendant was not prejudiced thereby.

5. The testimony of a witness as to the character of a wound inflicted upon deceased is admissible as a statement of fact, although witness is not a medical expert.

In bank. Appeal from superior court, Kern county; A. R. Conklin, Judge.

William Gibson and Charles Gibson were convicted of murder, and appeal. Affirmed.

Carroll Cook and Mahon & Laird, for appellants. Atty. Gen. Hart, for the People.

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[1] Rehearing denied.

VAN FLEET, J. Defendants were convicted of murder in the first degree, in the killing of one Fletcher Burton, and sentenced to the state prison for life. They appeal from the judgment, and from an order denying them a new trial. Numerous errors are assigned. (1) It is first urged, and at considerable length, that the evidence is insufficient to sustain the verdict. It will require but a statement of its salient features, we think, to show that this contention is wholly without merit. The theory upon which the case was tried by the prosecution was that the deceased was killed as a result of a criminal conspiracy between the defendants. The evidence was largely, if not wholly, circumstantial, but it tended to establish this state of facts:

The alleged homicide occurred on Sunday, the 27th day of November, 1892, and was the result of trouble between defendants and the Burton brothers over a mining claim. This mining claim had been discovered earlier in the month of November by Charles Gibson, one of the defendants, and David Burton, a brother of the deceased, who had married a sister of the defendants. Shortly after the discovery of the mine, and about 10 days or so before the alleged killing, David Burton and Charles Gibson met the deceased and Luther Burton, another brother, and told them of the discovery of the mining claim, and asked them to go in and help develop or work the mine, and, as the Burtons understood, have an interest in it. With this understanding on their part, the deceased and Luther Burton agreed to help work the mine, and the following Sunday, November 20th, they, in company with David Burton and the defendant Charles, took their tools and utensils, and went to the mine. This mine or claim was sometimes called the "Ross Claim," but more frequently referred to as the "Undershot Mine." It was situated in the hills about four miles from the town of Kernville, and near a cabin known as the "Ross Cabin." To reach the mine from Kernville, one traveled the main stage road running between Kernville and Caliente, to a point two or three miles from Kernville, where a road forked off, running up into the hills, known as the "Evans Sawmill Road." Following this latter road up for a distance of about 2 or 2½ miles, and then turning up a trail leading up a gulch for about 300 yards, would bring you to the Ross cabin. The mine was about 200 yards from the cabin, further up the gulch. The cabin was vacant at the time in question, and the parties took possession of it, and used it as a place in which to cook and sleep while working in the mine. Charles Gibson did not remain at the mine the Sunday they went up, but, after leaving the tools and implements, returned with his team to his home in the valley, a few miles distant. The three Burtons remained at the mine, and, commencing Monday morning, worked the claim during that week. Charles Gibson returned to the mine on Tuesday, and was told that they had discovered good prospects. He went away, and returned again on Thursday, and he then said that he thought there had been a misunderstanding; that he did not understand that deceased and Luther Burton were to have any interest in the mine. Some hot words were had between the defendant Charles and Luther Burton about the matter, and the Burtons said they would quit, rather than have any trouble or quarreling over the mine. David Burton, however, interposed, and said that Charley did not want them to quit; but, after further controversy, no definite understanding was reached. Charles Gibson then left the mine, and went home, where, as it subsequently appeared, he told his brother William of what had occurred. The next day (Friday) he returned again, when further controversy over the mine occurred between him and the Burtons. On the afternoon or evening of Saturday, Luther Burton met the two defendants in Kernville, and they did not seem disposed to be friendly with him. On the next morning (Sunday), the 27th day of November, Luther Burton, in company with a Mr. Robinson and his wife and a man named Walker, left Kernville for Bakersfield in a wagon, taking the stage road leading from Kernville to Caliente. About three miles south of Kernville they met William and Charles Gibson riding in a buggy and leading a saddle horse. Each had a rifle. William Gibson indicated to the party to stop, and upon their coming to a halt he asked Luther Burton if he had recorded a mine the day before. Luther replied that he had not, whereupon William Gibson said that he understood that he had, and asked him where his brother Fletcher was. On being told that Fletcher might have gone back to the mine, he said they were going up to take him out of that mine, and they did not propose that Luther should go and tell him that they were coming. He said he was going to see that Luther went on to Bakersfield, and did not go up where Fletcher was. He said that he was going to see that his brother Charley was not robbed out of that mine. During the conversation, which was of an angry and rancorous character, William Gibson became very much excited, and, jumping out of his buggy, took one of the rifles, and said to Luther Burton that, if he wanted to get out and take the other rifle, they would shoot the matter out right then and there. After some further controversy, Luther and his party drove on, and the defendant William Gibson thereupon mounted the saddle horse, and followed them for something over a mile, until they came to David Burton's place, where they stopped to talk with David Burton, who had returned from the mine. While at David Burton's, William Gibson again declared that he was going to see that Luther Burton went on to Bakersfield, and did not go and tell Fletcher that they were going to take him out of the mine. Luther told him that he was going to Bakersfield, but that, if they went up to the mine, to give his brother a square shake, and not try to sneak up on him. After further threatening language on the part of William Gibson, Luther Burton and his party continued on to Bakersfield. This was about 9 or half past 9 o'clock in the morning. On that same morning, prior to meeting Luther Burton and his party, the defendants had been at the house of David Burton, and they told David that they understood that Luther Burton had recorded the mine the day before in Kernville, and that they understood that he and Fletcher intended to jump the mine; that they understood Luther was going to Bakersfield that day. And William said they intended to meet the wagon, and "make Lute talk awful pretty that morning, if he got away." At this time they each had a rifle, and they drove away, going towards Kernville. Shortly after they left, David Burton heard a shot, and started up on a ridge to see what it meant, when the defendants caught sight of him, and came back, and asked him if he had started up to tell Fletcher that they were going up after him; and, in a threatening manner, the defendants informed David Burton that he should not go up where Fletcher was. They then drove away. About 2 o'clock in the afternoon of Sunday the defendants came to the house of Mr. Walker, who lived on the Kernville and Caliente stage road, about three-quarters of a mile from the Evans Sawmill road. At this time the defendants were on horseback, and each had a rifle. They left Mr. Baker's place about half past 2 o'clock in the afternoon, riding in the direction of the Evans Sawmill road. At this time a son of Mr. Walker's accompanied them. They rode to a point on the Caliente stage road some distance beyond the Evans Sawmill road, and to a point where a road turned up to the house of a Mr. Cochrane. Here they were seen by Mr. Cochrane, and the son of Mr. Walker left them, and went up to Mr. Cochrane's house, and remained there for some little time, when he left, about in time to reach home by dark. The defendants left young Walker at Cochrane's and went on. This, according to Cochrane, who was a witness for defendants, was between 3 and 4 o'clock. The defendants were next seen by David Burton that evening at about dark, riding on the Kernville and Caliente stage road, between the forks of the Evans Sawmill road and the house of Mr. Walker. At this time young Walker was again with them, but it did not appear where he met them, as neither defendants nor young Walker were put on the stand. They were about 300 yards from the Sawmill road, and about a quarter of a mile from Mr. Walker's, coming from the direction of the Evans Sawmill road. They were then about two miles from the mine. They were on horseback, and each one had a rifle. David Burton at this time stopped them, and asked them if they had seen Fletcher (meaning his brother). William Gibson said they had not. David said to them he would like to know before he went home, and asked them if they had been to the mine, but William said they had not. He said he had not seen Fletcher that day. He said that "Fletch had not jumped the mine. He did not think he would hold it any way, and he did not think Fletch would jump the mine." At this time William had been drinking some. David Burton followed defendants back to Walker's, and again asked them if they had been to the mine. William Gibson said they had not. He said they had started up there, and went part way, but believed it would be too late before they got up; "that Ben Walker got afraid, and thought Fletch had jumped the mine and would be laying for them, and they would wait, and go up in the morning." Charley Gibson, the other defendant, was present during this conversation, and he also said that they had not had any fuss with Fletcher, and that he had not seen him since Friday.

The body of Fletcher Burton was found that night, near morning, lying in the doorway of the Ross cabin. The trunk of the body was lying inside of the door, the legs extending out through the door, and the deceased was on his back, with his left hand lying on the floor near a clay pipe. The head was lying in a large pool of blood, and blood was found scattered over the interior of the cabin. There were no arms upon his person, but a Henry rifle stood in a corner of the cabin, some 10 feet distant. He had been shot through the head, the ball entering at the inner corner of the right eye near the nose, and coming out at the back of the head. The defendants, it appeared, had been sleeping at the house of David Burton for some days prior to this time but they did not return to David Burton's house on Sunday night, staying instead at Walker's. It further appeared that on Monday, after information had been received of the killing of Fletcher Burton, and the defendants had been informed of it by Mrs. Walker, they left the Walker premises, and were not seen again until the afternoon of the 29th day of November, when they appeared at the house of a Mr. Vaughn, in the neighborhood, and asked him to take them to Caliente to meet the sheriff. They told Vaughn they supposed the sheriff would be on the stage that day; that they had heard that Fletcher Burton had been shot, and that they were suspected of the deed, and they did not want to be arrested and taken back to Kernville; that they would rather take their chances at the county seat; that the protection would be better with the sheriff than to go to Kernville. At the time they came to Vaughn's house, each of the defendants was armed with only a pistol; but, after Mr.

Vaughn had started in a wagon to take them to Caliente, and they had gotten some little distance on the road, Charles Gibson got out and procured two rifles from a brush fence by the side of the roadway. One was a Winchester and the other a Colt's rifle. They told Mr. Vaughn that they had slept out the night before. They further said that they had had a dispute about the mine; that Fletcher Burton claimed that he had an interest in it, and Charley claimed that he had not; that Charley Gibson was alone at the mine at the time of the dispute, and did not want to have much of a quarrel, and he had come down and told Will about it, and they had gone up to the mine. It further appeared that the rifle which was carried by William Gibson on the Sunday in question was a Winchester, of the pattern known as a "40–65 Caliber, Model of '86." It also appeared that the cabin stood in a gulch facing and a few feet from the foot of a low rise or hill which sloped up a few feet from the door of the cabin. In coming up the trail from the point on the Evans Sawmill road towards the cabin, the trail divided a short distance below the cabin; one branch running up to the cabin, and the other running up over the top of this hill before mentioned. Bushes were growing on the slope of this hill, and there was a clump of bushes on a line between the top of the hill and the cabin door. An empty Winchester rifle shell was found at or near the top of this hill, at a point about 36 feet from the door of the cabin, and in line with the clump of bushes and the door of the cabin. This shell had stamped upon it "W. R. A. Co., W. C. F." and the figures "40–65." It also appeared that one standing at the point on the hill where this shell was found could look through this clump of bushes, and see very distinctly the door of the cabin; and, upon investigation being made of this clump of bushes, a couple of branches showed evidence of having been nearly shot off by the passage of a bullet or bullets through the bushes. Immediately behind the deceased, upon the floor of the cabin, and in a line running from the top of the hill down through the cabin door, was found a deep furrow or abrasion upon the floor of the cabin, which the testimony tended to show was made by the glancing stroke of a bullet; and on one of the boards at the back end of the cabin, directly in line with the door, was found a like abrasion or dent. Upon the floor of the cabin were found two parts of a bullet, which were much battered, and, from their appearance, had evidently come in contact with some hard substance, upon the larger piece of which there was what appeared to be a piece of bone adhering. It further appeared that, when the rifle carried by William Gibson was turned over to the sheriff, it still had cartridges in the magazine; that one of them was removed, and the shell found to correspond, in the letters and stamp upon it, and in size, with the shell found at the scene of the homicide.

These are substantially the main facts gathered from the record, although there are other circumstances, of a more or less incriminating nature, appearing in the evidence, which we do not deem it necessary to take the space to mention. So far from failing to sustain the verdict, these facts which we have recited are, to our minds, very persuasive of the guilt of the defendants, and certainly are sufficient to preclude us from disturbing the verdict upon this ground.

2. Several of the instructions of the court are complained of. The court, after properly defining murder both of the first and second degrees, instructed the jury as follows: "In order, therefore, to find the defendant guilty of murder of the first degree, you must be convinced beyond a reasonable doubt that the defendants, or either of them, unlawfully and with malice aforethought, killed the deceased, Fletcher Burton, either by means of poison, or lying in wait, or by torture, or by some other kind of willful, deliberate, and premeditated killing, or in the perpetration or in attempting to perpetrate arson, rape, robbery, burglary, or mayhem. If you believe from the evidence, beyond a reasonable doubt, that the defendants, or either of them, unlawfully and with malice aforethought, killed the said deceased, you will find them guilty of murder of the first degree; and if you believe from the evidence, and beyond all reasonable doubt, that such murder was perpetrated by any kind of willful, deliberate, and premeditated killing, it is murder of the first degree, and you will so find. If the jury finds the defendants guilty of murder, the next question to be determined is, was the murder accompanied with a deliberate and clear intent to take life? In order to constitute murder in the first degree, that intent to kill must be the result of deliberate premeditation. It must be formed upon a pre-existing reflection, and not upon a sudden heat of passion, sufficient to preclude the idea of deliberation. There need be no appreciable space of time between the intention to kill and the act of killing. They may be as instantaneous as successive thoughts of the mind. If the act of killing be preceded by a concurrence of will, deliberation, and premeditation on the part of the slayer, the killing is murder of the first degree, no matter how rapidly these acts of the mind may succeed each other, or how quickly they may be followed by the act of killing."

This instruction is attacked by appellants upon various grounds wherein they claim it does not correctly state the law. The first objection is directed to that particular part wherein the jury are told: "In order, therefore, to find the defendant guilty of murder of the first degree, you must be convinced beyond a reasonable doubt that the defendants, *or either of them*, unlawfully and with malice aforethought, killed the deceased," etc.

It is urged that the employment of the language above italicized, in the connection in which it is used, was to tell the jury, in effect, that the claim of the prosecution as to the conspiracy had been proved, and that, even without any proof of conspiracy, one defendant could be convicted for the act of the other. We do not so read the instruction, nor can it, in our judgment, be so regarded, without ignoring the context. The grammatical construction of this portion of the instruction, in expressing what the court intended, may be open to criticism, but the meaning of the court is plain. The court was informing the jury as to the circumstances under which the defendants, or either of them, committing the act, could be convicted of murder of the first degree; and the effect of its language was to tell the jury that, if they should find that the two defendants killed the deceased under the circumstances indicated, they could convict them both, or, if they should find that either one of them committed the act, then they could convict that one. The defendants were being tried together, and the court was endeavoring to so frame its charge as to convey to the minds of the jury the fact that they could find a verdict against either one or both of the defendants on trial, as the circumstances should warrant. That this was the idea in the mind of the court, and the meaning which would be conveyed to the mind of any jury of ordinary intelligence, is, we think, manifest; and we think it equally plain that no jury could get the impression from this part of the instruction that the court, by its language, was assuming a conspiracy established, or even referring to that subject. Elsewhere the court charged the jury upon the question of conspiracy, and not only made plain to them the rights of the defendants upon that subject, but clearly charged them that the question as to whether a conspiracy had been established was one upon which they alone were competent to pass, and indicated very plainly that the court in no way intended to trench upon the province of the jury in that regard. Even assuming, therefore, that the language under criticism, taken by itself, might possibly be open to the construction sought to be put upon it by appellants, when read, as it must be, with the other parts of the charge upon the same subject, there is no chance that any erroneous impression as to the meaning of the court could have been left upon the minds of the jury.

Appellants also complain of that portion of the instruction which reads: "If you believe from the evidence, beyond a reasonable doubt, that the defendants, or either of them, unlawfully and with malice aforethought, killed the said deceased, you will find *them* guilty of murder *of the first degree,*" etc.

It is first urged that this part of the instruction is open to the same objection made to that above discussed,—that it assumes the conspiracy to be established. The instructions, including the one from which the above excerpt is made, are found in the record in two places. They appear first, duly and regularly indorsed and authenticated, in the judgment roll, and they are also found inserted in the bill of exceptions. As found in the bill of exceptions, that part of the instruction under consideration reads as above quoted. As it appears in the judgment roll, there is a difference, it there reading: "If you believe from the evidence, beyond a reasonable doubt, that the defendants, or either of them, unlawfully and with malice aforethought, killed the said deceased, you will find *him* guilty of murder of the first degree," etc.,—the difference being that the word "them," where italicized above, is used in the bill of exceptions in place of the word "him," as found in the judgment roll. If the instruction was given as it appears in the judgment roll, it is apparent that the objection is untenable, and is disposed of by what is said of the same objection to the first part; the jury being merely told that they could convict either or both of the defendants, as the evidence might warrant. If, however, it was given as quoted above from the bill of exceptions,—and this is the assumption of appellants,—there is, perhaps, ground for the objection that it assumes the conspiracy established, since the jury are, in effect, told that if they find that defendants, or either of them, committed the act, then they can find them guilty; in other words, that if either one killed the deceased they would both be equally guilty. While it is very doubtful if the jury would so understand the language, in view of the other instructions given, we may assume for present purposes that they would, and that the charge in that form would be prejudicially erroneous. The question then arises, how are we to know in which form this particular instruction was given to the jury? In one form, it is free from objection. In the other, it is not. At one point in the record, we are told it was given in its unobjectionable form; at another, that, as given, it was erroneous. Both facts are certified to us in a manner importing equal verity. The recitals of the bill of exceptions in this regard are entitled to no greater consideration than those of the judgment roll. In fact, if any intendments are to be indulged in favor of one over the other, they should run here in favor of the judgment roll, since the instructions properly belong there, and do not belong in the bill of exceptions. It is only where an oral charge is given, and not otherwise authenticated, or modifications are made in written instructions, which it is desired to show, that it is either necessary or proper to preserve them in a bill of exceptions. Where the instructions are, as here, in writing, and indorsed by the judge, they belong properly in the judgment roll, and there alone. Here there is nothing to justify the inference that the instructions were incorporated in the bill of exceptions for the purpose of preserving any modifications, or to show that they were given to the jury in any different form from that in which they appear in the judgment roll. In fact, a comparison shows that the one change above noted is the only difference disclosed between the entire charge as found in the bill of exceptions and as it appears in the judgment roll. It is apparent, therefore, we think, that this discrepancy is the result of mistake, inadvertent or otherwise, but when the mistake occurred is not apparent. Under such circumstances, we must apply the familiar principle that all intendments of the law are in favor of the regularity of the judgment and proceedings of the court below, and it is incumbent upon appellants to show error affirmatively. People v. Williams, 45 Cal. 27. This the record does not disclose, and we will presume that the instruction was given in the form which will go to sustain the judgment. An observance of the plain dictates of the statute in making up the record would have avoided this confusion. These instructions, as we have indicated, had no proper place in the bill of exceptions, and yet they would seem to have been inserted solely because of an idea that it was necessary in order to have them reviewed. This idea is erroneous. Under the law, a defendant in a criminal case has the same advantage of every objection to an erroneous instruction when properly authenticated in the judgment roll as when set out in a bill of exceptions and formal exception made. The law preserves the exception as fully as though stated in terms in the record. The repetition of instructions, therefore, in the bill of exceptions, except in the instances above adverted to, is wholly unnecessary, and only serves to incumber the record, and impose an additional burden of expense upon the county which pays for the printing of the record.

It is further urged that the instruction is open to the objection that it ignores the necessary element of deliberation and premeditation, in its definition of murder of the first degree. Taken by itself, and there is no doubt but the language of that part last quoted is open to this criticism, since the jury are told that, if the killing was with malice aforethought, it would be murder of the first degree. This, of course, was erroneous, and the only question is, was it an error which worked prejudice to the defendants? It is perfectly apparent from a reading of the whole instruction that the addition of the words "of the first degree" after the word "murder," in the connection in which they were used in the part of the instruction objected to, was a mere misprision, or a slip of the pen; and it is only those words which work the vice complained of. Both immediately before and immediately following this part of the instruction, and in the same connection, the learned judge very fully and correctly charged the jury as to the elements of murder in the first degree. In the preceding sentence the jury are told: "In order, therefore, to find the defendant guilty of murder of the first degree, you must be convinced beyond a reasonable doubt that the defendants, or either of them, unlawfully and with malice aforethought, killed the deceased, Fletcher Burton, either by means of poison, or lying in wait, or by torture, or by some other kind of willful, deliberate, and premeditated killing," etc. And immediately following the objectionable language, and connected therewith by the conjunctive preposition, the jury are told: "If you believe from the evidence, and beyond all reasonable doubt, that such murder was perpetrated by any kind of willful, deliberate, and premeditated killing, it is murder of the first degree," etc. And again, in the next sentence: "If the jury find the defendants guilty of murder, the next question to be determined is, was the murder accompanied by a deliberate and clear intent to take life? In order to constitute murder in the first degree, that intent to kill must be the result of deliberate premeditation." In view of this clear and elaborate statement of the law, in the same breath, as it were, with the erroneous language, it is hardly to be conceived that by this mere accidental lapse the jury were in any way misled. Even if the objectionable words arrested their attention,—which, in all probability, they did not,—it would seem very improbable, indeed, almost impossible, under the circumstances, that they should give rise to any confusion in their minds. In such a case we cannot presume injury to the defendant. People v. Moore, 8 Cal. 90.

Several other instructions are assailed as not correct statements of the law, but we think the criticisms are without substantial merit, and some of them exceedingly hypercritical. The instructions upon the question of alibi were clearly right; and those upon the subject of circumstantial evidence, read together, stated the law correctly to the jury. In fact, taking the charge as a whole, while we cannot commend it as a model to be followed for brevity, conciseness, and freedom from verbal inaccuracies, we think that it stated the law sufficiently full and clear, and that it contains nothing of such prejudicial character as to warrant us in reversing the judgment. Some isolated sentences and phrases are open to just criticism, as is almost invariably the case when the court undertakes to charge the jury at great length; but, regarded in its entirety, we find nothing in the way of substantial error. See People v. Kernaghan, 72 Cal. 612, 14 Pac. 566; People v. Bruggy, 93 Cal. 486, 29 Pac. 26; People v. Chun Heong, 86 Cal. 331, 24 Pac. 1021.

3. A large number of rulings of the court in admitting and excluding evidence are complained of, a few of which are specifically pointed out and presented, but by far the larger number of which are assigned in

groups, without suggestion of counsel's reasons for deeming them erroneous. We shall undertake to notice those of the former class that require it, but we cannot undertake to deal with the latter in detail, nor to seek for grounds of error to which our attention is not called. It is the duty of counsel to direct the court's particular attention to those matters which he regards of sufficient moment to affect the substantial rights of his client, and, in the absence of this, we feel at liberty to regard points not thus presented as mere makeweight, of no real merit.

It was not error to admit in evidence the testimony of Luther and David Burton with reference to the working of the mining claim, and the misunderstanding arising between the Burton boys, Luther and Fletcher, and the defendant Charles, in the absence of William Gibson. This difficulty occurred less than a week prior to the homicide, and was shown to have been the primary cause which led to it. It constituted a link in the chain of circumstances sought to be established by the prosecution, pointing to the guilt of defendants, as tending to show motive, and was relevant and material to the issue. It was certainly admissible against the defendant Charles, and, it being subsequently shown to have been communicated to and acted on by William Gibson, was as clearly admissible against the latter. For like considerations there was no error in permitting the prosecution to prove by the same witnesses the statements made by Charles during this difficulty at the mine. It was simply evidence of a transaction, thereafter communicated to the other defendant, tending to establish the origin of the bad blood between the parties, a transaction avowedly, by William Gibson, made the basis of his subsequent conduct in the case. Under the circumstances shown, it was admissible against both defendants.

The witness Manning, who discovered the body of the deceased, was permitted, against the objection of defendants that he was not an expert, to testify as to the character of the wound found upon the body, and this ruling is assigned as error. Assuming, as contended by appellants, that this was the subject, properly, of expert testimony, we are of opinion that the witness was sufficiently shown to be such. He was shown to have had experience, not only in the observation of, but treatment of, gunshot and other wounds on the frontier, against the Indians and in the territories. We are not aware of any rule that requires experts in knowledge of this character to belong to the medical profession. It is not a class of knowledge which, in its nature, is so peculiarly confined to men educated in the science of medicine or surgery as to preclude its acquisition by others. We think the witness was shown to be competent. The testimony of the witness was, furthermore, more in the nature of a description of the wound than the opinion of an expert, and, as such, was clearly admissible as the statement of a fact. People v. Hong Ah Duck, 61 Cal. 388.

These are the only points requiring special notice. We have carefully examined the other assignments, and find no material error in the record. The judgment and order denying a new trial are affirmed.

**We concur: McFARLAND, J.; GAROUTTE, J.; HARRISON, J.**

(106 Cal. 514)

## SAVINGS & LOAN SOC. v. BURNETT et al.

(No. 14,553.)[1]

(Supreme Court of California. March 20, 1895.)

DEED OF TRUST — PAYMENT OF NOTE SECURED—EVIDENCE—SALE UNDER DEED—VALIDITY—EXCESSIVE AMOUNT—CHARGES AND TAXES.

1. M., being indebted to plaintiff, executed a deed to trustees as security for such indebtedness, and for future sums to be advanced by plaintiff for the benefit of the property described in the deed. The instrument provided for reconveyance to M., upon payment of his debt, and for a sale at public auction in case of default in such payment; the proceeds to be applied on

[1] Rehearing denied.

M.'s indebtedness, and the surplus, if any, paid to M., his heirs and assigns. *Held*, that such deed was not a mortgage, but a deed of trust, which transferred the legal title of the premises to the trustees, and entitled M. to a reconveyance upon repayment of the sums loaned by plaintiff, and to a sale as provided in case of default.

2. Where a note was secured by a trust deed, evidence that the debtor and another gave the creditor a second promissory note for a less amount will not, in the absence of an express mutual agreement to that effect, extinguish the debt evidenced by the earlier note, the presumption of payment arising from the delivery and cancellation of the former note being overcome by direct evidence that such was not the understanding of the parties.

3. Where there is no direct evidence of the intention of the parties, the fact that a note is unsecured raises a strong presumption against a claim that it was given in full satisfaction of a secured indebtedness.

4. A mortgage lien, or one created by a trust deed, cannot be enforced against subsequent incumbrances, of which the mortgagee has actual notice, for advances or indorsements made or given after such notice.

5. A sale made under power in a mortgage or trust deed is valid, though for an amount greater than the secured debt, if there is no proof of fraud, or that the rights of the mortgagor were injuriously affected, or that bidders were deterred from attending the sale.

6. Sums expended by a trustee under a trust deed, in payment of taxes and other paramount liens, are valid charges on the property, though the instrument contains no express authority for such payments.

7. An allegation of ownership may be either a statement of fact or a conclusion of law, and where the court has found, as a conclusion "of law, that plaintiff was not the owner" of property, such conclusion will not be treated as a finding of fact unless it clearly appears to have been such.

In bank. Appeal from superior court, city and county of San Francisco; John F. Finn, Judge.

Action by the Savings & Loan Society against John M. Burnett and another to quiet title. From a judgment for defendants, and an order denying new trial, plaintiff appeals. Reversed.

A. N. Drown and E. W. McKinstry, for appellant. Robert Y. Hayne and Jarboe & Countryman, for respondents.

HENSHAW, J. Action to quiet title. The appeal is from the judgment, and from the order denying a new trial.

On the 22d day of May, 1868, Denis Mahoney, the then owner of the lands in controversy, was indebted to the Savings & Loan Society in the sum of $20,000, gold coin of the United States, for moneys borrowed. Upon that date he executed, as party of the first part, a deed of trust to Burr and Dean, as parties of the second part. The Savings & Loan Society, as party of the third part, was the beneficiary of the trust, which was for the following declared purposes: "To secure the payment to the party of the third part of said indebtedness, and all further indebtedness of the party of the first part to the party of the third part that may be contracted during the continuance of this trust, not exceeding $35,000 at any one time, whether evidenced by promissory note or otherwise, whether for interest, insurance, or for moneys expended in and about said premises for repairs, taxes, liens, or incumbrances." The parties of the second part and the party of the third part, their successors and assigns, are expressly authorized to pay all taxes, assessments, and liens then subsisting, or which might afterwards be imposed, upon the premises; to keep the buildings on said premises insured against loss by fire; and to make such repairs and improvements on said buildings as to them may seem best. "These trusts shall continue," declares the instrument, "as security to the party of the third part and its assigns for the repayment in gold coin of the United States of the moneys so borrowed and received by the party of the first part, and the interest and premiums thereon, and of all amounts so paid out as aforesaid, * * * and for the repayment in like gold coin of all moneys that may be hereafter loaned and advanced, and all sums of money, with interest thereon, due or to become due from the said party of the first part to said Savings & Loan Society or their assigns, or to said trustees, whether the same be evidenced by promissory notes or otherwise, and all accruing accounts and balances, together with the reasonable expenses of this trust, and $2,000 in gold coin of the United States, as counsel fees, which shall become due and payable by the party of the first part to the parties of the second part immediately upon any default made or suffered by the party of the first part in any of the payments aforesaid." The instrument next provides for a reconveyance to Mahoney, his heirs and assigns, upon payment at maturity, and, upon demand, of all moneys advanced, laid out, and expended under and in pursuance of the trust, with interest. It is then provided that in case of default, upon demand of the party of the third part, it shall be lawful for the parties of the second part "to sell the above-granted premises, or such part thereof as, in their discretion, they shall find it necessary to sell in order to accomplish the objects of these trusts, in the manner following, namely." It is further provided that after publication, and on the day of sale so advertised by publication, or upon the day to which the sale may be postponed, "they may sell the property so advertised, or any portion thereof, at public auction, to the highest cash bidder." The Savings & Loan Society was authorized to bid and purchase at the sale, and the parties of the second part were to execute to the purchaser or purchasers a deed of conveyance of grant, bargain, and sale of the afore-granted premises. Out of the proceeds of the sale, the party of the third part was to be reimbursed costs and expenses of the sale, and counsel fees were to be retained, and the balance or surplus, if any, paid over to Denis Mahoney, his heirs and assigns. The instrument finally declares that the recitals given in such deed to the purchaser shall be conclusive proof of the default and due publication of notice, and the deed, with such recitals, shall be effectual and conclusive against the party of the first part, his heirs and assigns, and all other persons. On the 6th day of March, 1869, Denis Mahoney executed to John M. Burnett a deed of trust, whereby and wherein he "granted, bargained, sold, aliened, released, and conveyed" the land in controversy to Burnett," upon trust to receive the issues, rents, and profits of said premises, and apply the same, or such portion thereof as shall be necessary, for the support, maintenance, and education of the nine children of said Denis Mahoney, and to convey to the survivors of them, upon the youngest attaining his majority, equal, undivided portions thereof." This instrument further provides: "And in case it should become advisable, in the judgment of the said Denis Mahoney and Burnett, to make improvements upon said property, the said trustee is hereby authorized to raise money by mortgage or otherwise on said property, or such part thereof as may be necessary for that purpose, and to pay the same, and all charges and interest thereon, out of the rents and profits of the whole of said property, after the application of so much thereof as may be necessary for the support, maintenance, and education of said children." This instrument was duly recorded upon the 8th day of March, 1869, and, "from and after the recording thereof, plaintiff and Burr and Dean had full knowledge of said deed and its contents."

Sundry sums of money were expended by the Savings & Loan Society to release the property from liens of taxes and street assessments; other sums for insurance; still others for the improvement of the property. All of these sums were moneys which it was authorized to expend, and no expenditure was made upon the property not contemplated by, and included within the terms of, the trust deed. Default having been made by Burnett in his payments, the Savings & Loan Society made application to Burr and Dean to sell the property, or such part thereof as, in their discretion, they should find necessary to sell in order to accomplish the objects of the trust. Publication was then made in the manner prescribed by the trust. The conditions of the sale were set forth in the notice, as required. Burr and Dean "found it necessary to sell all of said property," and "did sell the property at public auction to the highest cash bidder therefor, and for gold coin of the United States, and at such sale said Savings & Loan Society became the purchaser of the land and premises so sold, at and for the sum of $17,250 cash, gold coin of the United States; said Savings & Loan Society being the highest and best bidder therefor, and said sum being the highest amount bid therefor at such sale." Thereafter, Burr and Dean executed and delivered to plaintiff their deed, as contemplated by the trust, and containing the recitals therein provided for. Said deed was duly acknowledged and recorded on the 9th day of February, 1882. "On the 12th day of October, 1878, in consideration of the indebtedness then due and owing upon said last-mentioned promissory note, and under the provisions of said last-mentioned deed of trust to the plaintiff herein, and in consideration of further indulgence granted thereon by plaintiff, the said Denis Mahoney and said John M. Burnett, as trustee as aforesaid, executed their certain indenture," renewing and continuing their liability and obligation to the Savings & Loan Society upon that certain promissory note for $4,565, dated November 13, 1873, and upon the guaranty thereafter executed by said John M. Burnett, and "each undertook and promised to pay to the Savings & Loan Society the note and all sums of money remaining unpaid or hereafter to become due thereon, and jointly and severally confirmed and continued until full payment of all indebtedness now owing, or hereafter to become due, the trusts created and the grants made by that certain deed of trust executed by said Denis Mahoney to E. W. Burr and Benjamin Dean, bearing date May 22, 1868." "On the 25th day of May, 1871, money was required for the purposes of said property, and for making repairs and additions to the buildings and improvements thereon, and on the 5th day of March, 1872, additional money was required for the purpose of protecting said land and improvements, and paying certain street assessments theretofore imposed and levied, and which were then a charge and lien thereon; and plaintiff loaned and advanced said further sums of money to be used, and which were used, for the purposes aforesaid, to wit, on said 25th day of May, 1871, the sum of $500, and on said 5th day of March, 1872, the sum of $650." On these dates, Denis Mahoney and John M. Burnett, "claiming to act as trustee," executed and delivered to plaintiff their promissory notes for these amounts. Burnett signed as trustee of the Mahoney estate. Each of these notes was declared by the makers to be secured by the deed of trust executed by Mahoney to Burr and Dean. On November 13, 1873, there had been paid, of the original note of $20,000, all but $2,000. There were likewise due and owing to the bank the two promissory notes above mentioned, and certain sums paid for taxes upon the property. More money was required on the 13th day of November, 1873, by Mahoney and Burnett, "for the purpose of protecting said property, and paying certain street assessments which had been imposed upon it, and which were then a charge and a lien upon it." Mahoney and Burnett, as trustee, were without funds to pay such assessment; and on said 13th day of November, 1873, the plaintiff, at the instance and request of said Mahoney, with the knowledge and concurrence and at the request of Burnett, claiming to act as trustee, loaned and advanced the full sum of $249, in gold coin, "with which to pay, and which was used to pay, such street assessments, and to discharge the lien thereof upon said real property." The sums above mentioned, with interest, including the $249 last referred to, aggregated the sum of $4,565; and, on this day, Mahoney and Burnett executed and delivered to plaintiff their promissory note for that amount, in which it was declared that "this note is secured by deed of trust, duly stamped according to law, made by Denis Mahoney to E. W. Burr and B. D. Dean, dated the 22d day of May, 1865." The note was signed: "Denis Mahoney. John M. Burnett, Trustee of Mahoney Estate." (The quotations are from the findings.)

1. The deed from Mahoney to Burr and Dean is not a mortgage, but a deed of trust. The decisions of this court upon such instruments have never been in flux, but, to the contrary, have been set and consistent since first they came before it. Moreover, this precise form of deed has, upon more than one occasion, been construed and upheld. Koch v. Briggs, 14 Cal. 262; Thompson v. McKay, 41 Cal. 221; Fuquay v. Stickney, Id. 587; Whitmore v. Savings Union, 50 Cal. 149; Grant v. Burr, 54 Cal. 300; Bateman v. Burr, 57 Cal. 483; Durkin v. Burr, 60 Cal. 360; Society v. Deering, 66 Cal. 281, 5 Pac. 353; Partridge v. Shepard, 71 Cal. 477, 12 Pac. 480; More v. Calkins, 95 Cal. 435, 30 Pac. 583. It transferred the legal title to the trustees, while Mahoney retained the right to a reconveyance upon payment, and to a sale as provided in case of default. Nothing in Powell v. Patison, 100 Cal. 235, 34 Pac. 676, can be construed as militating against the interpretation which has thus invariably been given. Moreover, in that case the instrument under consideration was not brought up for review.

2. The trial court, regarding the transaction of November 13, 1873, found that the note for $4,565, made by Mahoney and Burnett, "was taken and received by the Savings & Loan Society in payment and satisfaction and extinguishment of all sums of money then due it by Mahoney or Burnett, and of all claims and demands which it then had against said Mahoney and Burnett, or either of them." So finding, it properly concluded that by this payment the trust was extinguished, except as to the duty of the trustees to reconvey, and that their deed after sale was in contravention of the trust, and void. As is said in the first brief filed by respondents' counsel: "Our whole argument in this case proceeds upon this proposition: That, the debt originally secured by the Burr and Dean deed having been paid by the $4,565 note and the novation of the original indebtedness, the deed by Burr and Dean to plaintiff, being in contravention of the trust, was absolutely void, and conveyed no title whatever." Divers questions have been raised in later briefs filed by other counsel for respondents, but, as said, this finding, with its logical sequitur in the conclusions of law, was the determinative point in the trial court. The finding is attacked as wholly unsupported by the evidence. By respondents it is contended that there is at least a conflict of evidence, and that, under the rule, it will not be disturbed. The evidence said to raise a conflict is the presumption that an obligation delivered up to a debtor has been paid; that the ordinary course of business has been followed (Code Civ. Proc. § 1963, subds. 9, 20); and the circumstances of the cancellation and surrender of the $20,000 note, the satisfaction and cancellation of it upon the books of the bank, and the taking of the new note, to which Burnett affixed his signature as joint maker with Mahoney. Appellant claims that there is no evidence to support the finding that the note was entered as satisfied and canceled upon the books of the bank. There is no direct evidence to that effect. The books of the bank were not introduced, and that part of the finding, if it has support, must derive it from the inference drawn from the fact of delivery and its circumstances,—a deduction from this fact warranted by the course of business. Id. § 1960, subd. 2. But disputable inferences or presumptions, while evidence, are evidence the weakest and least satisfactory. They are allowed to stand, not against the facts they represent, but in lieu of proof of them. The fact being proven contrary to the presumption, no conflict arises. The presumption is simply overcome and dispelled. It is the general rule that one executory contract does not extinguish another. It is also the rule that there must be an express agreement or understanding to that effect before another note, bill, or check extinguishes and satisfies the indebtedness evidenced by an earlier one. Without multiplying authorities upon these propositions, it is sufficient to refer to Comptoir D'Escompte de Paris v. Dresbach, 78 Cal. 15, 20 Pac. 28, where the California cases are collated. In passing, it may be said that it is a matter of grave doubt whether the finding under consideration fills the required measure as a finding. It is silent as to any agreement between the parties, and merely declares that the $4,565 note was received in payment. Comptoir D'Escompte de Paris v. Dresbach, supra. But conceding, though not deciding, that the finding is sufficient in this regard, it is without evidence to sustain it. The presumptions and inferences must give way to the facts, as testified to by witnesses who were parties to the transaction; and, as to the evidence of these witnesses, there is not only no conflict, but it is singularly harmonious in showing that the note was neither given nor received in payment of the pre-existing indebtedness. Burnett testifies

that he and Mahoney went to the bank for more money; that Burr thought they should "clear up" the small notes, and give a new note for the balance, which was done; that he signed the note as trustee because Burr required it to be done. He (Burr) thought it should be done for the security of the bank. "Q. Now, when you and Mr. Mahoney went to the bank, and this note for $4,565 was executed, it was not for the purpose of paying off the $20,000 note? A. No, sir; our purpose was, as Mr. Burr expressed it, to clean up these two notes and whatever balance was necessary,—to clean up whatever was outstanding there. Q. Well, what was the purpose of your going there? It was not to pay the $20,000 note? A. No, sir. Q. But to get more money wherewith to pay these charges on the property? A. Yes, sir. Q. The intent of this note was simply to aggregate the existing amounts in one sum, and to evidence the indebtedness by this note. That was the purpose of giving the one note, as you have related, was it not? A. That was the intention." Burr, the other party to the transaction, and president of the bank, testified: "It was at my suggestion that the consolidation was made into this one note. The cashier probably suggested it to me that we had better make it into one note. The consolidation was merely to facilitate the bookkeeping of the bank. Q. Under what circumstances was this note for $4,565 made and taken? A. At the exclusive discretion of the president. Not for the purpose of paying anything, but to consolidate the debt, in the discretion of the president, without reference to the board." Such is the unconflicting testimony. The circumstances of the transaction, it is true, may be used to determine the character of the exchange. But the circumstances, to prevail, must be such as to establish the mutual agreement of the parties. Hart v. Boller, 15 Serg. & R. 163; Brown v. Dunckel, 46 Mich. 32, 8 N. W. 537. Here the circumstances, so far from raising a conflict, are in perfect adjustment to the acts and declarations of the parties. Burnett's evidence shows that he believed that in signing as trustee he was binding the interests of his beneficiaries, as the money was all used for the purposes of the property. The $4,565 note itself declares in terms that it is secured by the bank's deed of trust. Burnett and Mahoney subsequently asked for postponement of the sale about to be made under the terms of the trust, and by writing again solemnly ratified and confirmed the instrument. Nor, if the rule of knowledge of the law invoked by respondents' counsel be applied in all rigidity, is the situation of the parties to this transaction altered in the slightest; for if, as counsel contend, the agreement was one of satisfaction and payment, and if the bank was chargeable with this knowledge, so also were Burnett and Mahoney. Then Burnett and Mahoney should have immediately demanded a reconveyance, but they never did. They should not have inserted the misleading clause in the $4,565 note, securing it by the extinguished trust deed, but they did. They should not have asked a postponement of the sale, and ratified in writing the trust deed, but should have enjoined the sale, and had a court of equity declare the trust satisfied and discharged. Each and every circumstance points irresistibly to the one conclusion that there was no agreement of payment between the parties, and that the $4,565 note was not accepted for such purpose. And this aside from the consideration—which, nevertheless, is important—that, if the bank had taken the $4,565 note in payment, it was taking an unsecured debt for one fully secured. This fact alone, it is uniformly held, raises a strong presumption against payment, whether the new paper be by the same maker, or, as here, bears an additional name. 2 Daniel, Neg. Inst. (4th Ed.) §§ 748, 1260, et seq.; 1 Jones, Mortg. (4th Ed.) § 924 et seq.; Pinney v. Kimpton, 46 Vt. 83; Dayton Nat. Bank v. Merchants' Nat. Bank, 37 Ohio St. 209; Moses v. Trice, 21 Grat. 567. Finally, it may be added that the facts bring the finding within the rule declared in Field v. Shorb, 99 Cal. 662, 34 Pac. 504.

3. It is next contended by respondents that the optional payments or advances made by appellant after it had actual knowledge of Mahoney's later deed to Burnett could not be covered by the trust deed; that the sale was for a sum much larger than the amount with which the property was therefore chargeable; that this sum was fixed by appellant in its demand upon the trustees to sell; that appellant was the purchaser, with notice of these facts; and that the sale is therefore void. The rule in this state as to optional advances made by a prior mortgagee, though opposed elsewhere by authority of great respectability (1 Jones, Mortg. [5th Ed.] § 373), may be taken as declared in Tapia v. Demartini, 77 Cal. 387, 19 Pac. 641: "But the lien of the mortgage cannot be enforced against subsequent incumbrancers, of which the mortgagee has actual notice, for advances or indorsements made or given after such notice. The notice must be actual. Constructive notice, by the recording of subsequent incumbrances, is not enough." And, notwithstanding the differences existing between a mortgage and an instrument like the one in question, the same rule may justly be made applicable to both. The court found that, from and after the recording of the deed from Mahoney to Burnett, "plaintiff and Burr and Dean had full knowledge of said deed and its contents." This language is neither apt nor satisfactory. It leaves in uncertainty whether the court meant actual knowledge, or the constructive knowledge which follows recordation. Under the latter interpretation, it is insufficient. Actual knowledge alone will bind the prior mortgagor. Under the former interpretation the evidence does not support it in all its

scope. The deed to Burnett was recorded March 8, 1869. Upon May 25, 1871, Burnett signed the $500 note to appellant as "trustee of the Mahoney estate." Assuming that this signature was sufficient to give the bank actual notice upon that date, no intendment of law, to which our attention has been called, would operate to throw that notice back more than two years, to the date of the recordation of Burnett's deed; yet the record discloses no other prior actual notice. However, appelant had actual notice at least as early as May 25, 1871, and, as most of the payments or advances were made after that date, the effect of them upon the status of the parties is yet to be determined. The situation on May 25, 1871, taking that as the date of the actual notice, is said by respondents' counsel to be sufficiently advantageous to support his contention. Most of the moneys for which the property was sold were laid out after that date. Powers of sale under trust deeds or mortgages, it is true, will be strictly construed. Flower v. Elwood, 66 Ill. 449; Sears v. Livermore, 17 Iowa, 297. And the acts of the trustees in contravention of the trust are void. Civ. Code, § 870. But it does not follow that any sale made under such a power is void, or even voidable, because made for an amount greater than the secured debt. In Spencer v. Annan, 4 Minn. 542 (Gil. 426), relied on by respondents, the amount due was $964.62, and the notice of sale was for $1,606.60. The court said: "We do not hold that it is absolutely necessary to state with certainty the exact amount legally due, for a party, under a mistake of law or fact, may honestly claim more than by law he would be entitled to, and, if the other party is not shown to be prejudiced thereby, the sale should not be disturbed. The mortgagee may estimate the amount according to the strict terms of the contract, or may err simply in a computation of the interest, and if, under such circumstances, he claims more than he can legally recover, it does not necessarily vitiate the sale. Perhaps any amount within the terms of the contract may in good faith be claimed without affecting the legality of the notice. But we do hold that a party cannot arbitrarily or wantonly claim in his notice a sum which neither the terms of the contract, nor any legitimate calculation based thereon, will justify." It was found in that case that the sum claimed exceeded by more than one-half "the amount which any calculation based upon the note would produce," and therefore the sale was set aside, as irregular, under direct proceedings instituted for that purpose. In Ormsby v. Tarascon, 3 Litt. (Ky.) 404, also relied upon, the sale was not only for an amount much larger than was due, and for an installment not due, but the circumstances evidenced actual fraud and collusion between the parties to the sale; and "for this reason," says the court, "the sale ought not to be allowed to stand." In that case, Ormsby was seeking, under direct proceedings in equity, to redeem, and it is finally held that the title obtained by the sale was not, under these circumstances, freed from this equity. But, besides these cases cited by counsel, there are others elucidating the true principle. Thus in Ramsey v. Merriam, 6 Minn. 168 (Gil. 104), the case of Spencer v. Annan is discussed and distinguished. Any amount within the terms of the security, it is held, may be claimed in the notice; and, if the sale is for an actual excess, "there are other and more appropriate means of redress" than an action to set aside the sale, viz. an action to recover the surplus. So in Butterfield v. Farnham, 19 Minn. 85 (Gil. 58), the amount due was $26,916. The sale was for $34,251,—an excess of over $7,000. It was held that, in the absence of fraud or actual injury, the claiming of more than is legally due or stipulated for in the contract cannot affect the validity of the sale. That, while a claim which would necessarily have the effect to deter bidders would be held fraudulent in law, there is no rule of law by which the claim of such an excess must be held necessarily to have such an effect, and under existing circumstances it cannot be said that it would do so. The doctrine of Spencer v. Annan, supra, is subjected to the modification that, even if the excess be arbitrarily and wantonly claimed, it will not affect the sale, unless its amount was such as to deter bidders. "As to the mortgagor and those claiming under him, they knew what was due. No false claim could affect them, and for the excess for which the property was sold the mortgagor had his recovery." In Bowers v. Hechtman, 45 Minn. 238, 47 N. W. 792, it is said: "Perhaps there may be cases where the amount claimed to be due would be so excessive, and so wholly unwarranted by anything in the terms of the mortgage, as to furnish in itself intrinsic evidence of fraud on part of the mortgagee, and of consequent prejudice to the owner of the mortgaged premises. But the rule is that claiming in the notice more than is due on the mortgage will not affect the validity of the sale, unless it appeared that it was done with a fraudulent purpose, or that it has resulted in actual injury to the mortgagor." The rule may thus be stated: A sale under power for a larger sum than the amount due is valid in the absence of proof of fraud, or that the property or the rights of the mortgagor are injuriously affected, or that bidders were deterred from attending the sale. Jencks v. Alexander, 11 Paige, 619; Hamilton v. Lubukee, 51 Ill. 415; Fairman v. Peck, 87 Ill. 160. In this case the sums for which, in the aggregate, the property was sold were not only expressly contemplated by the deed of trust, but they were each and all paid out, within the terms of the trust, for the benefit of the property. If any one of them was a sum not properly chargeable in the notice of sale, it was not because it had not been paid, and not because its payment contravened the trust, but solely because of the intervening rights of the beneficiaries under the Burnett deed. But the beneficiaries were not purchasers or incumbrancers for value. The consideration for which they received Mahoney's interest was a good consideration, but it was not a valuable one. The later payments or outlays by the bank were not optional advances taken by Mahoney, and put in his own pocket. They are found by the court to be payments made to be used, and which were used, to pay street assessments and taxes, and to improve the property. They were all for the preservation and benefit, not only of appellant's security, but equally of the beneficiaries' interest in the land. As to the payment of the taxes and other superior liens, it is sufficient to say that appellant could have paid them to protect its security, and held the property for such payments, without any express authority. 1 Jones, Mortg. § 358; Insurance Co. v. Newell (Sup.) 28 N. Y. Supp. 913. The right depends, not upon express contract, but upon the general principles of equity. As to many of the other payments, Burnett, as trustee, not only sanctioned and ratified them so far as he had the power, but requested the making of them both orally and in writing, and signed as trustee the promissory notes evidencing them. Nor is it at all apparent that Burnett's acts in subjecting the interest of his beneficiaries to the terms of the Burr trust deed were in contravention of his trust and void. To make improvements, he was authorized "to raise money, by mortgage or otherwise, on said property, * * * and to pay the same * * * out of the rents and profits of the whole of said property, after deducting so much as may be necessary for the support of said children." The express power to raise money upon the property by mortgage or otherwise is conferred. He could not raise money "by mortgage on said property" without subjecting the corpus of the property to the lien of the mortgage. The direction for payment out of the rents and profits is not the designation of a fund, within the meaning of the cases. It is simply a direction. To hold that the language means merely that, if he desired to make improvements upon the property, he could do so only out of the surplus rents and profits, instead of investing them, renders meaningless and inoperative the power to mortgage. If the instrument meant only that, it should, as it easily could, have been aptly expressed. But the determination of the main question under consideration is not essentially affected by the interpretation of the Burnett deed. It is apparent that the moneys for which the property was sold were actually disbursed under the terms of the trust; that there was no fraud in the bank's claim to recover them; that the payment of many of them was requested by both Mahoney and Burnett; that Mahoney and Burnett had actual notice of the amount for which it was proposed to sell the property, and the time of the sale; that the sale was from time to time postponed at their joint request; that they, with this knowledge, undertook to ratify the Burr trust deed until full payment of all indebtedness due from them, or either of them, to the bank. Upon the other hand, it is not apparent that Mahoney, or the beneficiaries, or the property suffered in any of their rights under the sale, or that bidders, by reason of any of the acts of the bank, were deterred from attending it. Moreover, this ground of attack seems never to have been presented in the trial court, and was not raised by the first brief of respondents here filed. The consideration was not in the mind of the chancellor in deciding the case. Usually, attacks such as this are made in direct proceedings, accompanied by an offer to do equity. No pleading in the case presents the proposition, nor is any offer made to restore to the bank any of the moneys by it admittedly paid. It cannot, under all these circumstances, be here held that the sale was either void or voidable.

4. The complaint pleaded ownership in plaintiff. The court, in very voluminous findings, set forth the specific probative facts and circumstances of the transactions of the parties, and went no further. Under its conclusions of law, separately stated, is found this language: "And, as conclusions of law, this court finds that plaintiff was not at the time of the commencement of this action, or on the 29th day of December, 1881, or at any other times, the owner or seised in fee * * * of the land in the complaint described." Respondents contend that this is a misplaced finding of fact, and that, not being attacked, it must stand, and will support the judgment. In aid of this contention are cited Jones v. Clark, 42 Cal. 192; Breuner v. Insurance Co., 51 Cal. 107; Smith v. Acker, 52 Cal. 217; Bath v. Valdez, 70 Cal. 355, 11 Pac. 724; Foot v. Murphy, 72 Cal. 105, 13 Pac. 163; Burton v. Burton, 79 Cal. 490, 21 Pac. 847; Millard v. Legion of Honor, 81 Cal. 342, 22 Pac. 864; and Spargur v. Heard, 90 Cal. 228, 27 Pac. 198. Other cases could be added to this list, but an examination of them will disclose that they are alike in their essential features. In each of them the appellant was seeking to overthrow the judgment because of the alleged absence of a finding. A sufficient finding had been placed in the conclusions of law, and in nearly if not quite all of the cases it was the finding of a simple, unmixed, ultimate fact. Under such circumstances this court evinced a natural and strong unwillingness to consider so technical an objection, and to reverse a case fairly tried, and set aside a judgment justly given, because of a mere clerical misprision. So in Millard v. Legion of Honor, 81 Cal. 340, 22 Pac. 864, it said, "But surely the main object [of findings] was not to afford a cover under which a losing party might successfully set

a trap to capture a just judgment." But the rule laid down in the above cases is not one which permits of extension. It was announced to aid the ends of justice, not to defeat them. Paraphrasing the language above quoted, surely the main object of findings was not to afford a cover under which the prevailing party might successfully set a trap to hold an unjust judgment. The statute imposes upon the judge the duty of stating separately his findings of fact and his conclusions of law. Code Civ. Proc. § 633. The reason is obvious,—that the court may examine the facts found, and see whether or not they justify the conclusions of law and the judgment supported by them. Emeric v. Alvarado, 64 Cal. 603, 2 Pac. 418. It is true that ownership may be pleaded and found as an ultimate fact. No reference is needed to the numerous cases so holding. But it is equally true that ownership may be pleaded as a conclusion of law, and may be determined by the court as such a conclusion, and not as a fact. Thus, in Turner v. White, 73 Cal. 299, 14 Pac. 794, this court said: "It is perfectly true that in general an allegation that a party is the owner of real property is an allegation of an ultimate fact, and not of a conclusion of law. But as held in Levins v. Rovegno, 71 Cal. 273, 12 Pac. 161, the same averment or statement may be of a fact or of a conclusion, according to the context." Levins v. Rovegno, supra, is precisely in point. There, as here, the court found, "as a conclusion of law, that the defendants are the owners in fee simple"; and this court, after an elaborate discussion of the subject of findings, declared that the court below properly treated the ownership as a conclusion of law to be deduced from the facts found. So, here, it was by reason of the facts found, the previous payment by Mahoney, and the consequent extinguishment of the trust deed, that the court concluded that the trustees' deed to the bank conveyed no title, and that consequently plaintiff never was the owner. If it be not clear that the statement is one of fact, this court will be reluctant to take it from its context, and treat it as a fact. Haynes, New Trials & App. § 242. Still further, if it be regarded as a misplaced finding of fact, or a mixed matter of law and fact, which should be treated as a finding, it is nevertheless a finding drawn from the special fact of payment. If full authority is not to be given to the declaration of the judge, who, by putting it in the conclusions, holds out that he has reached the result by the application of the law to the facts, at least some weight must be accorded to his action, unless the error is merely a misprision. Treating it then as a finding, it is a finding drawn from the facts previously found. But a general finding, drawn as a conclusion from facts previously found, cannot stand if the specific facts do not support it. People v. Reed, 81 Cal. 76, 22 Pac. 474; Geer v. Sibley, 83 Cal. 4, 23 Pac. 220. The specific facts, as has been shown, do not support it. For the foregoing reasons the order and judgment appealed from are reversed, and the cause remanded.

We concur: BEATTY, C. J.; GAROUTTE, J.; VAN FLEET, J.; McFARLAND, J.; TEMPLE, J.

HARRISON, J., deeming himself disqualified, did not participate in this decision.

106 Cal. 580

## CHEVALIER v. COMMINS et al. (No. 15,704.)

(Supreme Court of California. March 24, 1895.)

REVIEW ON APPEAL—FRAUDULENT CONVEYANCES.

1. A verdict will not be disturbed on the ground that the witness on whose testimony it rests is not worthy of credit.

2. An agreement between a saloon keeper and a merchant selling him goods that, in case he becomes insolvent, he will turn over his stock of goods to the merchant, is void as against creditors, as in direct contravention of the insolvent act.

3. A bill of sale by an insolvent saloon keeper of his entire business is, as against creditors, prima facie fraudulent.

Department 1. Appeal from superior court, city and county of San Francisco; John Hunt, Judge.

Action by George F. Chevalier against Edward Commins and others. There was a judgment for plaintiff, and defendants appeal. Affirmed.

Mullany, Grant & Cushing and Wm. Grant, for appellants. Geo. A. Rankin, for respondent.

VAN FLEET, J. Plaintiff brings this action, as assignee in insolvency of one Healy, to recover certain personal property, or its value, which it is alleged was transferred by said Healy to defendants within one month before the filing of the petition in insolvency, with a view to give a preference to the defendants, and with reasonable cause by the latter to believe said Healy was insolvent, in violation of section 55 of the insolvent act of 1880. Verdict and judgment were for plaintiff, and from the judgment and an order denying a new trial the defendants appeal.

1. It is contended that the evidence is insufficient to sustain the verdict; that it establishes without conflict that defendants in taking the transfer acted in the utmost good faith, upon a valuable consideration, and without cause to believe that Healy was insolvent, or that he was making said transfer in contemplation of insolvency; and, further, that it appears without controversy that the transfer was made and accepted in pursuance of a verbal understanding made between defendants and Healy in 1890, whereby the latter agreed that, in consideration of defendants' (who were wholesale liquor dealers) selling Healy goods on credit with which to carry on business, the latter would trade with no other house, and,

if at any time he failed in the business or should cease to carry it on, he should turn the place and stock on hand over to the defendants. The transfer complained of was made by the insolvent, Healy, who was carrying on the business of saloon keeping, by a bill of sale made January 27, 1892, whereby he transferred to defendants his entire stock in trade, saloon fixtures, and furniture of every kind, accompanied by possession of the saloon. Upon the question as to the purpose and intent with which this transfer was made, Healy testified on behalf of plaintiff: "I was not able to attend to my business myself at that time. I was at home at the time of this transfer. I was sick, and Thomas Donohue was running the business. I saw on that day that I would be unable to pay my bills as they came due, and for that reason I turned over my business to the defendants. I had friendship for E. Commins & Co. in a business way. They started me up, and that was all; nothing more than in a business way. I sent Thomas Donohue to the place of E. Commins & Co., to see them with reference to turning the saloon and business over to them. Q. Why did you not send to some of your other creditors instead of to Mr. Commins? A. They were my heaviest creditors, and I thought it was only right to turn the place over to them. I intended to give them the preference; that is why I sent down a man to turn the place over to them. I do not know what goods I had in the place on the 27th of January, 1892, that I had bought from E. Commins & Co., or what goods I had there that I had bought from other parties." One Donohue testified: "I was barkeeper for Mr. Healy, and remember the bill of sale or assignment to E. Commins & Co. from Mr. Healy. I went down to see Mr. E. Commins myself. Mr. Healy owed considerable money then, and could not pay his bills, and he turned the place over to Mr. Commins. January 28, 1892, was steamer day, and we expected bills to be presented on that day; but I do not know the amount of bills that were expected. The bills due amounted to $1,500 or $1,600, as near as I can judge. We did not have any money to pay those bills with, and there was not enough of goods on hand to pay that amount. I went on behalf of Mr. Healy down to see Mr. E. Commins, and I called upon him on the 27th day of January, 1892, and saw himself, and told him how there were bills, and that Mr. Healy was sick, and was not able to attend to his business, and that he had no money to meet those bills to-morrow, being collection day, and that he wanted to turn the place over to him. He said: 'All right. I will make a bill of sale, and you can take it out to Mr. Healy, and have him sign it, and bring it back to me, and I will go down and take possession of the place.' I did so. I took the bill of sale out to Mr. Healy, and had him sign it, and brought it back to Mr. Commins, and gave it to him, and he told me to go up to the place, and he would be up there inside of an hour, and take possession of it, and I did so. I went back, and he came there about three or four o'clock in the afternoon, and took possession of the place, and put another gentleman in there, and I walked out. I told him that the next day was steamer day, and that Mr. Healy had no money to pay any of the bills that were due. He said that he had been a friend of Mr. Healy, and if anybody was to get the place that he knew that we could not pay the bills, and that he was entitled to it, as he had given Mr. Healy the goods in the first start, and, if anybody should have any preference, he was entitled to it. Then he asked me what bills were due, and I told him I could not tell him the amount of the bills that were due for whisky, cigars, etc. I did not name any of the creditors." Defendant Edward Commins and his bookkeeper gave testimony tending to contradict the witness Donohue as to his statement that he informed defendants of the financial condition of Healy at the time. They testified that Donohue said nothing about Healy owing any one else; that he gave as the sole reason for the transfer that Healy was sick, and had to go out of business; that defendants had no knowledge of any other debts owing by Healy, and no reason to believe him insolvent; that the transfer was taken by them solely in pursuance of an understanding they had with Healy that he should turn the business over to them in the event of his retiring. In this state of the evidence, it is idle for appellants to contend that the evidence was without conflict as to the purposes for which the transfer was made. Their argument is largely a suggestion of facts going to show that the witness Donohue had acted in bad faith in the transaction, and was not worthy of belief,—reasons which, addressed to a jury, might tend to affect the question of his credibility, but which have no place in discussing the question as to whether there was a conflict of evidence upon the point in question. It is obvious that, if the jury believed his testimony and that of Healy, there was evidence to sustain their verdict. The evidence of the alleged understanding between Healy and defendants about turning the saloon over to the latter was perhaps admissible on the question of the intent of the parties in making the transfer, but only for such purpose. If it constituted a valid or binding contract between the parties to it, which is doubtful, it was clearly void as against creditors, as being in direct contravention of the provisions of the insolvent act. Under it the parties could have accomplished indirectly the very thing denounced by section 55 of that act as fraudulent. Even if clearly established, therefore, such verbal understanding constituted in itself no defense to the action.

2. It is claimed that the court erred in charging the jury that the bill of sale in question given by Healy was not a sale in the ordinary course of business, and was therefore prima facie fraudulent and void. The instruction was clearly right. It appeared without con

flict that the business of Healy was that of saloon keeper,—a vendor of liquors in retail quantities, or drinks, over the bar. The bill of sale constituted a disposition of the entire business in bulk, and was therefore not a transfer in the ordinary course of the business in which the seller was engaged; and it was right for the court to so charge the jury as matter of law. Nor, for the reasons above stated, was the instruction erroneous because it ignored the alleged agreement or understanding between Healy and defendants. For the same reasons, it was not error for the court to exclude the offered evidence of a custom among liquor dealers to enter into similar arrangements with saloon keepers.

We find no error in the record. Judgment and order affirmed.

We concur: GAROUTTE, J.; HARRISON, J.

106 Cal. 541

## SARGENT v. SARGENT. (No. 19,327.)

(Supreme Court of California. March 21, 1895.)

HUSBAND AND WIFE—AGREEMENT TO SEPARATE—REVOCATION.

A contract whereby a husband and wife agree to live apart—the wife to have the custody of their child, and to receive a certain amount per month from the husband, and releasing the respective claims of each in the property of the other—cannot be revoked by the husband, under Civ. Code, § 101, declaring that consent to a separation is a revocable act, and if one of the parties afterwards, in good faith, seeks a reconciliation, but the other refuses, such refusal is a desertion.

In bank. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

Action by E. W. Sargent against Grace Ella Sargent for the custody of a minor. Judgment was rendered for plaintiff, and defendant appeals. Reversed.

Wells, Monroe & Lee, for appellant. John D. Pope and Wilson & Lamme, for respondent.

VAN FLEET, J. Appellant and respondent are husband and wife. This action was brought by the husband to have awarded to him the exclusive custody and control of Lillie W. Sargent, the minor daughter of the parties, aged 13 years,—the sole issue of the marriage,—then living with the mother. The court found that the parties, in April, 1890, entered into a contract of separation, wherein it was agreed that, by reason of unhappy differences, the parties should live separate and apart during the continuance of their matrimonial obligations, unless they should mutually agree to resume them; that the wife should have the sole and exclusive custody and control of said minor child, and of her education and bringing up, until the child should attain the age of 18 years, without any interference whatsoever on the part of the husband; that the wife should be at liberty to live in such place or with such relatives or friends as she should see fit; and that the husband should pay to the wife, so long as the marriage relation should exist, and she should continue to live apart from him, the sum of $60 per month, for the support and maintenance of the wife and daughter, except that after the daughter should attain the age of 18 years the father should contribute directly to her support, and the wife should from that time receive but $30 per month. The agreement further stipulated, among other things, for the payment to the wife of a certain sum in cash, in advance, and for a division of the community property of the parties; and it was covenanted that thereafter the husband should not receive or claim any of the wife's property or effects then owned or thereafter earned or possessed by her, but that she might sell, dispose of, or bequeath the same during her life, or by will or otherwise, as fully and effectually as if sole and unmarried; and, on the wife's part, that she should not at any time, while the husband continued to perform the agreement, contract any debt or liability of any character for which the husband should be liable, nor claim any alimony. In conclusion, the parties bind themselves to the faithful performance of the conditions and obligations of said agreement, "provided, always, and it is hereby agreed, that if the said husband and wife should be reconciled, and return to cohabitation, or if their marriage should be dissolved, then, in such case, all the covenants and conditions herein contained shall become void, but without prejudice to any act previously made or done hereunder," etc. The court further found that on September 12, 1892, respondent, the husband, "elected to revoke, and did revoke, said contract of separation, and requested that the marital relations between him and the said Grace Ella Sargent be resumed." This finding refers to, and is based upon, a letter or notice, attached to the complaint as an exhibit, addressed by respondent to the appellant at the city of Los Angeles, where they both were at the time, wherein appellant is informed by respondent that: "As provided by section 101 of the Civil Code, I now revoke, and declare null and void, an article of separation that was signed by us, dated April 26, 1890. As husband and father, I elect that we make our home for the present in this city. In revoking this article of separation, I also revoke every part thereof, particularly the clause that gives you the custody and care of the person of our daughter, Lillie; and, as father, I shall exercise and assume such control myself, considering always the wishes of my wife, her mother. The payment of money I have been making you will cease." Upon these findings, and others, relating to the conduct and character of the respondent, which we do not deem material to the question involved, the court concluded, as matter of law, that said agreement of separation "was revocable at the option of either of the parties thereto"; that the same was revoked by respondent, by virtue of the letter above referred to, declaring such revocation; that respondent was entitled to have the same canceled and annulled; and that he was entitled to the custody and control of said minor. Judgment was entered in conformity with these findings, and from it this appeal is prosecuted. The only question presented by the appeal is whether the findings support the judgment.

The solution of the question, in the view taken and presented by both parties to the controversy, in their briefs, depends upon the question whether the articles of separation between the parties were, or could be, revoked in the manner attempted. And this is the only question argued. The position taken by respondent, and sustained by the court below, is that, by virtue of section 101 of the Civil Code, the respondent had the right to absolutely revoke his entire contract with appellant at any time, by merely withdrawing his assent thereto, and notifying appellant of the fact, and that this result was accomplished by sending the letter mentioned in the findings. We do not regard the provision in question as having any such effect as was here attributed to it. That section is found in the chapter of the Code entitled "Divorce," and under the subdivision or title "Dissolution of Marriage," defining the causes for divorce. The six sections immediately preceding relate to desertion, and define what circumstances will, and what will not, constitute desertion. Section 99 provides that "separation by consent, with or without the understanding that one of the parties will apply for a divorce, is not desertion." Section 100 provides: "Absence or separation, proper in itself, becomes desertion whenever the intent to desert is fixed during such absence or separation." Then comes the section in question (101), which provides: "Consent to a separation is a revocable act, and if one of the parties afterwards, in good faith, seeks a reconciliation and restoration, but the other refuses, *such refusal is desertion.*" It is obvious to our minds that, regarding the connection in which this latter section is placed, and the logical relation it bears to the antecedent provisions on the subject, it was intended simply to declare the effect of such revocation upon the legal status of the parties, as affecting that particular ground of divorce. Its effect is to put the recalcitrant spouse in default, and to give to the other a right which he did not have under the previously existing circumstances,—a right which, if such refusal be persisted in for the statutory period, will ripen into a cause for divorce. That the effect of the section, and its only effect, is that declared in the language of the section itself, as above italicized, is, we think, plain. This view is strengthened by reference to section 159 of the same Code. That section provides: "A husband and wife cannot, by any contract with each other, alter their legal relations, except as to property, and except that they may agree in writing to an immediate separation, and may make provision for the support of either of them and of their children during such separation." There is nothing in this language to indicate an intention that the contract of separation there provided for shall be dependent for its subsistence upon the mere will of either spouse. To the contrary, the section provides in terms that the contract may provide for such separate maintenance during such separation. And that this was the construction put upon their contract by the parties themselves, at the time of its execution, is evidenced by its language, wherein it was provided "that if the said husband and wife shall be reconciled and return to cohabitation, or if their marriage shall be dissolved, then, in such case, all the covenants and conditions herein contained shall become void," etc. The contract in question is in conformity with the right given by section 159, and until avoided by the mutual resumption of marital duties, or the divorce of the parties, it remains binding and obligatory upon the parties thereto, as effectually as any other contract,—subject only to the limitation imposed by section 101, as above indicated. In all other respects the contractual relation subsists intact. To hold that one competent to contract, who, upon a subject-matter good in law, and for a sufficient consideration, enters into written stipulations and covenants of the most solemn character with another, should the next moment, without pretense of fraud, mistake, or undue influence, or other cause than a mere change of mind, be permitted to absolutely withdraw from and set at naught such obligations, without regard to the desire of the other contracting party, would, to say the least, be a strong departure in the law of contracts. There is no doubt that resumption of cohabitation would avoid the contract,—as to all features, at least, remaining executory,—even without any provision to that effect in the instrument, since the law itself attaches such consequence, upon the theory that the consideration for the deed has failed. Wells v. Stout, 9 Cal. 491; Schouler, Dom. Rel. § 218. But there has been no such resumption here. The parties are still living separate. Nor has the other contingency provided for in the contract—divorce—occurred. The contract must therefore be regarded as still subsisting, and binding upon the parties. And this binding character runs to the provision with reference to the custody of the child, equally with any other feature. Parents have a right to contract with each other as to the custody and control of their offspring, and to stipulate away their respective parental rights, and such contracts are binding upon them. Schouler, Dom. Rel.

§ 251; Bish. Mar. & Div. § 1169; State v. Smith, 6 Me. 462; Hunt v. Hunt, 28 Ch. Div. 606. Whether such a contract could be permitted to interfere with or impede, in a proper case, that wide discretionary power given to courts in the disposition of the custody of children, in accord with their best interests, independently of the desire of a parent, may well be doubted. But that question does not arise in this case. While there are some matters of a loose and vague character in the pleadings, tending to raise some such issue, it was apparently abandoned, since the findings and judgment proceed solely upon the theory that the contract had been revoked by respondent's act, and is therefore to be entirely disregarded for any purpose.

Nor does the question arise here as to the power of the court over the disposition of the child in the event of an action for divorce being instituted between the parties. Divorce is one of the contingencies under which, by the terms of the contract itself, its provisions terminate. In the event of a divorce being granted, therefore, the question of the custody of the minor would be left at large, for the disposition of the court, the same as if the contract had not existed. It follows from what has been said that the findings do not warrant the annulment and setting aside of the articles of separation, nor was the plaintiff entitled thereunder to the custody of the child. The findings, therefore, do not sustain the judgment. The judgment is reversed, and the cause remanded.

We concur: BEATTY, C. J.; HARRISON, J.; GAROUTTE, J.; McFARLAND, J.

106 Cal. 566

## HOPKINS et al. v. CONTRA COSTA COUNTY. (Nos. 15,698, 15,710.)

(Supreme Court of California. March 22, 1895.)

Sufficiency of Declaration — Several Causes of Action—Establishment of Highway — Validity — Fencing by Landowner — Right to Reimbursement—Claim against County — Interest.

1. A complaint by executors, stating several causes of action, which fails to embody in the statement of each cause allegations showing plaintiffs' right to sue as executors, is insufficient on demurrer, though such allegations are made previous to the statement of either of the different causes of action.

2. The fact that a bond accompanying a petition for laying out a road is defective, or that the sureties therein did not properly justify, does not divest the supervisors of jurisdiction to appoint viewers, and order the road laid out.

3. Pol. Code. § 2689, provides that the board of supervisors, upon ordering a road opened, shall order the amount of damages to landowners set apart out of the proper fund. *Held*, that when the board, in its order opening the road, gave landowners permission to fence the land at their own expense, one so fencing the road was entitled to be reimbursed therefor as soon as the financial condition of the road district would warrant, though the order provided that no reimbursement should be made until the board thought proper.

4. An assignment of a claim against a county for fencing a road, in the customary words and expressing a money consideration, passes a title available by the transferee, or his executors, in enforcing the claim, although the assignment was made solely for the purpose of including the claim in a suit to be brought by the transferor upon a similar claim, so as to avoid two suits.

5. Civ. Code, § 3287, providing that every person who is entitled to recover damages certain upon a certain day is entitled to interest thereon from that day, does not apply to a claim against a county.

Department 2. Appeal from superior court, Contra Costa county; Jos. P. Jones, Judge.

Action by Emily B. Hopkins, executrix, and others, executors, against Contra Costa county. From a judgment for plaintiffs, all parties appeal, and defendant also appeals from an order denying a new trial. Reversed.

Theo. Wagner and John O. B. Wyatt, for plaintiffs. C. Y. Brown and G. W. Bowie, for defendant.

PER CURIAM. The plaintiffs, as executrix and executors of the will of Moses Hopkins, deceased, brought this action to recover sums of money expended in fencing a public road which was laid out and opened through lands in Contra Costa county. The complaint commences with allegations that Moses Hopkins in his lifetime made and published his last will, whereby he appointed the plaintiffs executrix and executors thereof; that Hopkins died in February, 1892, and that in March, 1892, his said will was proved and admitted to probate in the superior court in the county of San Mateo, in this state; that thereupon letters testamentary on the said will were issued to plaintiffs, and they duly qualified and entered upon the discharge of their duties as executrix and executors; and that the defendant is a municipal corporation created by the laws of this state. It then proceeds as follows: "And for a first cause of action plaintiffs complain and allege that the said Moses Hopkins in his lifetime was the owner of and in possession of certain lands through which a public road was duly laid out and opened by the proper authorities of said county of Contra Costa." Then follow averments that the viewers, who were appointed to view and lay out the road, awarded to Hopkins the sum of $1,384.04 damages for fencing the same through his lands, and that said fencing was rendered necessary by the establishing of the road; that the board of supervisors of the county approved the report of the viewers, and granted the petition for opening the road, and declared the same to be a public highway by its order duly made and entered on June 6, 1887; that at that time there were no funds in the county treasury to the credit of the road districts within which the road was situated, from which the sum awarded Hopkins could be paid, and thereupon the board by its said order authorized the owners of the land through which the road was laid out and opened to maintain gates thereon, and further provided that if the owners of said land should construct fences along said road at their own expense the county would pay the sums awarded by the viewers whenever the financial condition of the road districts would warrant such expenditure; that from June 6, 1887, to November 1, 1889, there were no funds in the treasury to the credit of the road districts from which the awards could be paid; that after November 1, and on November 9, 1889, and ever since that time, the financial condition of the road districts was such as to permit the payment of said awards; that Hopkins, immediately after the said road was opened through his premises, proceeded to build, and did build, said fence along the road through his lands, and completed the same about the month of September, 1889; that on November 15, 1889, Hopkins filed his account for fencing, properly made out and itemized and duly verified, against the county with the clerk of the board of supervisors, and that the same was presented to the board within a year after the last item of the account accrued; that the board postponed consideration of the said claim, and refused to take action thereon until October 8, 1891, when by its order it rejected the same, and refused to allow any part thereof. The complaint then further proceeds as follows: "And for a second cause of action plaintiffs complain and allege that B. F. Brisac is the owner of and in possession of certain lands through which a public road was duly laid out and opened by the proper authorities of said county of Contra Costa." Following this are averments substantially the same as those set out in the first count or cause of action, except that the damages awarded Brisac for fencing were $713.92; and at the conclusion it is alleged that on January 4, 1892, Brisac assigned his said claim to Hopkins. The prayer is that the plaintiffs have judgment against the defendant for the aggregate of the said sums, $2,094.96, with legal interest upon said sums from the date the said claims were filed, and for costs of suit. The defendant demurred to each count of the complaint upon the ground that it did not state facts sufficient to constitute a cause of action, and the demurrer was overruled. It then answered, denying generally and specifically each and every allegation contained in the complaint and in each cause of action set forth therein. The case was tried without a jury, and the court found, among other things, that the allegations and averments of the complaint were true, and the denials and allegations of the answer were untrue. Judgment was accordingly entered that the plaintiffs recover from the defendant "the sum of $2,094.96, payable from the fund of road district No. 2 of supervisor district No. 1, upon the filing and recording in the office of the recorder of Contra Costa county of a proper instrument in writing * * * conveying to the county the right of way and incidents thereto of the road described in the complaint, by particular description thereof, and for costs and disbursements incurred in this action." The defendant appeals from the judgment and an order denying its motion for a new trial, and the plaintiffs appeal from the judgment.

The demurrer to the complaint should have been sustained. The rule is settled in this state that, where the complaint sets up more than one cause of action, each count must be complete in itself, and must contain all the facts necessary to constitute a cause of action; and its defects cannot be supplied from other statements, unless such statements are expressly referred to and adopted as a part of it. Haskell v. Haskell, 54 Cal. 262; Green v. Clifford, 94 Cal. 49, 29 Pac. 331; Reading v. Reading, 96 Cal. 4, 30 Pac. 803. Here the preliminary facts set out as to the making of the will, the death of Hopkins, the probate of the will, etc., were necessary to constitute any cause of action in favor of the plaintiffs, and yet they are not stated or in any way referred to in either count of the complaint. Under the rule above declared, it would seem that each count of the complaint was fatally defective, and surely the last count must be held to be so.

Many other points for a reversal are made and elaborately argued by counsel for defendant, but most of them need not be considered.

It is urged that the board of supervisors never acquired jurisdiction to appoint viewers, and to order the road laid out and opened, because the bond accompanying the petition was defective in certain respects, and the signers did not justify as required by law. Similar points were made, and held not tenable, in Humboldt Co. v. Dinsmore, 75 Cal. 604, 17 Pac. 710, and in Hill v. Supervisors, 95 Cal. 239, 30 Pac. 385. In the last-named case it is said: "As to the point that the bond was approved, although the sureties had not justified as required by law, it is plainly an irregularity only, and one which did not affect the private rights of the appellant. The validity of the proceedings establishing public highways cannot be made to depend upon the correctness of the judgment of the board as to whether the justification of a surety was in accordance with the statute."

It is also urged that the fencing done by Hopkins and Brisac was at their own expense, and without any right to demand pay therefor, because the board of supervisors never provided for the fencing nor made any order for the payment therefor. The order approving the report of the viewers, and declaring the said road a public highway, contained the following provision: "It is further ordered that said road is granted without fencing until such time as the financial condition of the road districts in which it is situated will, in the opinion of this board, warrant the construction of fencing along said road, and that until such time the owners of the land through which said road passes may maintain gates upon said road, provided that said landowners may fence said road at their own expense at any time; and whenever, in the opinion of this board, the financial condition of the districts will warrant, and whenever this board shall provide for fencing said road, then such parties as may have fenced said road at their own expense shall be reimbursed therefor in accordance with the report of the viewers." Section 2689 of the Political Code provides: "If the board approve the report, and there are no nonconsenting landowners, the road must by order be declared a public highway, and the same opened to the public." The section then goes on to say that the board, upon making such order, shall order the amount of damages as fixed to be set apart in the treasury out of the proper fund, etc. Hopkins and Brisac both expressly agreed to grant the right of way, and to claim no damages on account of the establishment of the road, except for the cost of fencing the same through their respective premises. And they may be said to have consented that the payment for the fencing might be postponed until the financial condition of the road district would warrant such payment. There is nothing, however, to indicate that they consented or intended to consent to wait for payment indefinitely, or until the board should choose to order the cost reimbursed to them; and that part of the order, in effect so providing, was unauthorized and void. They were certainly entitled to payment as soon as the financial condition of the district was such as to warrant it, and that time, as the court finds, had arrived when they presented their claims. The claims should therefore have been allowed, and the action was properly brought to recover the amounts due.

It is also urged that the claim of Brisac was never properly assigned to Hopkins, and that the plaintiffs had therefore no right to institute an action based upon it. It is true it appears that the claim was assigned for the purpose of having it included in the suit to be brought by Hopkins, and to avoid the expense and trouble of a separate suit. But the customary words of assignment were used, and a money consideration was expressed, and that was sufficient to pass a title to the transferee, which could be availed of by him or by the representatives of his estate in enforcing payments. The principal point made by the plaintiffs, in support of their appeal, is that interest should have been allowed on the claims from the time of their presentation, and section 3287 of the Civil Code is cited. That section provides: "Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day, except during such time as the debtor is prevented by law, or by the act of the creditor, from paying the debt." It is objected for defendant that this section does not apply to the state or to counties, and in support of the objection the case of Sawyer v. Colgan, 102 Cal. 283, 36 Pac. 580, is cited. In that case it is said (102 Cal. 292, 36 Pac. 580): "It is contended by appellant that his bonds and coupons bear interest from the time of their maturity until payment; but section 1917 of the Civil Code, cited, does not apply to an indebtedness of the state, and the state is not liable to pay interest on its debts, unless its consent to do so has been manifested by an act of its legislature, or some lawful contract of its executive officers." But in Davis v. Yuba Co., 75 Cal. 452, 13 Pac. 874, and 17 Pac. 533, it was decided that coupons on bonds issued by a county, after they become payable, bear interest from the time they are presented to the county treasurer for payment; thus apparently holding that section 1917, Civ. Code, does apply to counties. Counties are political subdivisions of the state, organized for governmental purposes, and the rule as to liability to pay interest, applicable to the state, should be held applicable to them. The Davis Case, if it must be construed as holding to the contrary of the Sawyer Case in regard to interest, must, therefore, be considered as in effect overruled by that case. And section 3287 of the Code, supra, must accordingly be held not to apply to a claim for damages against the state or against a county. The court did not err, therefore, in not allowing interest on the claims here in suit. It is not necessary to notice other points. The judgment and order must be reversed, and the cause remanded for a new trial, with leave to the plaintiffs to amend their complaint, if so advised. So ordered.

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106 Cal. 167

## GUTIERREZ v. HEBBARD, Judge. (No. 15,895.)

(Supreme Court of California. March 29, 1895.)

In bank.
On rehearing. Motion denied.
For former opinion, see 39 Pac. 529.

PER CURIAM. The opinion heretofore rendered in this case is hereby modified so that the first sentence thereof shall read as follows: "It is stated by the petitioner in the affidavit for the writ herein that in the action of Emeric vs. Alvarado, for the partition of certain real estate, certain lands were by the interlocutory decree allotted to her, and that upon the final decree subsequently entered a portion of the lands so allotted to her was awarded to the plaintiff." The rehearing asked for is denied.

106 Cal. 589

### HOLBROOK, MERRILL & STETSON v. SUPERIOR COURT OF SACRAMENTO COUNTY. (No. 18,371.)

(Supreme Court of California. March 30, 1895.)

APPEAL FROM JUSTICE—OBJECTION TO JURISDICTION—WAIVER.

1. Code Civ. Proc. § 890, subd. 4, providing that, if an objection that the action before a justice is brought in the wrong county is overruled, it is cause for reversal on appeal, does not prevent defendant, on such objection being erroneously overruled, from appealing both on questions of law and fact, so as to enable the appellate court to dismiss the case.

2. Under Code Civ. Proc. § 890, providing, in regard to justices of the peace, that if the objection that the action is brought in the wrong county "is not taken at the trial it is waived," the objection may be taken by answer, and urged on the trial, and therefore an answer to the merits does not waive such objection.

3. Under Code Civ. Proc. § 976, providing that on appeals from a justice to the superior court on questions of fact, or law and fact, the action must be tried anew, on such appeals it is proper for the superior court to first determine defendant's plea to the jurisdiction, in that the action was brought in the wrong county, before considering the merits, and on the plea being sustained the action is properly dismissed.

Commissioners' decision. Department 1.

Petition by Holbrook, Merrill & Stetson against the superior court of Sacramento county (A. P. Catlin, judge) for writ of review. Writ dismissed.

L. T. Hatfield, for petitioner. F. E. Baker, for respondent.

HAYNES, C. This is a proceeding to review the action of the superior court of the county of Sacramento (Hon. A. P. Catlin, judge) in a cause wherein the petitioner was plaintiff and Samuel Caldwell was defendant. The petitioner commenced an action in a justice's court in the county of Sacramento against said Caldwell, a resident of Woodland township, in Yolo county, alleging in the complaint that the defendant promised to pay the moneys sued for to the plaintiff at the city of Sacramento, and service was made upon the defendant in Yolo county. The defendant appeared specially in the justice's court, and served and filed notice of a motion to dismiss the action, based upon the complaint in the action, the return of service upon the defendant, and an affidavit of the defendant showing that he was a resident of Woodland township, Yolo county, and stating facts tending to show that the liability upon which the suit was brought was a contract made and to be performed in said Yolo county. This motion was noticed for March 28th, which was one day after the time for answering expired; and, to avoid a default, defendant obtained an extension of time to answer until March 30th. In the meantime, defendant filed a demurrer to the complaint for want of facts, and also, specially, that the court had no jurisdiction, and afterwards, not waiving his motion or demurrer, answered to the merits, and, in a separate defense, stated facts showing the court had no jurisdiction. His motion to dismiss was denied, a trial was had, the plaintiff had judgment, and defendant appealed to the superior court upon questions both of law and fact. In the superior court the case was regularly set for trial, and defendant gave notice of a motion to dismiss the action upon the same grounds urged before the justice of the peace. This motion was continued until the day set for the trial. The plaintiff opposed the motion, insisting that, if defendant ever had any ground for dismissal he had waived it by filing a demurrer and answer to the merits, by going to trial upon the merits, and taking an appeal on questions of both law and fact, without a statement of the points upon which he relied, and that the court had no jurisdiction to do anything but try the case de novo. The court overruled the objection, and plaintiff excepted. The return made by respondent then states as follows: "Whereupon, evidence was introduced by the respective parties upon the question of defendant's residence, and the place where plaintiff's alleged cause of action arose and was to be performed, and the plea to the jurisdiction submitted to the court for decision." The court thereupon found that defendant's residence was at all times at Woodland township, Yolo county; that the alleged cause of action arose and was to be performed there; that the summons was served in Yolo county; that defendant appeared and first objected to the jurisdiction of the justice before whom the action was brought, and had continually objected, and never consented to a trial upon the merits, nor waived his right to a trial in the proper township; and that the justice who tried the cause had no jurisdiction to try the cause upon its merits,—and thereupon the superior court dismissed the action.

The vital question in the case is whether Caldwell was authorized by law to take the appeal in the form in which it was taken. If he could only appeal upon questions of law raised by his objection to the place of trial, the only judgment the superior court was authorized to enter was that of affirmance or reversal; but if the appeal was rightfully taken upon questions of both law and fact, thus bringing up the whole case, the jurisdiction of the superior court was not exceeded, in dismissing it. Counsel for petitioner relies upon section 890, Code Civ. Proc. (relating to justices of the peace), which provides: "Judgment that the action be dismissed, without prejudice to a new action, may be entered with costs in the following cases: (4) When it is objected at the trial, and appears by the evidence, that the action is brought in the wrong county, or township, or city; but, if the objection is taken and overruled, it is cause for reversal on appeal, and does not otherwise invalidate the judgment; if not taken at the trial, it is waived." Under this section, it is not essential that the defendant appear specially and move to dismiss the action, but the objection may be taken by answer and urged upon the trial, but "if not taken at the trial it is waived." In this case the defendant not only objected to the jurisdiction of the justice by motion, but also by demurrer and answer; and, as the objection is expressly authorized to be taken upon the trial, it is clear that the defendant did not waive the objection by his answer, which contained the objection, and submitting to a trial upon the merits when his objection to the jurisdiction was overruled.

But counsel further insists that defendant should have appealed upon questions of law, and brought up the evidence by a statement. This contention seems to be based upon the provision in said section, that "if the objection be taken and overruled it is cause only of reversal upon appeal and does not otherwise invalidate the judgment." If a defendant sued in the wrong county had no defense upon the merits, and his objection to the jurisdiction is overruled, there would be no object in taking an appeal upon any other question, and, so far as that ground is concerned, it could only result in a reversal of the judgment; but it was certainly not the purpose of this section to prevent the defendant, when he conceived the judgment to be wrong upon the merits also, having his appeal upon both questions; and this he could only have by appealing upon questions of both law and fact, and in such case no statement is required. Such appeal absolutely vacates the judgment in the justice's court, since upon such appeal the case is heard de novo; and the judgment of the superior court is executed just as though the case had originally been brought therein, and is not remitted to the justice's court for any purpose. If the construction of section 890, Code Civ. Proc., above given, is correct, it is obvious that the numerous authorities cited to the effect that a general appearance, as by answering to the merits, waives the question of jurisdiction over the person of the defendant, can have no application here.

It is further contended by the petitioner that, the appeal having been taken upon questions of both law and fact, the action must be tried anew in the superior court, and hence that the court had no jurisdiction to dismiss it upon motion; citing section 976, Code Civ. Proc.[1] As the superior court acquired jurisdiction over the cause by the appeal, all proper proceedings in the cause thereafter were as fully within the power of that court as if the cause had been commenced therein; and, if it be conceded that the court should have refused to hear the motion, and should have determined the question of jurisdiction upon the plea contained in defendant's answer, it could only be said that the court erred, not that it exceeded its jurisdiction. The return made by respondent to the writ shows, however, that defendant's plea to the jurisdiction was submitted, and it was proper to dispose of that defense before considering the merits. The writ should be dismissed.

We concur: BELCHER, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the writ of review heretofore granted herein is hereby dismissed.

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106 Cal. 500

## PEOPLE ex rel. BEASLEY v. TOWN OF SAUSALITO et al. (No. 15,789.)

(Supreme Court of California. March 20, 1895.)

INCORPORATION OF TOWN — CANVASS OF VOTES—PROCEEDINGS OF SUPERVISORS—REGULARITY OF BALLOTS CAST.

1. St. 1883, p. 94, requires elections to determine whether a town shall become incorporated to be held in accordance with the general election laws of the state. *Held*, that a provision of the act requiring the board of supervisors to "canvass the votes" cast at such an election does not require it to count the ballots, a canvass of the returns being within the intent of the act.

2. Where the order of the board of supervisors, entered in the minutes, as required by St. 1883, p. 94, § 3, under which an election as to town incorporation was held, shows that a majority of the votes "cast" were for incorporation, the fact that it also shows that such majority was less than a majority of votes "polled" may be explained, in an action attacking the incorporation, by a count of the ballots in court.

3. Under St. 1883, p. 94, requiring the board of supervisors, after an election in favor of town incorporation, to declare the territory duly incorporated by an order entered on its minutes, and to file a copy of "such order" with the secretary of state, it is not necessary to file a copy of all the entries made in the minutes at the time the order was entered therein.

4. Ballots polled at an election upon the question of town incorporation, under St. 1883, p. 93, which have no mark to indicate the electors' wishes in any particular, cannot be considered as votes for any purpose.

5. A ballot cast at an election upon the question of town incorporation, under St. 1883, p. 93, marked in pencil in lieu of the official stamp, or having no mark except the words "against incorporation" at the bottom, is invalid.

6. The fact that the cross strokes on a ballot are blurred, or that the lesser part of the cross is on the line below, does not render the ballot invalid.

In bank. Appeal from superior court, Marin county; F. M. Angellotti, Judge.

Proceeding by the people, upon the relation of one Beasley, against the town of Sausalito and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Atty. Gen. Hart and Geo. W. Towle, for appellant. Hepburn Wilkins and Robt. Harrison, for respondents.

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[1] Code Civ. Proc. § 976, provides that on appeals from a justice to the superior court on question of fact, or law and fact, the action must be tried anew.

McFARLAND, J. This is a proceeding brought in the name of the people to have it decreed that the town of Sausalito is not a duly-organized municipal corporation, etc. Judgment went for the defendants, and plaintiff appeals. It is contended by appellant that the board of supervisors of Marin county did not "canvass the votes" given at the election called to determine whether or not the town should be incorporated, because said board did not have before it the ballots deposited at said election, and did not count the same, but merely canvassed the "returns." St. 1883, p. 93. This position is not tenable. To canvass the votes does not necessarily mean to count the ballots; and to give it the latter meaning would be to defeat the entire purpose of the statute, for it provides that the election shall be conducted "in accordance with the general election laws of the state," and as the ballots were returned to the county clerk the board could not get possession of them, and therefore could not have counted them. To "canvass the returns" and to "canvass the votes" are frequently used in statutes and judicial opinions synonymously, and in the case at bar the words used should be held to have been intended in the sense that would give effect to the statute.

Appellant introduced certain "records" (so called) of the board of supervisors, from which it appears that, after the canvass, the board entered an order on its minutes, as required by section 3 of the act under which the election was held (St. 1883, p. 94, § 3), which showed that votes were cast as follows: "For incorporation received 128 votes; against incorporation received 105 votes;" and then, after a showing of certain votes for officers, there was this statement in the order: "Total votes polled, 266." Appellant contends that these minutes, or "records," bind respondents to the proposition that there was not a majority of votes cast for incorporation, because of said statement, "Total votes polled, 266,"—128 not being a majority of 266; but we do not think so. The board was not required to enter on their records the number of votes polled. Moreover, it does not appear what was meant by "polled." The board may have meant merely that there were certain blank official ballots deposited in the ballot box. Under any view, as the board found and ordered that a majority of the votes cast were for incorporation, the respondents, when the validity of the incorporation was attacked by this action, had the right to explain any uncertainty that might arise from the statement about the 266 votes polled, by showing the real facts upon a judicial count of the ballots in court.

The board sufficiently complied with the provision of the statute that a certified copy of the order declaring the territory duly incorporated should be filed in the office of the secretary of state. The provision is that "the board shall, by an order entered upon their minutes, declare such territory duly incorporated as a municipal corporation,"—giving its class, name, etc.; and that a copy of "such order" shall be filed. This was done, and there was no necessity of certifying and filing all the entries which were made at the time on the minutes of the board. The foregoing points made by appellant are largely technical. The real point on the merits is whether or not there was, in fact, a majority of votes cast "for incorporation." The votes were counted by the court; and the statement on motion for a new trial declares that "upon such count it appeared that there were 130 votes cast for incorporation; 112 votes against incorporation; 7 official ballots without mark placed thereon by the elector to indicate the voter's wish in any particular, either on the subject of incorporation or officers; 17 official ballots without mark placed thereon by the elector to indicate his wish on the subject of incorporation, but having marks against names of officers named on ballots." According to this statement, there was certainly a majority for incorporation. It is clear that the 7 ballots without any marks to indicate the elector's wish "in any particular" were not votes in any sense. They were mere blanks, and were not to be counted or considered for any purpose. The sum of 112 votes against incorporation and the 17 for officers only is 129, less than the number of votes for incorporation; and therefore a majority of the votes cast were for incorporation. But there is a dispute between the parties as to how nine of the ballots should have been counted. Appellant contends that ballot marked "C" should have been counted against incorporation; but the only marks on it were made with a lead pencil, and not with the official stamp, and it was properly excluded. Lay v. Parsons (Cal.) 38 Pac. 447. Appellant also contends that ballot F should have been counted against incorporation; but it had no mark of any kind except that, at the bottom, entirely below all the printed matter, it had the words "Against incorporation" written with a pencil, and was properly excluded. There is no provision for that method of voting except when one desires to vote for a candidate for office whose name is not on the printed list on the ballot. Under our present election laws it is not enough to find out generally the intention of the voter (as it was under a former and simpler system); that intention must be expressed in the manner prescribed by the law, which has also other purposes, as the preservation of absolute secrecy, etc. Appellant also contends that ballot E should not have been counted for incorporation; but this ballot was stamped at the proper place with the official stamp, and the only objection to it is that the cross strokes were blurred, and that is not a sufficient circumstance to make the vote invalid. Appellant also contends that ballot I should not have been counted for incorporation. The only objection to this ballot is that a part of the cross was on the line below; but the court, upon inspection of the ballot, held that the greater part of the cross was above the line, and we cannot disturb the ruling. The foregoing are the only points which appellant makes in his brief on this branch of the case.

Of the other five disputed ballots, A, D, and G were counted against incorporation, over the objections of respondents; and B, which showed no attempt at voting on the subject of incorporation, was counted as a vote on officers, against the objections of respondents, who claimed that it should not have been counted at all, because the marks for officers were not in the right place. H was counted for incorporation. This ballot had the cross marked in the center of the ballot, and not in the square provided for it under the election law. But ballots A and D have the same defect as ballot H, and were counted against incorporation; and B, which was counted for officers, had also the same defect; and ballot G, counted against incorporation, had the cross entirely outside of the square, and beyond the dotted line. It is quite clear, therefore, that, if H, counted for incorporation, should have been excluded, then A, D, B, and G should also have been excluded, and thus the majority for incorporation would have been greater.

The foregoing views are conclusive in favor of respondents, and it is unnecessary to examine the position taken by the learned judge of the court below, in a very able opinion, that under the language of the statute under which the election was held only those votes are to be considered which were cast on the proposition of incorporation. He distinguishes the language of this statute "from language in constitutions and statutes which require that before a measure shall be deemed adopted it must receive the 'assent of the majority of the electors of a territory,' the votes of a majority of the electors of a county, 'the assent of a majority of the electors voting at a general election,'" etc. We are much inclined to agree with the learned judge on this point, but we are not called upon to definitely determine it in this case. The judgment and order denying the motion for a new trial are affirmed.

We concur: VAN FLEET, J.; HARRISON, J.; GAROUTTE, J.; HENSHAW, J.

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(106 Cal. 608)

FRANKEL v. BOYD et al. (No. 19,525.) [1]

(Supreme Court of California. March 30, 1895.)

DIVORCE—AWARD OF COMMUNITY PROPERTY TO WIFE—COMMUNITY DEBTS.

A decree of divorce in favor of a wife, awarding to her, under Civ. Code, § 146, all the community property of herself and husband, who has no separate estate, does not cut off the rights of one who has previously furnished her husband with groceries and provisions for his family upon the faith of his possession and ownership of such property to have it subjected to the payment of his debt in an action in the nature of a creditor's bill.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; Waldo M. York, Judge.

Bill by M. E. Frankel against E. H. Boyd and others for a decree adjudging certain lands of defendant S. J. Boyd liable to the satisfaction of plaintiff's demands. From the granting of the relief prayed for, and the refusal of a new trial, the defendant S. J. Boyd appeals. Affirmed.

Kendrick & Kendrick and J. B. Hollaway, for appellant. Shinn & Wilbur and Wilson & Lamme, for respondent.

SEARLS, C. This is a bill in equity to obtain a decree adjudging certain lands of the defendant S. J. Boyd liable to the satisfaction of a demand of plaintiff for $600 and interest. Plaintiff had a decree as prayed for, from which decree, and from an order denying her motion for a new trial, said defendant S. J. Boyd appeals.

For many years prior to January 30, 1891, the defendants herein were husband and wife, and the owners of, as community property, a tract of land in the county of Los Angeles, of the value of, say, $50,000, upon which they resided with their family and upon which they had filed a declaration of homestead. They had no other property than this land and the improvements thereon, together with live stock, farming utensils, furniture, etc., and neither of defendants owned any separate property. There was a mortgage of $5,000 upon the property. The plaintiff herein was a merchant, living in the vicinity of defendants, and familiar with their financial standing. Relying upon the ownership by defendants of said property, plaintiff was induced to extend to them credit, and did sell and deliver to the defendant E. H. Boyd (the husband) through defendant S. J. Boyd (his wife), groceries, provisions, etc., for family use, upon credit, until there was due him on said January 30, 1891, the sum of $600 for goods thus sold. On said January 30, 1891, defendant S. J. Boyd commenced an action against her husband, E. H. Boyd, for a divorce upon the ground of adultery, and procured an injunction against the defendant, therein restraining him from disposing of, incumbering, or interfering with said property, and from collecting any indebtedness due the parties, or either of them. On the 27th day of May, 1891, a decree of divorce was made and rendered in said cause in favor of plaintiff and against the defendant therein, and awarding to her, the said S. J. Boyd, all of the community property, including all the property hereinbefore mentioned and referred to, subject to the mortgage of $5,000. Defendant

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[1] Rehearing denied.

E. H. Boyd was thereby rendered, and ever since has been, insolvent, and entirely without property. On the 4th day of November, 1891, the plaintiff herein, M. E. Frankel, commenced an action against said defendant E. H. Boyd, to recover said sum of $600 so due as aforesaid, and thereafter, and on the 30th day of August, 1892, obtained a judgment for said sum, upon which he caused an execution to be issued and levied upon all the right, title, and interest of defendant E. H. Boyd in the land and premises aforesaid. Appraisers were appointed, and a homestead exemption was set apart, etc. Thereupon said S. J. Boyd served notice upon the sheriff, claiming the whole property in fee simple absolute, whereupon the execution was returned unsatisfied, and this action instituted.

The statute of limitations was pleaded by defendant, and the court very properly, as we think, found against the plea. The action is in the nature of a creditor's bill to have what, at the date when the credit was given, was community property, appropriated to the payment of a community debt. The real question is: Has a general creditor of the husband, who has credited the latter upon the faith of his possession and ownership of community property, a right to follow such property, and have a decree establishing the liability thereof for the satisfaction of his demand, after such property has been awarded to the wife by a decree of divorce, in a case where the husband had no separate or community property? The contention of appellant is that, as the decree of divorce, duly given and made, divested all the community interest in said property, and awarded it to the wife, long before the plaintiff herein acquired any specific lien thereon against the husband, plaintiff cannot, in the absence of fraud, assert any right to have such property appropriated to the satisfaction of his demand. That the plaintiff has no specific lien upon the property sought to be held liable for the satisfaction of his debt may be conceded. Had his judgment or execution established such lien, there would have been no necessity for this action. The nature and purpose of a creditor's bill is to enable the creditor to apply to the payment of his debt property of the judgment debtor, which by its nature cannot be taken in an execution at law, or to convert the holder of a legal estate into a trustee, and call for a conveyance, or to have it sold in satisfaction of his claim, or to aid the creditor in reaching property of his debtor by removing fraudulent judgments or conveyances which defeat his remedy at law. So, too, a creditor's bill will lie to defeat a gift by the debtor, the necessary effect of which is to defeat the existing debt due from him to his creditor at the date of such gift. These constitute a few of many instances in which creditors' bills, or bills in the nature of creditors' bills, will lie. In such cases equity proceeds upon the theory that a moral obligation rests upon the debtor to discharge all his debts to the extent of his ability, and that, in so far as he has, without the sanction of positive law, placed his assets beyond the reach of his creditors by a fraudulent transfer thereof, or by a transfer without consideration, under circumstances calculated to defeat the just claims of creditors, which constitutes constructive fraud, the court will intervene and hold the right of the creditor an equitable lien upon property thus transferred, as well as upon property which cannot be reached by the ordinary process at law.

These remarks are indulged in as preliminary to saying that, if plaintiff is entitled to have his judgment satisfied out of the property described in the complaint, his bill is in proper form, and states facts sufficient to constitute a cause of action. The question of the right of plaintiff, as a judgment creditor, to follow the community property of his debtor, E. H. Boyd, and his wife, S. J. Boyd, and to appropriate it to the satisfaction of his judgment after such property has been awarded to the wife in the divorce proceedings, must turn upon the proper construction of the statute under which the court awarded such property. Under our Civil Code all property acquired after marriage by either husband or wife or both, except that acquired by gift, bequest, devise or descent, is community property. Civ. Code, §§ 162–164. "Upon the death of the husband one-half of the community property goes to the surviving wife, and the other half is subject to the testamentary disposition of the husband. * * * In the case of the dissolution of the community by the death of the husband, the entire community property is equally subject to his debts, the family allowance and the charges and expenses of administration." Civ. Code, § 1402. Upon the dissolution of the marriage by the decree of a court of competent jurisdiction the community property and the homestead shall be assigned as follows: "(1) If the decree be rendered on the ground of adultery or extreme cruelty, the community property shall be assigned to the respective parties in such proportion as the court, from all the facts of the case and the condition of the parties, may deem just. (2) If the decree be rendered on any other ground than that of adultery or extreme cruelty, the community property shall be equally divided between the parties." Civ. Code, § 146. The remaining subdivisions of the same section relate to the disposition of the homestead, and need not be noticed. The groundwork of the several provisions of the Civil Code herein quoted and referred to are to be found in the "act defining the rights of husband and wife," passed April 17, 1850. St. 1850, p. 254. The eleventh section of that act provided as follows: "Upon the dissolution of the community by the death of either husband or wife, one-half of the common property shall go to the survivor, and the other half to the descendants of the deceased husband or wife subject to the payment of the debts of the deceased," etc. Under this provision it was plausibly contended that it was only the half of the common property which went to the descendants which was subject to the debts of the deceased, and that the survivor took one-half of the property discharged from such debts. The supreme court, however, held in Panaud v. Jones, 1 Cal. 488; In re Tomkins' Estate, 12 Cal. 114; Packard v. Arellanes, 17 Cal. 525; Johnston v. Union, 75 Cal. 134, 16 Pac. 753, and in a number of other cases, —that the estate in law consisted of the residue after all debts were paid, and that all of the community or common property was liable for such debts. In Packard v. Arellanes, supra, the court, speaking through Cope, J., said: "Our whole system by which the rights of property between husband and wife are regulated and determined is borrowed from the civil and Spanish laws, and we must look to these sources for the reasons which induced its adoption and the rules and principles which govern its operation and effect. The relation of husband and wife is regarded by the civil law as a species of partnership, the property of which, like that of any other partnership, is primarily liable for the payment of its debts. * * * It is the well-settled rule of that law that the debts of the partnership have priority of claim to satisfaction out of the community estate. Jones v. Jones, 15 Tex. 143, and authorities there cited. * * * The legislature intended to establish a similar relationship as to property as that existing in the civil law. The contracting of debts is one of the incidents of that relationship, and it would be unreasonable to suppose that the intention was to do away with so important a principle as that of the liability of the community property for their payment. We think that for all purposes connected with the administration of such property the debts of the community are to be regarded not as the mere private and individual debts of the husband, but as obligations involving the liability of each of the members of the community." The contention of respondent is that a like construction should be given to section 146, Civ. Code, with that so often imposed upon section 11 of the act of 1850, and that, when the community is dissolved, not by death, but by the only process known to our law, viz. by a decree of divorce, the authority of the court to assign all the community property to one of the spouses must be taken and construed as meaning the residue of such property after the payment of the existing debts of the husband, contracted upon the faith of such property. By parity of reasoning this result would seem to follow. The community property to be distributed may well be considered (as in case of partnership, to which in many respects it bears a close resemblance) as the residue which remains after the discharge of the community obligations. Had the husband, by a voluntary conveyance, transferred all of the community property to his wife, leaving himself without means, it is not doubted but that the property so transferred would have been liable to his creditors for existing debts. When the court assigned all the property to appellant it in effect did what in law the husband should have done under like circumstances, and the conclusion is reached that in such a case, where all the community property has been assigned to the wife, leaving the husband without separate property, the property so assigned is taken subject to the equitable claim of existing contract creditors, whose demands are due or to become due on account of credit extended during the existence of the marital relation to the husband for the benefit of the community. In the present instance this construction works no hardship to the appellant. She purchased the supplies for which the credit was given (as the agent of her husband), and they were used by the family. In her complaint for a divorce, the fact "that the supplies for defendant's family have not been paid for, and are now due, amounting to more than $400," is alleged as a predicate in part for the prayer that she have the property set apart to her, and for an injunction to restrain defendant from making collections, etc. Under such circumstances, every moral consideration prompts the satisfaction of the demand from the community property. And we are of opinion the moral and legal obligations go hand in hand. The other errors assigned do not call for comment. The judgment and order appealed from should be affirmed.

We concur: BELCHER, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

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106 Cal. 486

## McCABE v. GOODWIN et al. (No. 15,817.)

(Supreme Court of California. March 20, 1895.)

SWAMP LANDS—PATENT — TITLE OF ASSIGNEE OF CERTIFICATE—APPEAL—OBJECTIONS WAIVED.

1. The filing and approval by the surveyor general of a township plat upon which certain lands are designated as swamp and overflowed lands, pursuant to Act Cong. July 23, 1866 (14 Stat. 218), providing an additional mode for identifying such lands conveyed to the state by Act Sept. 28, 1850, operates as a determination by the United States that the lands were on the date of the latter act swamp and overflowed lands, and that the title thereto vested in the state on that date.

2. A certificate of purchase of swamp and overflowed lands, issued under Act Cal. April 21, 1858 (St. 1858, p. 198), which bound the state to issue a patent to the purchaser or the last assignee of the certificate, without placing any restriction upon the character of such assignee, constitutes a contract obligation of the

state, which is not impaired as to an assignee of a purchaser whose rights to a patent accrued before the adoption of the constitution, article 17, § 3, of which forbids the grant of lands to any but citizens and actual settlers.

3. A plaintiff who makes another a party defendant, and asks affirmative relief against him, cannot urge for the first time on appeal that the matters involved could not be litigated in such action.

Department 1. Appeal from superior court, Sonoma county; S. K. Dougherty, Judge.

Action by McCabe against Goodwin and others to determine a conflict before the surveyor general concerning the right to purchase swamp and overflowed lands. From a finding and judgment that plaintiff was not entitled to purchase the lands, and that defendant Goodwin was the owner and entitled to a patent, plaintiff appeals. Affirmed.

Ira C. Jenks and J. A. Barham, for appellant. Hudson & Sayre, for respondents.

HARRISON, J. This action was brought under section 3415 of the Political Code, to determine a conflict before the surveyor general, respecting the right to purchase from the state certain swamp and overflowed lands in Lake county. August 1, 1860, certificates of purchase were issued by the registrar of the land office for different portions of the lands to Isaac P. Rice and James E. Allen, respectively, which, by proper transfers and assignments, were afterwards vested in the defendant Goodwin,—the one issued to Allen September 16, 1862, and the one issued to Rice April 30, 1869. The full amount of the purchase money and interest thereon for the lands represented by the certificate issued to Rice was paid to the state May 12, 1868, and for those represented by the certificate issued to Allen March 8, 1873. The plaintiff entered and took possession of the lands March 5, 1884, and has since been in possession thereof. At the time of so entering, Goodwin was in possession of the lands, and, upon being excluded therefrom by the plaintiff, commenced an action in ejectment against him, which is still pending in Lake county. August 1, 1890, the plaintiff made application to the surveyor general for the purchase of the lands from the state, with the knowledge that they were claimed by the defendant Goodwin under the above certificates of purchase; and at his instance the contest was transferred to the superior court of Lake county. The lands are a part of township 14 N., of range 9 W., Mt. Diablo Meridian, and the plat of the township was approved by the United States surveyor general for California August 24, 1884. On this plat the lands in question were designated and marked as swamp and overflowed lands. The court below found that the plaintiff was not entitled to purchase any portion of the lands, and that the defendant Goodwin was the owner of the aforesaid certificates of purchase issued to Allen and Rice, and was entitled to receive a patent from the state therefor. From the judgment entered thereon, the plaintiff has appealed.

The grant of swamp and overflowed lands to the several states by the act of congress of September 28, 1850, was a grant in praesenti, and operated as an immediate transfer to the state of California of all the lands within its boundaries which at that date were "swamp and overflowed," within the meaning of the act. Wright v. Roseberry, 121 U. S. 488, 7 Sup. Ct. 985; Tubbs v. Wilhoit, 138 U. S. 134, 11 Sup. Ct. 279, affirming 73 Cal. 61, 14 Pac. 361. The subsequent segregation of these lands from the upland is merely a designation of the boundaries of the lands thus granted, without conferring any additional title. While a patent issued therefor, or any equivalent determination by the land department of the character of the lands would have the effect to estop the United States from afterwards questioning their character, it does not confer any additional title upon the state. "The patent would be evidence of such identification, and declaratory of the title conveyed. It would establish definitely the extent and boundaries of the swamp and overflowed lands in any township, and thus render it unnecessary to resort to oral evidence on that subject." Wright v. Roseberry, supra. By the act of July 23, 1866 (14 Stat. 218), congress provided an additional mode for identifying the swamp and overflowed lands which were conveyed to the state of California by the aforesaid act of September 28, 1850. In the fourth section of this act it is declared "that in all cases where township surveys have been or shall hereafter be made under authority of the United States, and the plats thereof approved, it shall be the duty of the commissioner of the general land office to certify over to the state of California, as swamp and overflowed, all the lands represented as such upon such approved plats, within one year from the passage of this act, or within one year from the return and approval of such township plats." It was held in Wright v. Roseberry, supra, that the representation of lands as swamp and overflowed upon the township plat, made by the surveyor general, was as conclusive against the United States as if they had been patented under the act of 1850, or had been certified over to the state under the provisions of section 2488 of the Revised Statutes. It follows that when the township plat, including the lands in question, was filed (August 23, 1884), it was a determination by the United States that the lands involved herein were on the 28th of September, 1850, swamp and overflowed lands, and that the title thereto vested in the state of California at the passage of that act.

As the proprietor of the lands, the state could make such disposition as it chose; and, when it had once disposed of them, its power of disposition was at an end. In the act of April 21, 1858 (Stat. 1858, p. 198), and acts amendatory thereof, provision was made for the disposition of the lands received by the state by virtue of the act of congress of September 28, 1850, under which any person qualified to become a purchaser might, upon making proper application, make the payment for said lands, and receive from the registrar of the land office a certificate of purchase. This certificate of purchase was declared to be prima facie evidence of title, and was sufficient to enable the holder to recover in ejectment. Upon its presentation to the governor by any person holding such certificate, section 7 of the act declared that if the governor should find that the whole amount of purchase money, together with interest thereon, had been paid, he should issue a patent for the land. When Goodwin, therefore, on May 12, 1868, had paid the full amount of the purchase money due on the certificate issued to Rice, and on March 8, 1873, had paid the full amount due on the certificate issued to Allen, he had become vested with the entire ownership of the lands described in said certificates of purchase, and could make the same disposition of the lands as could any other owner of lands. By issuing the certificates of purchase and receiving the money for the lands in accordance with the provisions of the statute, the state had as effectually parted with all interest in the lands as if the patent therefor had been issued. Whether Goodwin made immediate application for a patent, or whether its issuance after its application was delayed by the governer, would be immaterial. His right to the land was vested, and the governor had no discretion in issuing the patent to him. "When a party is authorized to demand a patent for land, his title is vested as much as if he had the patent itself, which is but evidence of his title."

September 22, 1876, Goodwin transferred the aforesaid certificates of purchase to the Clear Lake Waterworks, a corporation; and on July 24, 1882, the last-named corporation transferred the certificates to the California Agricultural & Improvement Association, a corporation; and on June 27, 1891, the last-named corporation transferred them to the defendant Goodwin. It is contended by the appellant that, by reason of these transfers, the state has become released of its obligations to issue a patent for the lands; that, under the provisions of section 3 of article 17 of the constitution, the state is forbidden to grant the lands to any but "actual settlers"; and that, in the nature of things, a corporation can be neither a citizen of the state, nor an actual settler upon the lands. At the time of the transfer of the certificates (September 22, 1876), Goodwin, as we have seen, was vested with the ownership of the lands, without any limitation upon their transfer; and at that date there was no inhibition upon the state respecting the character of any grantee of its lands. By the terms of the statute under which the state had sold the lands, it had agreed that, upon the payment therefor it would issue a patent "in case such original certificate has been assigned, then to the last assignee of such certificate, or to his legal representative, and the title shall vest in such assignee or legal representative as effectually as if he had been the original purchaser." The "purchaser" of lands is the person to whom the certificate of purchase is issued, and who pays for the lands. The act of 1858 limits the character of those to whom a certificate of purchase may be issued, but does not limit the character of those to whom the patent is to be issued. On the contrary, section 7 of the act provides that any person "holding" the certificate of purchase shall be entitled to the patent upon the payment of the whole amount of the purchase money, and, as above quoted, that the patent shall be issued to the assignee of the original holder with as much effect as if issued to the original purchaser himself. The certificate of purchase has been termed, as against the state, "evidence of a contract to convey." Taylor v. Weston, 77 Cal. 540, 20 Pac. 62. The state cannot divest itself of the obligation of this contract by a constitutional provision, any more than it can by a statutory enactment. If any other interested person would show that the state is not bound to comply with such contract, he is authorized by section 3414 of the Political Code to procure a judicial determination of this question by having previously instituted a contest in the surveyor general's office, and causing a transfer to the superior court of the county in which the lands are situated. If, upon such contest, it appears that the certificate of purchase was issued to one properly qualified, and that the holder thereof has fully complied with the terms of the contract on his part, he is entitled to a judgment in his favor and against the state for the issuance to him of a patent for the lands.

The order referring the contest to the superior court was entered in the surveyor general's office December 23, 1890, and was filed in the superior court of Lake county February 5, 1891. In this order the conflicting claims of the plaintiff and the aforesaid Rice and Allen were set out. The original complaint herein was filed February 21, 1891; but the fourth amended complaint, upon which the cause was tried, filed August 19, 1892, is the only complaint set forth in the transcript. In this last complaint the plaintiff has included as defendants various individuals and corporations, under the averment that they have or claim to have some interest, right, or title in and to the lands herein described, under the aforesaid Rice or Allen, and has also made as a defendant the respondent Goodwin, who, he alleges, "claims to hold the lands as grantee, lessee, or otherwise, from the said Rice and Allen, or one of them, or from their assignee or assignees, or one of them, or from the defendant the Clear Lake Waterworks, or the defendant the California Agricultural & Improvement Association, or one of them," and asks judgment that the defendants are neither nor any of them entitled to purchase said lands from the state. Goodwin answered this amended complaint, in which he set forth, among other matters, his assignment aforesaid to the Clear Lake Waterworks, the subsequent assignment by it in 1882 to the California Agricultural & Improvement Association, and the assignment by the latter corporation to himself June 27, 1891. Upon the issues thus presented, the cause was tried and judgment rendered that Goodwin was entitled to receive the patent for the lands. The appellant now urges that, inasmuch as the certificates of purchase were not assigned to Goodwin until after the commencement of the present action, this portion of the judgment was unauthorized. The averments of the original complaint are not before us, but we are of the opinion that by making Goodwin a party defendant, and asking judgment that he be not entitled to purchase said lands from the state, the plaintiff is precluded from making this objection to the action of the court. See Perri v. Beaumont, 91 Cal. 30, 27 Pac. 534. Upon the face of the record, Goodwin's claim to the patent appears to have been presented to the superior court, and determined without any objection in that tribunal on the part of the appellant. If the appellant would have contested Goodwin's right to have his claim determined in this proceeding, he should have made the objection in the superior court, and not have raised it for the first time after the appeal to this court.

The judgment is affirmed.

We concur: GAROUTTE, J.; VAN FLEET, J.

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(106 Cal. 554)

## PEOPLE v. FREDERICKS. (No. 21,156.)[1]

(Supreme Court of California. March 21, 1895.)

HOMICIDE—INFORMATION—JURISDICTION—CHANGE OF VENUE—LOCAL PREJUDICE—COMPETENCY OF JURORS—EVIDENCE—SUFFICIENCY—NEW TRIAL.

1. An objection that the information is defective, in alleging that the offense was committed in a certain county, over a portion of the territory of which the court has no jurisdiction, without denying its commission upon such excepted territory, is a matter of defense, and cannot be raised by demurrer or motion in arrest.

2. An accused waives any error committed in denying his motion for a change of venue on the ground of local prejudice, where he is afterwards given an opportunity to renew his motion, and he fails to call it up or ask the court to pass upon it at the time set for a hearing.

3. A challenge to a juror on the ground of actual bias presents a question of fact, as to which the ruling of the trial court is conclusive, where the evidence of the jurors challenged is contradictory.

4. It is not error, on a prosecution for murder, to admit evidence as to the facts pertaining to the pursuit and capture of defendant immediately after the homicide, notwithstanding an admission of such facts by him.

5. A conviction of murder will not be disturbed on the ground that the evidence conclusively shows that it was physically impossible for defendant to have fired the fatal shot, where defendant himself admits, and another witness testifies, that it was fired by him.

6. Affidavits in the transcript claimed to have been used on a motion for a new trial, but which are not incorporated in any bill of exceptions, nor identified by the judge as having been used on such motion, and which do not appear to have been filed with the clerk, will not be considered on appeal from the overruling of such motion.

In bank. Appeal from superior court, city and county of San Francisco; Walter H. Levy, Judge.

Prosecution against William M. Fredericks for murder. From a conviction of murder in the first degree, and the denial of a new trial, defendant appeals. Affirmed.

G. E. Colwell, for appellant. Atty. Gen. Hart, for the People.

GAROUTTE, J. The appellant, Fredericks, was charged with the murder of one Herrick. He was subsequently convicted, and a judgment of death passed upon him by the trial court. He now appeals from such judgment, and from the order denying his motion for a new trial.

Upon the morning of March 23, 1894, during business hours, the defendant, Fredericks, in attempting to rob a savings bank in the city of San Francisco, precipitated a combat with the employés, at which time the cashier, Herrick, was shot and killed. Fredericks immediately fled from the scene of his crime, but was hotly pursued, and captured within a few hours. Upon March 28th he was preliminarily examined by a committing magistrate, and committed for trial. Upon March 29th an information was filed against him, and upon March 30th he was arraigned, and allowed until April 2d to plead to the information. At that time, upon refusing to plead, a plea of not guilty was entered in his behalf, and the case set for trial April 5th, at 10 a. m. Upon that day the trial proceeded. At each step in these proceedings the defendant asked for more time, and excepted to the various orders of the court denying his request. While the period of time, to wit, three days, intervening between the arraignment and the commencement of the trial of the defendant, might be ample time, in some European countries, to bring to trial, convict, and decapitate half a dozen criminals, yet in this country, where judicial tribunals are organized upon a different system, and where persons charged with crime have more rights under the law, we think this defendant might well have been allowed 10, 20, or even 30 days to prepare for his defense. In view of the enormity of the charge against him, in view of the public clamor that was pursuing him, in view of his own poverty and friendlessness, the state could well have afforded to concede him such a continuance, in order that he might have full opportunity to make his defense, however weak it may have been when made. The state would have lost nothing by such a course, and justice would have been done just the same. While the state should administer justice to lawbreakers with no laggard hand, yet, at the instance of public clamor, or other causes, it is beneath its dignity to act with unseemly haste. We conclude this branch of the case by saying that we do not think the mere fact of fixing the day of the trial at a time so soon after the arraignment and plea ipso facto furnishes sufficient ground for a reversal of the judgment.

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[1] Rehearing denied.

1. It is claimed that the information is fatally defective in its statement of facts. While it alleges the offense to have been committed in the city and county of San Francisco, it is insisted that the superior court has no jurisdiction over certain territory situated within said city and county, and for that reason no jurisdiction is shown in the court by the information to try the case, there being no allegation contained therein denying the commission of the offense upon such excepted territory. This question of jurisdiction was directly presented to the court for consideration in the very recent case of People v. Collins (Cal.) 39 Pac. 16, and it was there held that it could not be raised by demurrer, or motion in arrest of judgment, but was a matter of defense.

2. Defendant's counsel moved for a change of venue, and, in support of his motion, read the affidavit of the defendant and also his own. They are based upon the ground that the defendant could not have a fair and impartial trial in the city and county of San Francisco, by reason of the bias and prejudice of the people against him. The motion was denied by the trial court. The affidavits present a strong prima facie case in support of the motion, and were contradicted in no material part. No counter affidavits whatever were introduced, and the statement of the district attorney, under oath, in opposition to the granting of the motion, related almost entirely to matters outside of the question of the condition of the public mind in the locality where the defendant was to be tried. If the matter had rested at this stage of the proceedings, we would feel in duty bound to grant a new trial of this case, upon the showing made by defendant, and would be fully supported in such conclusion by both the cases of People *v.* Yoakum, 53 Cal. 566, and People v. Goldenson, 76 Cal. 328, 19 Pac. 161. But subsequently, upon the 7th day of April, and during the impanelment of the jury, defendant's counsel was given a second opportunity to urge his motion for a change of venue, and the hearing thereof was set for April 9th. At that time, counsel failed to call up his motion, and no action whatever was taken upon it by the trial court. We deem counsel's conduct an abandonment and waiver of the whole question, and he cannot now insist upon a new trial upon a ruling of the trial court, when he had full opportunity to secure the results desired at the hands of that court; for we must assume that his motion, when renewed, would have been granted, if the facts and the law demanded it. The facts disclosed by this record in this regard are similar to the facts of the case of People v. Plummer, 9 Cal. 298. In that case, during the impanelment of the jury, counsel for defendant expressly declined to renew their motion for a change of venue, which had previously been denied. In the present case counsel, in effect, does the same thing, for after the motion is set for hearing he fails to press, or even insist or ask that the court pass upon, it. In the Plummer Case the court disposed of the whole matter in these words: "There was no error in postponing the consideration of the application for a change of venue until an attempt was made to impanel a jury, and as the counsel, after a number of persons had been rejected, declined, on the intimation of the court, to renew his motion, he cannot take advantage of the failure to order a change of venue." This doctrine is approved in the later case of People v. Goldenson, 76 Cal. 328, 19 Pac. 161, where this court said: "The motion was denied temporarily only, and, although permission was given to renew the application, no effort was afterwards made to procure a change of venue." And it was held that the fact that defendant did not renew his application for a change of venue at the time suggested by the court was fatal to any claims which might be based upon the original application. See, also, State v. Gray (Nev.) 8 Pac. 456; Hunter v. State, 43 Ga. 483.

3. This court is only allowed to review an order denying a challenge to a juror upon the ground of actual bias when the evidence upon the examination of the juror is so opposed to the decision of the trial court that the question becomes one of law, for it is only upon questions of law that this court has appellate jurisdiction in criminal cases. See concurring opinion in People v. Wong Ark, 96 Cal. 129, 30 Pac. 1115; People v. Wells, 100 Cal. 227, 34 Pac. 718. In this case the examination of some of the venire who were subsequently unsuccessfully challenged upon the ground of actual bias by the defendant discloses a state of facts which might well have justified the trial court in excluding them from the jury box. But the evidence of these various jurors, taken upon their voir dire, is not at all conclusive that they were disqualified from acting in the case. When the matter was submitted to the court for a decision upon the evidence taken, it can at least be said the question was an open one, as to their disqualification. The evidence of each juror was contradic-

tory in itself; it was subject to more than one construction; a finding by the court either way upon the challenge would have support in the evidence; and under such circumstances the trial court is the final arbiter of the question, for under such conditions the question presented to this court by the appeal is one of fact, and our power to hear and determine is limited to appeals upon questions of law alone. For these reasons the counsel's contentions in this regard furnish no material to justify a retrial of the case. Neither do we find any merit in the exception to the order of the court in disallowing his challenge to the panel.

4. The trial court committed no error in admitting evidence as to the pursuit and capture of the defendant immediately after the commission of the homicide; and the prosecution had the right to prove the facts pertaining thereto, if it deemed that course advisable, rather than take an admission as to them from the defendant. We do not discover any error in the admission of defendant's statements and confessions. It appears that they were freely and voluntarily made.

5. It is claimed that the verdict is contrary to the evidence. Defendant's counsel declares that the evidence shows conclusively that it was a physical impossibility for the defendant to have fired the shot that killed the deceased. In answer to this contention, it is sufficient to say that the witness Melvin testified in direct terms that defendant fired the fatal shot, and the defendant himself admits the fact. Under these circumstances, we will not disturb the verdict upon the ground of the insufficiency of the evidence upon the point as to who fired the fatal shot.

6. After conviction, defendant made a motion for a new trial, and, as one of his grounds, relied upon newly-discovered evidence. We find within the lids of the transcript certain affidavits which counsel, in his brief, assumes were used by him as the basis of his motion for a new trial. They are not incorporated in any bill of exceptions. Neither are they identified in any way by the judge as having been used and considered upon the hearing of the motion for a new trial. The purported affidavit of one Henderson, as to his examination of the gunshot marks in the bank upon the morning after the homicide, and to the further fact that he noticed upon the floor, outside of the counter, broken glass from the hole made by the bullet in the glass near the cashier's window, is not even subscribed and sworn to; and none of the affidavits, with but a single exception, appear to have been filed with the clerk. For the reason that there is nothing to indicate, even inferentially, that these affidavits were used upon the hearing of the motion for a new trial, we are not authorized to consider them. We do not even intimate that a new trial would be granted upon the showing made by these affidavits, if they were properly authenticated as having been used at the hearing. They were all directed to the point that the defendant did not fire the fatal shot, but that Marvin (Herrick's assistant) accidentally did. All of them, except the one not signed and sworn to, tended to show that Herrick's clothing, at the point where the bullet entered, was powder-burned, and that a shot, in order to so powder-burn the clothing, could not have been fired at a distance of more than two feet. It appears by the record that defendant's counsel formulated his defense upon the foregoing lines as early as March 30th, and, by the exercise of due and proper diligence, it seems to the court that prior to the time he was called upon to present his defense to the jury, which was some two weeks later, he must have had ample time and opportunity to have examined the clothing of the deceased in relation to powder burns, and have been prepared to produce before the jury expert witnesses as to the distance powder burns could be made in clothing from a pistol shot. There is nothing further disclosed by the record demanding our consideration. For the foregoing reasons the judgment and order are affirmed.

We concur: McFARLAND, J.; VAN FLEET, J.; HARRISON, J.

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106 Cal. 594

## BORDERRE v. DEN et al. (No. 19,418.)

(Supreme Court of California. March 30, 1895.)

AUTHORITY OF AGENT—RATIFICATION—NEW TRIAL—SURPRISE.

1. An agent authorized to let the whole of a tract of land for one year from November for $600 cannot bind his principal by a lease of a part of the tract for $225, for a term exceeding one year, and commencing in the April preceding November.

2. An agent, with authority to lease the whole of a tract of land, leased a part of it for over a year. Upon learning of the lease, the principal, who had leased the entire tract, asked the agent by telegraph what he had done with the rents collected. *Held*, that under Civ. Code, § 2310, providing that a ratification can be made only in the manner necessary to confer original authority for the act ratified, and section 2312, providing that a ratification is not valid unless, when made, the principal has power to confer authority for the act done, and section 2313, providing that no unauthorized act can be made valid retroactively to the prejudice of a third person, without his consent, there was no ratification of the lease.

3. In an action based upon a written lease for a term slightly exceeding one year, and executed by an agent with oral authority, the fact that both plaintiff and his counsel supposed the lease was for a term of one year only does not constitute surprise "which ordinary prudence could not have guarded against," prescribed as a ground for new trial by Code Civ. Proc. § 657.

Commissioners' decision. Department 1. Appeal from superior court, Santa Barbara county; W. B. Cope, Judge.

Ejectment by Jose Borderre against A. H. Den and Bruno Orella. From a judgment for defendants, and an order denying a new trial, plaintiff appeals. Appeal from judgment dismissed. Order denying new trial affirmed.

B. F. Thomas, for appellant. John J. Boyce and Boyce & Taggart, for respondents.

BRITT, C. Appeal from a judgment in favor of defendants and an order denying plaintiff's motion for a new trial. The appeal from the judgment was not taken within one year from the time of entry of the same, and must be dismissed.

The action is ejectment for a tract of land in Santa Barbara county, and for the recovery of damages for loss of the use thereof. In his amended complaint, plaintiff alleges himself to be the owner of an estate for years in the land therein described, "to wit, one year from and after" April 25, 1892; that on May 14, 1892, defendants ousted him from the possession of said land, etc. The answer consists of denials of the material allegations of the complaint, and the findings of the court are as general in their statements as the pleadings themselves. In this condition of the judgment roll, of course any material conflict appearing in the evidence—which in this instance is brought up in a statement of the case on motion for new trial—must be resolved in such manner as will sustain the general conclusions found as facts by the court. So treated, the evidence discloses that defendant A. H. Den was the owner of a larger tract of land, which included the parcel described in the complaint, and that on April 23, 1892, being about to depart for a brief period of absence from the county where the land is situated, he orally authorized one E. R. Den, his brother, to lease the whole of his land for the period of one year, to begin upon the expiration of a then subsisting lease of a part of the tract, in the month of November next to follow; the rental to be the sum of $600, payable in advance. On April 25, 1892, E. R. Den, assuming to act as the agent of his brother, the said defendant, and having no authority except as above shown, executed in the name of A. H. Den a written lease to the plaintiff, Borderre, of a part only of the tract for the sum of $225 (then paid by plaintiff to said agent), for a term "from the 25th day of April, 1892, to the 1st day of May, 1893." The premises described in the instrument just mentioned are those for which plaintiff sues here, and his claim is founded on such written lease. He never had possession of the land. About April 29, 1892, and before defendant Den had any information of the said written lease, he in person leased the land in suit for the period of one year to his codefendant, Orella, who, it seems, also had no knowledge of a lease to plaintiff, and Orella at once entered into possession. On May 9, 1892, after defendant Den had knowledge of the terms of the written lease to the plaintiff (he having then seen and read it), and knew of the payment of the specified rental by plaintiff, he sent a telegram to said E. R. Den, then temporarily absent from the county, in the following words: "What have you done with the money you collected? [Signed] A. H. Den,"—to which E. R. Den replied by wire: "Your money is safe." But a few days later, on the occasion of a personal interview between the brothers, the defendant Den refused to receive such money, or any part of it, though it was then tendered to him.

1. Obviously, the agent transcended his authority in executing the written lease. Being empowered to let the whole tract for one year, commencing in November, 1892, at a rental of $600, he could not make a lease, either oral or written, obligatory on his principal, for a portion only of the land, at a rental of $225, for a term exceeding one year, commencing in April, 1892. Besides, the lease being for a period in excess of one year, and the authority of the agent not being in writing, it was, for that further reason, invalid. Civ. Code, § 1624, subd. 5; Folsom v. Perrin, 2 Cal. 603. Nor could it, as claimed by appellant, even if it pursued the terms of the agent's oral authorization, operate as a valid lease for one year. See Talamo v. Spitzmiller, 120 N. Y. 37, 23 N. E. 980. "It is difficult to perceive how such a contract, declared to be void by the statute, can be held to be valid for a single hour." Thomas v. Nelson, 69 N. Y. 121.

2. But the appellant maintains that the lease was ratified by defendant Den. Such alleged ratification is asserted on the effect of the telegram sent by him to his agent on May 9, 1892, and on certain oral declarations attributed to him, but which he testified that he did not make. We see no ground for holding that the lease was ratified. When defendant sent said message, he had already rented the land to Orella, and no power remained in him to ratify the previous unauthorized act of his agent so as to warrant a recovery of the land from Orella. Civ. Code, §§ 2312, 2313.[1] There was no attempt to ratify the lease "in the manner that would have been necessary to confer an original authority," nor any acceptance of the benefit of the same. Civ. Code, § 2310.[2]

3. It is further contended that the court should have granted the motion for a new trial on the ground of surprise suffered by plaintiff; the alleged surprise consisting in

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[1] Section 2312: "A ratification is not valid unless, at the time of ratifying the act done, the principal has power to confer authority for such an act." Section 2313: "No unauthorized act can be made valid, retroactively, to the prejudice of third persons, without their consent."

[2] Section 2310: "A ratification can be made only in the manner that would have been necessary to confer an original authority for the act ratified, or where an oral authorization would suffice, by accepting or retaining the benefit of the act, with notice thereof."

the facts that plaintiff and said E. R. Den both supposed that the written lease was for a term of one year only,—from May 1, 1892, to May 1, 1893,—they having agreed verbally on such a contract, and believing that it had been so drawn, and that they did not discover anything to the contrary until after the trial of this action, and that plaintiff's counsel had not read the entire lease, and so did not discover that it embraced a term in excess of one year, until near the conclusion of the oral argument; that, if he had known of that circumstance, he would have pleaded the mistake in his complaint (we suppose with a view to reformation of the instrument); and that he was misled by the action of the court in admitting the document in evidence over the objections of defendants, and afterwards holding it to be invalid. Assuming, without deciding, that we are authorized to consider the affidavits by which the alleged surprise is made to appear, it is yet clear that the failure of the plaintiff and his counsel to acquaint themselves before the end of the trial with that important clause of the comparatively brief instrument which is the foundation of the plaintiff's action, it being in their possession and produced in evidence by them, was not "surprise which ordinary prudence could not have guarded against." Code Civ. Proc. § 657. Nor is it shown why application for leave to amend, if that was desired, was not made when the defect in the document was first discovered, and before the submission of the case. Certainly, the discretion allowed to the trial court in passing upon applications for new trial on such ground has not been abused in this case.

There is no merit in the appeal. The appeal from the judgment should be dismissed, and the order denying the motion for a new trial should be affirmed.

We concur: VANCLIEF, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the appeal from the judgment is dismissed, and the order denying plaintiff's motion for a new trial is affirmed.

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106 Cal. 477

## KELSO v. TEALE, City Auditor. (No. 19,421.)

(Supreme Court of California. March 20, 1895.)

CLAIM AGAINST CITY — NUMBERING AND RECORDING—MANDAMUS AGAINST CITY—LIBRARY FUND—PROPRIETY OF APPROPRIATION.

1. Under the charter of the city of Los Angeles (St. 1889, p. 508, art. 21, §§ 213, 214), providing that all demands payable out of the library fund must be approved by the library board, and then delivered to the city auditor, and, if disapproved by him, again presented to the board, and that on reapproval by the board they "shall be delivered to the city auditor, who shall number and make a record of such demand," it is no objection to a petition for a writ of mandate to compel the numbering and recording of a demand so reapproved that petitioner could have presented her demand to the treasurer, and have had it paid, without such numbering and recording.

2. Under the city charter of Los Angeles (St. 1889, art. 21, § 215), providing that "no demand can be approved by any board or officer * * * unless it specify each several item with the date and amount thereof," a demand for $200, approved by the library board "on account" of expenses of a delegate to a convention, is sufficient, since it consists of but one item.

3. Under the city charter of Los Angeles (St. 1889, p. 484, art. 8, § 86), authorizing the library board "to control and order the expenditure of all moneys at any time in the library fund," and "generally to do all that may be necessary to carry out the spirit and intent of this charter in establishing a public library and reading room," the board may appropriate money to pay the expense of a delegate to a congress of librarians.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

Petition by Tessa L. Kelso for a writ of mandate to Fred H. Teale, city auditor of Los Angeles. From a decree granting the writ, defendant appeals. Affirmed.

C. H. McFarland and Albert Crutcher, for appellant. Sheldon Borden and F. H. Howard, for respondent.

BELCHER, C. This is an appeal from a judgment of the superior court of Los Angeles county, directing the issuance of a peremptory writ of mandate commanding the appellant, as city auditor of the city of Los Angeles, to number and record a demand which had been duly approved and allowed by the board of directors of the Los Angeles Public Library. The charter of the city of Los Angeles makes provisions for a public library, which is to be managed by five directors, known as the "Board of Directors of the Los Angeles Public Library." St. 1889, p. 456, art. 8. By section 86 the board is given power, among other things, to appoint a librarian and necessary assistants, and such other employés as may be necessary; to control and order the expenditure of all moneys at any time in the library fund, and order the drawing and payment of all moneys out of said fund for such expenditures and liabilities as are authorized, subject to the general provisions for the payment of demands on the city treasurer contained in article 21; and generally to do all that may be necessary to carry out the spirit and intent of the charter in establishing a public library and reading room. Article 21 contains the following provisions:

Section 213: "All demands payable out of the library fund must, before they can be approved by the city auditor or paid, be previously approved by the board of directors of the Los Angeles Public Library by a vote of three members thereof, taken with the ayes and noes and spread on the minutes, and the action of said board indorsed on said demand, and signed by the presiding officer and the clerk thereof. After the approval of said demands they shall be delivered to the city auditor, who shall have the same power and perform the same duties in reference to demands payable out of the library fund as is provided for other demands; provided, that in case the city auditor shall reject any such demand, or if, in his opinion, said demand should be paid only in part, he shall return the same to the said board of directors."

Section 214: "Any demand returned to * * * the board of directors of the Los Angeles Public Library, with the objection of the city auditor, shall again be considered by such board, and if such demand be again approved as required in the first instance, such objection of the city auditor shall be thereby overruled, * * * and any demand, the objection to which of the city auditor has been overruled by * * * the board of directors of the Los Angeles Public Library * * * shall be delivered to the city auditor, who shall number and make a record of such demand, as in the case of demands approved by him."

Section 215: "No demand can be approved by any board or officer, audited or paid, unless it specify each several item, with the date and amount thereof."

Section 218: "The city auditor must number and keep a record of all demands on the treasury approved by him or his objections to which have been overruled, showing," etc.

The demand in question was for $200, which sum, by a resolution passed June 6, 1893, was appropriated by the board of library directors on account of the expenses of a delegate representing the library at the World's Congress of Librarians and to the American Library Association Conference, to be held from the 10th to the 24th of July, 1893. The said demand was presented to the board of directors on September 5, 1893, and on the 29th of the same month was duly approved by the board, and indorsed and authenticated in the manner and form required by the charter. Thereafter the said demand, with the action of the board indorsed thereon, and signed by its president and clerk, was delivered to the appellant, as city auditor, for his approval, but he refused to approve the same, and on October 5, 1893, returned the demand to the board of directors, specifying in writing his objections thereto. The demand was thereupon again considered by the board, and again approved as required in the first instance, and the objections of appellant were thereby overruled. Thereafter the demand was delivered to appellant, with the last-mentioned action of the board duly indorsed thereon, and authenticated by the signatures of its president and clerk, with a request that he should number and record the same as required by the charter. Appellant refused to comply with this request, and thereupon the respondent, as the person beneficially interested, demanded of appellant that he should number and record the said demand, but he refused, and still refuses, to do so. Shortly thereafter the respondent commenced this proceeding by filing her affidavit setting out the facts, and an alternative writ of mandate was granted by the court. The appellant filed a general demurrer to the affidavit, which was overruled, and then answered. The case came on regularly for trial, and, after argument of counsel, was submitted to the court for its decision upon the "pleadings and admission of the facts made at the hearing." It does not appear from the record what the facts admitted were, but in view of them the court held that the plaintiff was entitled to the relief demanded, and thereupon ordered and adjudged that a peremptory writ of mandate issue as prayed for.

1. Appellant contends that respondent has no special or beneficial interest in having her demand numbered and recorded, because "such acts upon his part are not prerequisite to the presentation of such demand to the treasurer, and its payment by that officer"; and in support of this position he cites sections 216 and 219 of the charter. The first section cited provides: "The term 'audited,' as used in this charter, with reference to demands upon the treasury, is to be understood to mean that said demands have been presented to, passed upon and approved by every officer and board of officers, as required by this charter, or the objections of the mayor, or city auditor, or both, as the case may be, have been overruled, as herein provided, and this must appear on the face of the paper representing the demand, or else it is not audited." And the last section cited provides: "Every lawful demand upon the treasury, duly audited as in this charter required, shall in all cases be paid on presentation and canceled." Conceding, without deciding, that this point is well taken, and that respondent could have presented her demand to the treasurer, and had it paid, notwithstanding it had not been numbered and recorded by appellant, still the charter expressly required appellant, after his objections were overruled, to "number and make a record of such demand, as in the case of demands approved by him." This was a ministerial act, and it was the duty of appellant to obey the law, and in all respects comply with its requirements. And, having failed and refused to do so, he is in no way "aggrieved" by the judgment of the court below commanding him to perform that duty. The judgment cannot, therefore, be reversed on this ground. Falk v. Strother, 84 Cal. 544, 22 Pac. 676, and 24 Pac. 110.

2. Appellant also contends that the demand was not itemized, as required by section 215 of the charter, and hence that the directors of the library had no authority to approve

or reapprove the same, and their action in attempting to do so was in excess of their powers and jurisdiction, and therefore void. And in this connection it is urged that it does not appear that respondent was a delegate to the World's Congress of Librarians, or that she attended such congress, or that she expended the sum of $200, or any part thereof, as such delegate. A sufficient answer to this point is that the demand was for a specific sum, appropriated on account of the expenses of a delegate to the congress, and constituted only a single item; and that respondent was such delegate, and attended the congress, and expended the money in paying her expenses must be conclusively presumed from the action of the board and "the admission of the facts made at the hearing. The cases cited by appellant to the effect that it is the privilege and duty of a county auditor to refuse to draw his warrants on the treasurer for claims which, although sanctioned and ordered paid by the board of supervisors, are void upon their face for want of jurisdiction in the board to allow them, are not in point. It does not appear here that respondent's demand is void upon its face, nor is appellant called upon to draw any warrant for it.

3. Appellant further contends that, under the provisions of the charter, the directors of the library had no right to make such an appropriation from the library funds as that here in question. And it is said: "The benefits to be derived by the taxpayers and patrons of the library from what might be learned by a delegate to a congress of librarians are too remote, too speculative, too chimerical to make the expenses of such a delegate a legal charge upon the public funds." But the question of benefits to the library and its patrons from an expenditure like that here involved was one to be determined by the directors in the first instance; and, if there could be any state of circumstances under which such an expenditure would be authorized, it must be presumed that such a state was shown, and was considered and acted upon by the directors, when they made the appropriation. The board was authorized "to control and order the expenditure of all moneys at any time in the library fund," and "generally to do all that may be necessary to carry out the spirit and intent of this charter in establishing a public library and reading room." In view of the action of the board and of the court below, we cannot say that the appropriation, under the circumstances shown, was not justifiable and proper. No other points are made, and, in our opinion, the judgment should be affirmed.

We concur: BRITT, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

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106 Cal. 602

## COTTER v. LINDGREN. (No. 19,502.)

(Supreme Court of California. March 30, 1895.)

Action for Personal Injuries—Unguarded Excavation in Sidewalk—Negligence of Employes—Liability of Subcontractor.

1. A complaint reciting that defendant wrongfully dug a pit on a certain highway on February 9th, and left the same unguarded during the nighttime; that on February 10th plaintiff fell into the pit, without any negligence on his part,—is demurrable as not showing that the pit was unguarded when plaintiff fell in.

2. Defendant, having a subcontract for the brickwork of a building, on account of lack of work for his laborers, put some of them to work on an excavation not included in his contract, under an agreement with the contractor that defendant should pay their wages, which should be repaid him by the contractor. The laborers worked under the direction of the contractor. When the excavation was completed, defendant paid the laborers, and was repaid by the contractor. *Held*, that the laborers, while working on the excavation, were not defendant's servants, so as to render him liable for their negligence.

3. A contractor who has completed an excavation in a sidewalk, as required by his contract, is not liable for injuries to persons falling therein, due to the absence of proper guards, if he did not contract to guard the excavation after it was completed.

Commissioners' decision. Department 1. Appeal from superior court, Kern county; A. R. Conklin, Judge.

Action by William Cotter against Charles Lindgren. There was a judgment for plaintiff, and defendant appeals. Reversed.

Mahon & Laird, for appellant. R. J. Ashe, for respondent.

VANCLIEF, C. Action for damages alleged to have been suffered by the plaintiff in consequence of negligence of the defendant in leaving unguarded an excavation which he had made in the sidewalk of a street in the town of Bakersfield, into which plaintiff fell and was injured. The plaintiff had judgment for $1,600, from which, and an order denying a new trial, the defendant has appealed.

1. The appellant contends that the court erred in overruling his general and special demurrer to the complaint. The following is a copy of the complaint: "That on or about the 9th of February, 1893, defendant, by his servant, wrongfully dug a pit in the sidewalk of a certain highway, known as 'Nineteenth Street,' in the town of Bakersfield, Kern county, state of California, and negligently left the same open and exposed during the nighttime, without any protection, barriers, or lights to warn citizens or travelers of danger. That on or about the 10th of February, 1893, the plaintiff was lawfully traveling on said street, wholly unaware of any danger; was precipitated into said excavation without any fault or negligence on his part, whereby his left hip was dislocated, and he was made sick &

sore & lame, & was confined to his bed, & had to use crutches for a long time, & was compelled to abstain from work for sixty days, to his damage one hundred & twenty dollars ($120), and he has been compelled to incur an expense of three hundred dollars in medical services, nursing, & medicines. That ever since said accident he has suffered great bodily pain and anguish of mind, & that he is stiff & lame, & his health, strength & activity has been & will be permanently injured and impaired, to his damage in the sum of ten thousand dollars. Wherefore, plaintiff prays judgment against defendant in the sum of ten thousand four hundred & twenty dollars, with costs of suit." The following are the grounds of demurrer: (1) That said complaint does not state facts sufficient to constitute a cause of action. (2) The complaint is uncertain in this: The complaint states that the said pit was dug on or about the 9th day of February, 1893, and that the same was left without protection, barriers, or lights to warn citizens of danger. The accident complained of is alleged to have occurred on or about the 10th day of February, 1893, a time subsequent to the 9th, but it is not stated that at the time of the alleged accident the said pit was not properly protected and guarded by barriers and lights sufficient to apprise persons traveling on said highway or sidewalk of danger." I think the demurrer should have been sustained on the second ground, at least. It was essential to plaintiff's cause of action that the pit was not sufficiently guarded and lighted at the time plaintiff fell into it; but this fact is not expressly alleged, nor does it necessarily follow from the allegation that defendant negligently left the pit "open and exposed during the nighttime," etc., since it is not alleged that plaintiff fell into it during any nighttime, much less during any particular night, and therefore cannot be inferred that the pit was not properly guarded when he fell into it. In this respect the complaint is wholly uncertain.

2. The findings of fact are also defective in that, although it is found that the plaintiff fell into the pit "on or about the night of February 10th," it is not found, and cannot be inferred from the findings, that the pit was not sufficiently guarded and lighted at the time he fell into it. And upon this issue the evidence was substantially conflicting.

3. Appellant further contends that the evidence does not justify the finding that defendant, by his servants, negligently or otherwise dug the pit into which plaintiff fell; and this raises the most important question in the case, which, in view of a new trial, should be decided. The evidence, without conflict, proved the following facts relative to this issue; Mr. A. Bodley contracted to build a house for Mr. Harris on Nineteenth street, in the town of Bakersfield. The contract required Bodley to furnish all the materials and to do all the work, including all necessary excavations for the foundation, with areas under the sidewalk to give light and ventilation to the cellar. Bodley entered into a subcontract with the defendant by which the latter was to do all the brickwork, ironwork, glasswork on sidewalk, and the plastering. The brickwork included walls inclosing the areas under the sidewalk. When all other brickwork was so nearly completed as not to afford work for all his employés, the defendant announced to Bodley that he was ready to commence work on the area walls, for which no excavations had then been made, and proposed that Bodley allow defendant's idle men to excavate the areas, for which defendant would pay their wages, to be repaid to him by Bodley. To this proposal, Bodley assented; and thereupon defendant told his men to go to work on the areas, and that Bodley's foreman would show them where to dig. When they commenced, Mr. Bodley himself showed them where to dig, and they dug the holes under his directions. Among other things, Bodley strictly directed them on the first day, and also on the second day they worked, to put up guards around the excavations to keep people from falling in, and they promised to do so. When the work was completed the defendant paid the men their regular wages; and, as soon thereafter as Mr. Bodley "came around," he repaid the defendant what he had paid the men for excavating the areas. Although there was a sharp conflict of evidence as to whether the excavation was properly guarded at the time of the accident, a finding that it was not so guarded would be held here to have been justified. Does the evidence substantially tend to prove that the negligence by which the excavation was left unguarded was that of the defendant? is the only material question to be considered. No evidence tends to prove that the defendant contracted to excavate the areas, nor that he controlled, or had the right to control, the workmen while doing the work; and it does not matter that the servants who did the work were in his general employ for other purposes. Speaking of the principle of respondeat superior, Mr. Wharton, in his work on Negligence (section 173), says: "Nor does it matter that the servant is in the general employ of third persons. Hence, it is a logical inference that the principle does not cease to operate when the servant is in the employ of a third person, if released for the particular work in question"; citing Kimball v. Cushman, 103 Mass. 194, which is similar to this case, but extends the doctrine further than necessary to discharge the defendant here. It is well settled that, in order to hold the master responsible for the negligence of a servant, he must have the power of supervision of the servant's conduct. Indeed, the words "mas-

ter and servant" imply such power. In this case the relation of master and servant did not exist between the defendant and the men who excavated the areas in the sidewalk, in regard to that work. At least, the evidence has no tendency to prove such relation, but the contrary.

It is also to be observed that even if the defendant, by his servants, had excavated the areas under contract, it would not have been his duty to guard them after the job was completed, unless he had agreed to do so. Donovan v. Rapid-Transit Co. (Cal.) 36 Pac. 517. And there is no evidence tending to prove that the job had not been completed before the accident, while circumstantial evidence tends to prove that it had been so completed. I think the judgment and order should be reversed, and the cause remanded for a new trial.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are reversed, and the cause remanded for a new trial.

106 Cal. 660

## McGUIRE v. BROWN (DORN, Intervener).

(No. 19,540.)

(Supreme Court of California. April 2, 1895.)

WATERS—APPROPRIATION—RIGHT OF ENTRY ON LAND.

1. Rev. St. U. S. §§ 2339, 2340, providing that rights to the use of water on public lands, vested and accrued by priority of possession, shall be protected, and all patents granted and homesteads and pre-emptions allowed shall be subject thereto; and Civ. Code Cal. § 1412, providing that one entitled to the use of water may change the place of diversion if others are not injured thereby,—do not confer the right upon an appropriator of water on public land to go upon the land after its entry by another as a homestead, but before the claimant has made final proof, to change the point of diversion and construct new ditches.

2. An appropriator of water on public land, by wrongfully changing the point of diversion and building new ditches after the land has been entered by another as a homestead, does not lose his right to the use of the water.

Commissioners' decision. Department 1. Appeal from superior court, Ventura county; B. T. Williams, Judge.

Action by William McGuire against Marcellus Brown. W. A. Dorn intervened. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Reversed.

H. L. Poplin, for appellant. W. E. Shepherd and Orestes Orr, for respondent. Blackstock & Ewing, for intervener.

BRITT, C. The controversy which resulted in this action arose between plaintiff and defendant concerning the right to the use of water flowing in Cuyama creek, in the county of Ventura. One W. A. Dorn was permitted to intervene, he asserting an interest in the water superior to that of both the original parties; but, as the court below found against his pretensions, and dismissed his complaint "without prejudice," and he has not appealed, his claims are eliminated from the case.

It appears from the record that in January, 1885, one Beekman took possession of the N. W. ¼ of a certain section 20, the same being unappropriated lands of the United States, and shortly afterwards filed his declaratory statement as a pre-emption claimant thereon, paid the purchase price, and obtained the receiver's final receipt some time in the year 1886, and in June, 1891, the United States patent for the same was issued to him. At the time Beekman entered upon said land there was a ditch thereon, constructed by a former occupant, leading from a point on Cuyama creek, within the boundaries of the N. E. ¼ of said section 20, and thence westerly across a part of such N. E. ¼ and upon said N. W. ¼, by means of which ditch water was diverted from said creek, and made to flow upon the latter quarter section. This ditch was repaired by Beekman in the spring of 1885, and was thenceforward used by him to divert said water for irrigation and other purposes on his said land; it having a capacity, the court finds, of 90 inches, which was filled when the creek afforded sufficient water, and exhausted the flow of the creek at the point of diversion when the supply was less than that amount. In December, 1888, Beekman conveyed the land covered by his pre-emption claim,—said N. W. ¼ of section 20,—together with its appurtenances, to one Crawford, who entered into possession. Crawford then, in May, 1889, changed the point of diversion of the ditch to a place about a quarter of a mile further up the creek, eastward from the head of the old ditch, and dug a new ditch across the said N. E. ¼, and upon the N. W. ¼ of said section 20, connecting with the old ditch near the west line of said N. W. ¼. The new ditch had a capacity of 90 inches, as the court also found, and was used by Crawford on his lands from 1889 to 1891, inclusive, for the same purposes that the former ditch had been used by Beekman. January 20, 1892, Crawford conveyed to plaintiff by deed of grant said N. W. ¼ of section 20, together with all water rights possessed or acquired by the grantor "either by use, purchase, or appropriation." But in August, 1888, Brown, the defendant and appellant, a person qualified to acquire land under the homestead laws, settled upon said N. E. ¼ of section 20, it being then public land of the United States, and in October of the same year he filed his homestead application therefor in the proper land office, paying the fees of the receiver upon such entry and obtaining his receipt therefor. Ever since his settlement he has resided on the land, cultivating and improving considerable portions of it, but has not made final proof, nor received a patent for the same. When Crawford constructed the new ditch across defendant's homestead claim in 1889, defendant was temporarily absent therefrom, and gave no consent to the change; but on his return, soon afterwards, he made no complaint or claim of damage, and permitted the use thereof by Crawford and his successor, the plaintiff, until the month of October, 1892, when he filled up such new ditch at a point on his homestead claim, and stopped the further flow of the water, and by force prevented plaintiff from repairing the ditch. In November, 1889, defendant constructed a ditch tapping Reyes creek, a tributary of said Cuyama creek, on land in section 16, belonging to the state of California, at or near the point of confluence of the two streams, about one-half mile above the head of the new ditch dug by Crawford in May of the same year, and thence leading to his (defendant's) homestead claim, said N. E. ¼ of section 20. By means of this ditch defendant diverted water from Reyes creek during the years 1890, 1891, and 1892, and used the same for irrigation and other purposes on his claim, not interfering with the flow of water to plaintiff's ditch during the first two of those years, but increasing the amount diverted during 1892 so as to materially lessen the quantity descending to plaintiff. Plaintiff then, in September, 1892, filled up defendant's ditch on said section 16, so that no water could pass into it from the creek. All the lands above mentioned lie in the same township and range, and are riparian to Cuyama creek.

Plaintiff commenced this action May 4, 1893, to restrain defendant from interfering with the ditch and water rights acquired by plaintiff from Crawford, and for damages. Defendant answered, and also filed a cross complaint, setting up his claims to the water and to damages for plaintiff's invasion of his rights, and praying that plaintiff be restrained from interference with his use of the water, etc. After trial, the court rendered judgment determining that plaintiff has the paramount right to 90 inches of the water in Cuyama creek for all useful and beneficial purposes, to be diverted through the ditch constructed by Crawford in 1889, and is the owner of such ditch, with the right to maintain it across the homestead claim of appellant, and enjoining defendant from disturbing plaintiff's enjoyment of such rights. Also that defendant is entitled to take 90 inches of water flowing at the head of his ditch in section 16 so long as the diversion of that quantity does not reduce the flow at the head of plaintiff's ditch below the same amount; that defendant has the right to maintain and use his said ditch to convey the water to which he is so entitled, and plaintiff is restrained from interference therewith. Plaintiff is awarded the entire flow of water at and above the head of the Crawford (new) ditch when the quantity falls below 90 inches; also judgment for nominal damages and his costs.

1. The first and most important question arising on this record relates to the right of Crawford, plaintiff's predecessor in interest, to enter upon the land claimed by and in the possession of defendant, and, in the exercise of the right to change the point of diversion, there construct a new aqueduct, and lead the water through the same. For, if he had not the right to effect the change in this manner, then the defendant was not in the wrong when he obstructed the flow of the water in the new ditch, and the judgment restraining him in that behalf, and establishing the right of plaintiff "to have, maintain, keep, and use" such new ditch for diverting and conveying the water upon his (plaintiff's) land is erroneous. The claim that Crawford, the former ditch owner, was justified in shifting the point of diversion and the line of his ditch in the manner here disclosed is based mainly on the familiar provisions of the legislation of congress (sections 2339, 2340, Rev. St. U. S.)[1] concerning the rights of appropriators of water on the public lands, and the saving of those rights in patents for such lands granted by the government; on section 1412 of the Civil Code of this state: "The person entitled to the use may change the place of diversion if oth-

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[1] "Sec. 2339. Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; but whenever, any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.

"Sec. 2340. All patents granted, or pre-emption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by the preceding section."

ers are not injured by such change;" and on certain cases in this court, which will be noticed further on. We do not think that the right of the settler under the federal homestead laws on public land through which water flows is of the unsubstantial character which the contention of the respondent implies. Of course, if a valid appropriation of the water, whether on the particular tract or off it, has been made, the settler must take the land subject to that qualification of his right and of the title which he may ultimately acquire; but it should not be held that such qualification involves the indefinite extension of the right of the prior appropriator, unless the law is thus plainly written. It is of the highest importance to the bona fide settler on riparian lands to know the extent to which he must subordinate his claims to those of prior appropriators of the water; to know, in short, what easements and servitudes his land is subject to in favor of the previous appropriation. Has the prior appropriator license to enter upon the homestead claim of such a settler for the purpose of materially changing thereon the point of diversion and constructing new waterways through the land? Is such a license among the servitudes to which the land must be submitted? We think not. "In no just sense can lands be said to be public lands after they have been entered at the land office, and a certificate of entry obtained. If public lands before the entry, after it they are private property." Witherspoon v. Duncan, 4 Wall. 218. The term "entry," as applied to appropriations of land within the scope of the language just quoted, has been held to mean "that act by which an individual acquires an inceptive right to a portion of the unappropriated soil of the country by filing his claim." Sturr v. Beck, 133 U. S. 547–549, 10 Sup. Ct. 350; citing Chotard v. Pope, 12 Wheat. 588; Railroad Co. v. Whitney, 132 U. S. 357, 10 Sup. Ct. 112. It appears from the evidence in this case that on October 22, 1888, the defendant made entry (within the meaning of the authorities referred to) of the land in question in the proper United States land office, and that his entry remains intact. Crawford, a witness for plaintiff, testified: "When I went there in 1888, Brown was on the northeast one-quarter of section 20, and, I think, had a house. * * * When I made the change in my ditch, Mr. Brown was in possession of his land. We had a fence between us, so I ran with my new ditch through his fence." Here was an entry, and here was an actual possession of the land by defendant. In course of time, and on compliance with the law relative to continuous residence and cultivation, he will be entitled to a patent which will invest him with the legal title. Now, it cannot be that, pending proceedings for the consummation of his interest thus initiated, any other person may rightfully invade his possession for the purpose of making an original appropriation of water, and so possibly divesting the land of its chief element of value, any more than for the purpose of cutting off its timber or committing other trespass. This proposition is substantially adjudged in Sturr v. Beck, 133 U. S. 541, 10 Sup. Ct. 350, where the supreme court of the United States affirmed the doctrine that the plaintiff in that case had "no right to enter upon the prior possession of the defendant under his homestead entry for the purpose of appropriating any portion of the running streams and creeks thereon." But what is the difference in the legal wrong to the defendant between an entry on his homestead, with a view to appropriating for the first time the water there flowing, and an entry having for its object the material shifting of the place of a previous diversion, and the construction of new waterways to make the diversion effectual? Either purpose, if carried out, must interrupt the quiet of his enjoyment, and deprive him of the use and control of some portion of his property.

If it be said that by the ninth section of the act of congress of July 26, 1866, now embodied in section 2339 of the Revised Statutes, vested and accrued rights to the use of water for beneficial purposes, acquired by priority of possession thereof on the public lands, are to be maintained and protected as against homestead settlers on those lands, and that the right of way for the construction of ditches for such purposes is acknowledged so long as they are in any sense "public lands," and before a patent has issued for the same, and hence that defendant took up his land subject to those reservations in favor of the prior appropriator, and the consequent right of the latter to change his system of works at will, it may be replied—Firstly. That the argument, if good for anything, proves too much; for by the terms of section 2340 of the Revised Statutes,—a re-enactment of section 17 of the act of July 9, 1870, upon this subject,—the same exceptions and reservations are declared to qualify all patents granted as well as all homesteads allowed; so that the right of the prior appropriator of the water to make such use of the land of the homestead claimant would not cease with the issue of a patent to the latter, but must continue indefinitely,—a result which even the cases relied on by respondent discountenance. Osgood v. Mining Co., 56 Cal. 571; Farley v. Irrigating Co., 58 Cal. 142. Secondly. It is only "vested and accrued" rights to the use of water which are reserved by the operation of the acts of congress above referred to from the interest that without those provisions would vest in the homestead claimant; and the only vested and accrued right which Crawford had in the land at the time defendant made his homestead entry was the right to the continued flow of the water into his existing canal to the extent of his prior appropriation, including, of course, the right to maintain and improve such canal. True, he had the privilege of changing the point of diversion if he could do so without injury to others (Civ. Code, § 1412; Ramelli v. Irish, 96 Cal. 217, 31 Pac. 41); but such privilege is a different thing from the "vested and accrued" right to the use of the water. It is not a part of that right; and the condition upon which it can be exercised to any material extent becomes impossible when another person has made a lawful settlement on the land affected, and is proceeding in good faith under the homestead laws to perfect his title,—impossible, that is, without the consent of such settler. This court, speaking through Mr. Justice Harrison, said recently: "That section [Rev. St. § 2339] does not confer the right to enter upon lands in the possession of another for the purpose of securing the water thereon, or of completing an attempted diversion of water, even though the person seeking so to enter had at some previous time manifested his intention to secure a water right thereon." Taylor v. Abbott, 103 Cal. 424, 37 Pac. 408. As little does it, in our opinion, confer the right to enter upon the possession of another for the purpose of materially changing the point of diversion of water already appropriated; certainly not for the purpose of constructing new aqueducts where none existed before. By the terms of the proviso found in section 9 of said act of July, 1866, it is declared "that whenever after the passage of this act any person or persons shall, in the construction of any ditch or canal, injure or damage the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage"; and respondent claims that such provision authorized the construction of the new ditch by plaintiff's predecessor, and that defendant's right is limited to compensation for the damage therein mentioned. This is not the proper construction of the proviso. It does not grant rights of way where none existed before, nor confer additional rights upon owners of ditches subsequently constructed. Jennison v. Kirk, 98 U. S. 460; Robertson v. Smith, 1 Mont. 411.

Does the fact that defendant has not made final proof of residence and cultivation, or obtained a patent, affect the case? In Sturr v. Beck, above cited, the court quotes with approval this language of Attorney General McVeagh in an opinion rendered by him in 1881: "Upon the entry, the right in favor of the settler would seem to attach to the land, which is liable to be defeated only by failure on his part to comply with the requirements of the homestead law in regard to settlement and cultivation. This right amounts to an equitable interest in the land, subject to the future performance by the settler of certain conditions (in the event of which he becomes invested with full and complete ownership); and, until forfeited by failure to perform the conditions, it must prevail, not only against individuals, but against the government." And in the course of the same decision the court says further: "When, however, the government ceases to be the sole proprietor, the right of the riparian owner attaches, and cannot be subsequently invaded. As * * * no subsequent attempt to take the water only can override the prior appropriation of both land and water, it would seem reasonable that lawful riparian occupancy with intent to appropriate the land should have the same effect." 133 U. S. 548, 551, 10 Sup. Ct. 350. We see no reason to hold that defendant's rights for the purposes of this case would have been enlarged by the issue of a patent to him. How could they have been augmented by that means in view of the provision (Rev. St. § 2340) that such a patent must be subject to all "vested and accrued" water rights? It must be remembered that the appropriator is not the owner of the "very body of the water" until it passes into the appliances he has provided for its reception. Before he is thus possessed of it he has a mere right to its continued flow, in order that he may impound it; but the stream itself, flowing in its natural course, is a part of the land over which it flows. Mining Co. v. Hoyt, 57 Cal. 46; Canal Co. v. Kidd, 37 Cal. 310, 311. And it follows that, after the land where the diversion is made has ceased, by reason of a lawful private appropriation thereof, to be public land, and passed into private occupancy, the occupant of the land—in this case the homestead claimant—is the owner of the stream, in the same sense that he is the owner of the land, until it comes into the possession of the appropriator, and may justly repel any attempt to interfere with such ownership at any place except that where the diversion was effected when his rights to the land attached. Nor is this necessarily a mere empty abstract right. The stream may add beauty to the landscape, or afford valuable fishing privileges, or furnish useful mechanical power, any of which elements of value would be liable to destruction if the prior appropriator may remove his point of diversion whithersoever he will after the inception of private title to the land in another person.

Our conclusion is supported by analogy also with the rule for many years enforced both in the federal courts and the courts of this state, that the right of property which the laws of congress allow to be acquired on the public domain shall not be initiated by trespass and intrusion on the actual possession of a prior occupant. McBrown v. Morris, 59 Cal. 64; Goodwin v. McCabe, 75 Cal. 588, 17 Pac. 705, and cases cited. In McBrown v. Morris this court, quoting with approval the language of Mr. Justice Miller in Atherton v. Fowler, 96 U. S. 513, concerning the acquisition of pre-emption rights, said: "The right to make a settlement was to be exercised on unsettled land. * * * It had reference to vacant land, to unimproved land; and it would have shocked the moral sense of the men who passed these laws if they had supposed that they had extended an invitation to the pioneer population to acquire inchoate rights to the public lands by trespass, by violence, by robbery, by acts leading to homicides, and other crimes of less moral turpitude." We regard this just and forcible statement as equally cogent in the present case. The new ditch over defendant's claim, established as a legal right of plaintiff by the judgment appealed from, was constructed in virtue of an intrusion on defendant's possession during the latter's temporary absence from his home, and through artificial barriers erected by him. Such acts, if tolerated at all, must certainly tend to the promotion of the evils prefigured in the language of the court just cited.

We have treated this subject somewhat at large because of its practical importance in the constantly expanding scheme of water development in this state, and because the result at which we have arrived seems to be at variance with parts of the argument, at least, on which rest some former decisions of this court (Osgood v. Mining Co., 56 Cal. 571; Farley v. Irrigating Co., 58 Cal. 142), in so far as those cases seem to hold that, by reason of the legislation of congress, the interest of the settler on government land with respect to appropriators of water on land claimed by him must be held to attach only at the time of the issuance of his patent, or at the earliest when he makes final proof and payment. The judgments announced in those cases may have been correct on their special facts. We do not pass on that question. But to the extent that they must find support in the proposition that the interest of a settler on the public lands under the pre-emption or homestead laws attaches as against the appropriators of water rights on his tract only as of the time of his final proof or obtaining a patent, they appear to be in conflict with the decision of the federal supreme court in Sturr v. Beck, 133 U. S. 541, 552, 10 Sup. Ct. 350; and the views of that court, as those of the tribunal of last resort in cases of this impression, must of course, prevail. See, also, Faull v. Cooke, 19 Or. 455, 26 Pac. 662; Black's Pom. Water Rights, §§ 40–42; Kinney, Irr. §§ 212–220. It follows that the defendant had the right to obstruct the flow of water across his claim in plaintiff's new ditch, and the court below erred in restraining him from so doing. And, since the plaintiff insisted on taking and did take the water by means and at a place unwarranted by his rights as a prior appropriator, it results further that the defendant, as entitled to the flow of the water after supplying the lawful requirements only of the plaintiff, had the right to use the same, and should recover the damages, if any, which he sustained by reason of the destruction of his dam and the filling of his ditch by plaintiff, and his consequent deprivation of the water.

2. But the plaintiff had the prior right to the use of the water to the extent of the appropriation made by his predecessors, Beekman and Crawford, through the old ditch, prior to defendant's settlement, together with the right to maintain such ditch. Brown's claims as a homestead settler were subordinate to those interests, and his land was subject to a servitude for the support of the same. De Necochea v. Curtis, 80 Cal. 397, 20 Pac. 563, and 22 Pac. 198; Wells v. Mantes, 99 Cal. 583, 34 Pac. 324. It would be inflicting a severe penalty for the trespass committed by Crawford on the land of Brown, and the attempt to shift the location of the ditch, to hold that by that circumstance alone Crawford lost for himself and his successor, the plaintiff, all prior right to the flow of the water itself. He certainly did not intend to abandon his interest in the water. Whether he abandoned his property in the former ditch, and the right to lead water through the same, is a question which has not been argued here or apparently litigated below, and ought not to be now decided; but the parties should be allowed, if they so desire, to amend or supplement their pleadings, and to have determined in the trial court the issue just suggested, and any other necessary to the adjustment of their relative rights under the law as stated in this opinion. It seems to us doubtful whether the finding to the effect that the first ditch, after its repair by Beekman in 1885, was of a capacity to carry 90 inches of water, is sustained by the evidence in the record; but, as the question is not important to the present decision, we mention it merely that the parties may have the matter in mind if it should become of moment upon another trial. We recommend that the judgment against the defendant and the order appealed from be reversed, and the cause remanded for a new trial and other proceedings not inconsistent with this opinion; both parties to the appeal having leave to amend their pleadings as they may be advised.

We concur: BELCHER, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment against the defendant and the order appealed from are reversed, and the cause remanded for a new trial and other proceedings not inconsistent with such opinion; both parties having leave to amend their pleadings as they may be advised.

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106 Cal. 616

## LOFTUS v. FISCHER. (No. 15,750.)

(Supreme Court of California. April 2, 1895.)

REFORMATION OF CONTRACT — MISTAKE OF LAW— PLEADING—DEFECTIVE DENIALS—DEMURRER.

1. Imperfect and defective denials, if acted upon as sufficient at the trial, do not admit the

allegations of the pleading which are attempted to be denied.

2. Where the record contains none of the evidence adduced at the trial, the findings of fact are conclusive as to the matters therein stated.

3. A written contract by which defendant agreed to sell certain shares of stock to plaintiff, and to look to such shares alone for payment of the purchase price, will not be reformed on the ground of mistake of law, in that plaintiff believed that only the dividends on the shares would be liable for his debt, where no fraud or misrepresentation is shown, and plaintiff executed such contract with full knowledge of its contents.

4. The omission of the court to pass upon a demurrer before rendering its decision in the case is not prejudicial error if, in fact, such demurrer had no merit.

Department 1. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Action in equity by Edward C. Loftus against Jacob A. Fischer to reform a written contract. From a judgment for defendant, plaintiff appeals. Affirmed.

James L. Crittenden, for appellant. Scrivner & Schell and Wheaton, Kalloch & Kierce, for respondent.

GAROUTTE, J. This is an action in equity to reform a written contract. Judgment went for the defendant, and an appeal is taken upon the judgment roll alone, without a bill of exceptions. The contract sought to be reformed was the result of the following state of facts: Loftus was the owner of 5,000 shares of stock of a certain mining corporation. Fischer was the owner of a much larger number of shares. Loftus desired to purchase of Fischer 6,800 shares. Fischer claimed that Loftus was already indebted to him in the sum of $5,000. The price agreed upon for the stock was $10,971.80, and no money was to be paid in hand at the time. As a result of these negotiations, the following contract was entered into between the parties: "Know all men by these presents, that the undersigned, Edward C. Loftus, * * * hereby acknowledges that he is indebted to Jacob A. Fischer, of the city and county of San Francisco, state of California, in the sum of fifteen thousand nine hundred and seventy-one and eighty-one one-hundredths ($15,971.81) dollars, the purchase price of eleven thousand eight hundred (11,800) shares of the capital stock of * * * mining company, * * * which said shares the undersigned, E. C. Loftus, has herewith deposited with said J. A. Fischer as security for said sum aforesaid; and the said E. C. Loftus does hereby agree to repay said sum, together with interest at the rate of eight (8) per cent. per annum from and after the 12th day of June, 1891, it being, however, understood and agreed that said Fischer is to look to said shares alone for payment of said sum of $15,971.81, and that no liability outside thereof is to attach to said Loftus." Plaintiff alleges that he was not indebted to defendant in the said sum of $5,000, and that defendant willfully and knowingly misrepresented the facts in reference thereto, and by his complaint he prays for a decree that he was laboring under a mistake of fact as to such matter, and further prays that the agreement be modified, "in so far as the same provided and recited that the plaintiff was or is indebted to the defendant in any other or greater sum than $10,971.80." He further asks for a decree that said agreement was signed and executed by the plaintiff under a mistake of law, in that he (the plaintiff) was laboring under a misapprehension of the law in regard to the legal meaning and effect of said agreement, and believed and supposed that said agreement provided that the indebtedness mentioned in said agreement should be paid only out of dividends declared on the said stock.

The complaint is loaded down with matter which we deem entirely immaterial to any question which can properly arise upon the merits of the case. An answer was filed, the case proceeded to trial, findings of fact and conclusions of law were also filed, and judgment for defendant duly entered. Appellant now asserts that the findings of fact are contrary to facts admitted by the pleadings, and in this regard declares that many of the denials of the answer are defective. It is a complete disposition of a great portion of counsel's argument on this branch of the case when we say that imperfect and defective denials, if acted upon as sufficient at the trial, are in no sense admissions of the allegations of a pleading which are attempted to be denied. Again, many of the matters admitted by the answer are wholly immaterial to the case, and, even though there should be findings of fact contrary to such admitted allegations, the contradictions would avail nothing.

The evidence is not before us, and consequently the findings of fact are conclusive as to the matters therein stated. In relation to the contract entered into by these parties, the court made the following finding: "On said 12th day of March, 1891, Loftus desired to purchase from Fischer 6,800 shares of said stock, and Fischer was willing to sell the same; but he (Fischer), on said 12th day of March, 1891, required of Loftus, as a condition to selling him said 6,800 shares of stock, that he (Loftus) should acknowledge an indebtedness of said $5,000 as being properly due on said 5,000 shares. The agreement was thereupon made between them that Fischer should convey to Loftus said 6,800 shares, and that Loftus should acknowledge an indebtedness to Fischer of an aggregate amount of $15,971.81." There is no admitted allegation of the complaint contrary to this finding, and it not only supports the judgment, but necessarily controls it against the plaintiff. This is not an action to rescind, but an action to reform. Under this finding the contract was an entirety, and was indivisible. It could not be reformed as desired. The plaintiff had to acknowledge it all, or repudiate it all. He had to take the bad with the good,—the fat with the lean. The other findings of fact may all be given to him, and yet the finding quoted will always stand in his way as an unsurmountable barrier to a recovery.

The contention as to mistake in law upon plaintiff's part in believing the advice of said Fischer that, under the contract, only the dividends upon the stock should be applied to the payment of the indebtedness, has no merit. Conceding, for present purposes, such mistake in law furnished sufficient ground for a rescission of the contract, it was no ground upon which to reform the contract, so that it might conform to plaintiff's intentions as to what the contract should be. For aught that appears to the contrary, the contract, upon its face and as it was written, expressed Fischer's intentions, and he had the same right to insist upon it standing as written as plaintiff had to reform it in consonance with what he intended it should be. To further dispose of this question, it might be suggested that the trial court found in detail that Fischer made no misrepresentations in this regard, and practiced no fraud upon plaintiff, and that plaintiff entered into the contract with a full knowledge of its contents and its meaning.

After the case was submitted for decision, defendant, by leave of the court, filed an answer to certain amendments to the complaint. Plaintiff demurred to this answer, and now insists that the court committed error in not passing upon the demurrer before rendering a decision in the case. The evidence is conflicting upon the question of service of the demurrer, and also leaves the matter in doubt as to whether or not the court in fact passed upon the demurrer prior to its decision upon the merits of the case; but we deem both matters entirely immaterial. The important question is, had the demurrer any merit? If the demurrer was in fact overruled by the trial court, then we must review that ruling. If the demurrer was not passed upon by the trial court, and yet possessed no merit, the plaintiff has not been prejudiced. A violation of the mere abstract right to have the court pass upon a demurrer is not prejudicial error. We must assume here that the trial court would have acted rightly and legally in disposing of the demurrer, and would have overruled it if the law demanded it. The plaintiff has no right to assume that the court would have done otherwise. Upon an examination of the demurrer, it is sufficient to say we see no merit in it.

For the foregoing reasons, the judgment is affirmed.

We concur: HENSHAW, J.; VAN FLEET, J.

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107 Cal. 37

## KRUMDICK v. WHITE. (No. 15,873.)

(Supreme Court of California. April 4, 1895.)

TERMINATION OF AGENCY — PRINCIPAL'S DEATH—RATIFICATION BY EXECUTOR—ESTOPPEL.

1. An agency created by an instrument authorizing the agent to conduct the business of the principal while the latter is disabled vests in the agent no interest in the subject-matter of the agency, and is terminated by the death of the principal.

2. A wife, by accepting part payment for goods belonging to the estate of her deceased husband, sold by one wrongfully claiming to be the husband's agent, is not estopped to deny such agent's authority, and recover the goods or their value from one who purchased them from the agent with knowledge of the terms of the instrument under which the latter claimed to act.

3. The acceptance by the executrix, decedent's widow, of the proceeds of a sale of property belonging to the state, by one claiming to act as decedent's agent, is not a ratification of such sale.

Department 2. Appeal from superior court, Lake county; R. McGarvey, Judge.

Action by Jennette Krumdick, executrix of the will of William Krumdick, deceased, against Daniel White. Judgment for plaintiff, and defendant appeals. Affirmed.

J. A. Cooper and Clay W. Taylor, for appellant. J. H. Seawell, for respondent.

HAYNES, C. Upon the first trial of this case the defendant had judgment, and the plaintiff appealed, and the judgment was reversed by this court. See 92 Cal. 143. After the reversal a new trial was had, which resulted in findings and judgment for the plaintiff, and defendant appeals therefrom, and from an order denying his motion for a new trial. The action is in claim and delivery to recover possession of certain personal property, with damages for its detention. William Krumdick died February 13, 1887. On January 4, 1887, during his last illness, he executed a certain instrument in writing to F. J. Edmunds concerning the property here in question, under which Edmunds sold the property, consisting of horses and wagons, to the defendant in April, 1887, after the death of Krumdick; and this instrument, it is contended by appellant, empowered Edmunds to confer a good title to the property by the sale. Upon the former appeal a construction was given to that instrument. It was there said: "The instrument was one which constituted Edmunds the agent of Krumdick, while disabled, to carry on his business as a hauler of freights, and to do all acts in that behalf which Krumdick could. But it did not vest any interest in Edmunds to the subject-matter of the agency confided and intrusted to him; and at Krumdick's death the power of Edmunds to sell ceased as to White, who had notice of Krumdick's death before the former purchased the property." This must be taken as the law of the case, and, unless new facts appear requiring a different construction, is conclusive of the correctness of the judgment.

It is urged that a paper intended to be signed by Krumdick's creditors, and which accompanied the instrument given to Edmunds, was not before this court upon the former appeal, and that the agreement intended to be signed by the creditors, and which was afterwards signed by some of them, requires a different construction of the principal instrument from that given upon the former appeal. Appellant is mistaken. It is true this creditors' agreement is not mentioned in the opinion, but it was printed in the transcript immediately following the instrument creating the agency of Edmunds, and must have been considered. If, however, the question were open, there is nothing in the creditors' agreement inconsistent with or requiring a different construction of the instrument given to Edmunds. If Edmunds' power or authority to sell the property terminated with Krumdick's death, as was conclusively settled upon the former appeal, the authorities cited by appellant upon the subject of trusts can have no application now, and need not be noticed.

It is also contended that the plaintiff is estopped from asserting a claim to the property in controversy. The evidence discloses the fact that the purchase money paid by defendant for the property was distributed by Edmunds among those creditors of Krumdick who presented their claims to him; that, among others, Mrs. Krumdick's attorney presented her claim for $300; and that she received her pro rata share of the proceeds, amounting to $124; and appellant contends that, because thereof, she is estopped from asserting that Edmunds had no power to sell the property and distribute the proceeds. But the evidence further shows that the defendant, the purchaser of the property, knew the terms of the instrument under which Edmunds sold the property, and also knew of Krumdick's death; and, if he was mistaken as to its legal effect, the plaintiff is not responsible for his error. And appellant expressly testified that plaintiff did nothing to influence him in any way; that he consulted an attorney, and acted upon the instrument alone. The facts concerning the power of Edmunds to sell being known, and not having been misled by the plaintiff, there is no room for an estoppel upon those facts. If the receipt by her, as a creditor, of her pro rata share of the money paid by the defendant for the property had any effect, it must have been by way of ratification; and appellant claims that it so operated. But this contention cannot be sustained. If Edmunds was not authorized to sell the property after Krumdick's death, as was settled upon the former appeal, the property belonged to his estate, and was assets to be administered by the executrix. Section 2312 of the Civil Code provides: "A ratification is not valid unless, at the time of ratifying the act done, the principal has power to confer authority for such an act." And section 2313, Id., provides: "No unauthorized act can be made valid, retroactively, to the prejudice of third persons, without their consent." It is hardly necessary to say that the plaintiff, whether as executrix or legatee, could not have authorized a sale of the property by Edmunds to the defendant, and therefore could not ratify such sale; and, besides, it appears from the evidence that neither the expenses of the last sickness of the deceased nor the funeral expenses had been paid, and these are preferred claims; and such ratification would operate to the prejudice of that class of the creditors of the estate, if no other.

The only errors assigned are that certain of the findings are not justified by the evidence, and, as the supposed insufficiency depends upon the questions discussed, the judgment and order appealed from should be affirmed.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

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106 Cal. 574

## In re CLOSE. (No. 15,831.)

(Supreme Court of California. March 23, 1895.)

INSOLVENCY—SUFFICIENCY OF PETITION BY CREDITORS—VERIFICATION—COSTS.

1. A petition by creditors to have their debtor adjudged insolvent, under Act April 16, 1880, § 8 (St. Cal. 1880, p. 82), is sufficient where it shows that the petitioners are all residents of the state, and the nature and amount of their several demands, and that they are due and accrued within the state, and the other facts required by such law showing that it is necessary to the preservation of the estate and the protection of creditors that the debtor be adjudged insolvent, and enjoined from receiving and disposing of his property and assets.

2. A verification of a petition by creditors to have their debtor adjudged insolvent, signed by three persons, one of whom is described therein as vice president of a certain corporation, one of the petitioners, is sufficient without setting out the facts of his election or appointment as an officer of the corporation, under Code Civ. Proc. Cal. § 446, providing that a verification may be made by any officer of a corporation.

3. A debtor whose petition therefor does not show the nature or value of his estate is not entitled to an allowance of his counsel fees and expenses in resisting proceedings by his creditors to have him adjudged insolvent, in the absence of any statute authorizing such an allowance.

Commissioners' decision. Department 2. Appeal from superior court, Humboldt county; G. W. Hunter, Judge.

Petition by certain creditors of Benjamin Close to have him adjudged an insolvent debtor. From a judgment granting the prayer of the petition, and an order denying his application for an allowance from his estate of money sufficient to employ counsel and pay costs and expenses, the said Close appeals. Affirmed.

John A. McQuaid, for appellant. Joseph Kirk and Ford & Burnell, for respondent.

SEARLS, C. This is an appeal by Benjamin Close from the judgment of the superior court in and for Humboldt county adjudging him an insolvent debtor, and from an order denying his application for an allowance from his estate of money sufficient to employ counsel, pay costs, expenses, etc.

The petition is in the following language: "In the Superior Court of the County of Humboldt, State of California. In the Matter of Benjamin Close in Insolvency. Creditors' Petition in Involuntary Insolvency. The petition of the hereinafter mentioned creditors respectfully shows: That said respondent, Benjamin Close, is indebted to the following petitioners, all residents of the state of California: To Root & Sanderson, a partnership, in the sum of $537.26, for goods sold and delivered to said Benjamin Close within twenty-three months last past. To H. Levi & Co., a partnership, in the sum of $136.30, for goods sold and delivered to said Benjamin Close within twenty-three months last past. To Seller Bros. & Co., a partnership, in the sum of $28.89, for goods sold and delivered to said Benjamin Close within twenty-three months last past. To Getz Bros. & Co., a partnership, in the sum of $79.05, for goods sold and delivered to said Benjamin Close within twenty-three months last past. To Wheaton, Breon & Co., a partnership, in the sum of $73.88, for goods sold and delivered to said Benjamin Close within twenty-three months last past. To J. A. Folger & Co., a corporation, in the sum of $285.81, for goods sold and delivered to said Benjamin Close within twenty-three months last past. That all said demands accrued in this state. That all said sums are due and unpaid, and have not been assigned to the petitioners in whole or in part. That said debtor resides and has his place of business in said county of Humboldt, state of California, and has permitted his property to remain under attachment for over four days; and that he is insolvent, and has so been before and ever since said attachment was levied on his property. That the said insolvent has no other property. That it is necessary for the preservation of the estate of said debtor that said debtor be restrained from receiving the payment of any debts, and the delivery of any property, and from transferring any property; and that all persons, corporations, or associations indebted to said debtor, or having in their possession property belonging to said debtor, be forbidden to make payment of such debts, or to deliver such property to said debtor, or to any one for the use of said debtor. Wherefore petitioners pray that the said debtor show cause, at a time and place to be fixed by this honorable court, why he should not be adjudged insolvent, and the surrender of his estate be made for the benefit of his creditors; that no creditor whose debt is provable under said act be allowed to prosecute to final judgment any action therefor against said debtor until the question of discharge shall have been determined, and that any and all suits and proceedings be stayed until the further order of the court; that all persons be forbidden to pay any debts to said debtor, or to deliver any property belonging to said debtor to him, or to any person, firm, corporation, or association for his use; that said debtor be forbidden to transfer or deliver any property; and that such further proceedings may be had as the law in such cases prescribes. Jos. Kirk and Ford & Burnell, Attorneys for Petitioners.

"State of California, City and County of San Francisco—ss.: E. M. Root, C. J. Paddock, and Paul Breon, being each severally sworn, doth say, on oath, that he is one of the petitioning creditors in this proceeding; that he has heard read the foregoing petition, and is acquainted with the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated upon his information or belief, and that as to those matters he believes it to be true; that said E. M. Root is a member of the firm of Root & Sanderson, one of the petitioners herein; that Paul Breon is a member of the firm of Wheaton, Breon & Co., one of the petitioners herein; that C. J. Paddock is vice president of J. A. Folger & Co. (a corporation), one of the petitioners herein. E. M. Root. C. J. Paddock. Paul Breon.

"Subscribed and sworn to before me, this 3d day of April, 1894. Samuel Rosenheim, Notary Public. [Seal of Notary.]"

The respondent therein, who is the appellant here, demurred to the petition upon the ground that it did not state facts sufficient to constitute a cause of action or petition under the insolvent act of 1880. The demurrer was overruled, and such ruling is assigned as error. The petition is sufficient within the rulings of the court in Wright v. Cohn, 88 Cal. 328, 26 Pac. 600, and In re Dennery, 89 Cal. 107, 26 Pac. 639. It shows that all of the petitioners are residents of the state of California; that the demands are due, and accrued in this state; the nature and amount of their several demands; and the other facts required by section 8 of the insolvent law, approved April 16, 1880 (St. 1880, p. 82). The demurrer was properly overruled.

A motion was also made to strike out the petition, "upon the ground that the same is not verified by three of the petitioners named therein." The motion was overruled, and error is predicated upon such ruling. As will be observed, the affidavit is by three persons, one of whom (C. J. Paddock) swears he is "vice president of J. A. Folger & Co. (a corporation), one of the petitioners." Section 446 of the Code of Civil Procedure provides, in reference to the verifications of pleadings, that, when a corporation is a party, "the verification may be made by any officer thereof." A vice president certainly is or may be an officer of a corporation, and, when he states under oath that he is such officer, it is sufficient. It is not more necessary for a vice president to set out the fact of his selection as an officer of the corporation than it would be for the president, secretary, or other officer to do so. A vice president, or one who acts in the place of and instead of the president, is an officer well known and recognized by the law in incorporated companies. His statement in an affidavit to a pleading that he is such officer is sufficient to give validity thereto.

The motion on the part of the appellant here for an allowance of $250 from his estate to employ counsel and pay expenses, etc., was properly refused for two reasons: (1) The law makes no provision for such an allowance. (2) The petition therefor was insufficient. It did not show the nature or value of the estate. It may well be that the sum asked was in excess of the entire assets of the estate of the insolvent.

The judgment and order appealed from should be affirmed.

We concur: VANCLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

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5 Cal. Unrep. 11

## BANK OF UKIAH v. GIBSON et al. (No. 15,662.)[1]

(Supreme Court of California. April 3, 1895.)

CHATTEL MORTGAGES—VALIDITY—NOTICE.

1. Civ. Code, § 2955, provides for chattel mortgages on certain property; and section 2957 provides that the record of such mortgages shall be constructive notice, and that mortgages not recorded shall be void as against subsequent creditors and purchasers. *Held*, that Act March 9, 1893, amending section 2955 so as to authorize mortgages on sheep and neat cattle, does not entitle a mortgage on such stock, executed before the passage of such act, to be recorded, so as to render its record, made after the passage of the act, constructive notice.

2. A chattel mortgage on property other than that authorized to be mortgaged by Civ. Code, § 2955, is as a common-law mortgage, valid against all persons except subsequent creditors of the mortgagor and bona fide purchasers.

Commissioners' decision. Department **1.** Appeal from superior court, Mendocino county; R. W. Crump, Judge.

Action by the Bank of Ukiah against E. S. Gibson and others to foreclose a mortgage. From a judgment denying plaintiff a foreclosure as to part of the property, it appeals. Affirmed.

J. A. Cooper, for appellant. J. M. Mannon, T. L. Carothers, J. W. Oates, J. Q. White, and J. H. Seawell, for respondents.

SEARLS, C. This is an action by the Bank of Ukiah (a corporation) to foreclose two mortgages executed by E. S. Gibson, to secure the payment of a promissory note made by him to said bank. One of the mortgages was upon certain real property, and the other a chattel mortgage upon 3,500 head of sheep, more or less, and 100 head of neat cattle, more or less, upon a certain ranch therein described. The court entered a decree in favor of plaintiff for the foreclosure of the mortgages and sale of the real property and the neat cattle, but denied a foreclosure as to the sheep. Plaintiff appeals from so much of the decree as denied to it a foreclosure and sale of the sheep, etc., described in the complaint and chattel mortgage. The cause comes up on the judgment roll, without a statement or bill of exceptions.

Under these circumstances, the question for determination is, do the findings support the decree? All reference to the mortgage upon the real estate may be omitted, as no question is made in regard to it. As to the chattel mortgage, the following facts, drawn from the pleadings as admitted and from the findings, will serve to an understanding of the legal question involved. On the 30th day of June, 1892, at Ukiah city, Mendocino county, the defendant E. S. Gibson made to the Bank of Ukiah, the plaintiff herein, his promissory note for $29,917.88, payable one year after date, with interest at 10 per cent. per annum, etc. To secure the payment of this promissory note, defendant executed to plaintiff a chattel mortgage upon certain personal property, then being upon that certain ranch of defendant Gibson, in the county of Mendocino, known as "Island Mountain Ranch," said personal property so mortgaged consisting of 3,500 head of sheep, more or less, and 100 head of neat cattle, more or less, being all the sheep and cattle owned by defendant Gibson on said ranch. The mortgage was made, executed, acknowledged, and verified in all respects as provided and required by section 2957 of the Civil Code, except that it was not recorded until May 9, 1893, when it was duly recorded in the office of the county recorder in and for the county of Mendocino, in which county the parties resided and the property was situate. The mortgagor, E. S. Gibson, retained possession of the mortgaged property. It may be remarked here, by way of parenthesis, as it is not within the findings, that, at the date of the execution of the mortgage, neat cattle and sheep were not among the articles of personal property upon which personal mortgages could be made under section 2955 of the Civil Code, but that on the 9th day of March, 1893, said section 2955 was amended so as to include "neat cattle, horses, mules, swine, and sheep, and the increase thereof." Subsequent thereto, and on the 9th day of May, 1893, the mortgage was recorded as before stated. After the recording of said mortgage, viz. after May 9, 1893, the defendant T. J. Welden, with full knowledge of the existence and recording of said mortgage, and without the knowledge or consent of the plaintiff, purchased from defendant E. S. Gibson, at the ranch of the latter in Mendocino county, the said neat cattle and sheep so mortgaged, and drove the sheep hence to Drury's corral, in the county of Humboldt, where on May 19, 1893, he sold and delivered them to the defendant Mrs. M. C. Drew, who purchased said sheep in good faith, for a valuable consideration, and without notice in fact of the mortgage of the plaintiff, and without knowledge that Gibson ever owned the sheep. The contract for the purchase of the sheep between Mrs. Drew and Welden was made at Ukiah, in Mendocino county, before the sheep were driven from said county, but she was not aware of that fact, and went with Welden to said Drury's corral, Humboldt county, the day the sheep were driven thither from Humboldt county, viz. May 19, 1893. Welden, when he purchased the mortgaged property from defendant E. S. Gibson, gave to the latter an agreement to pay $2.50 per head for the old sheep, and $20 per head for the cattle. Lambs and calves were to be thrown in. He has paid nothing on account thereof, and the court finds that said Welden "is not the owner of the neat cattle described in the complaint, and his title and claim thereto is not paramount to plaintiff's mortgage, and he is not the purchaser of said property in good faith or for value without notice." As before stated, the sheep were removed from Mendocino to Humboldt county May 19, 1893, and within 10 days thereafter, viz. May 29, 1893, plaintiff's chattel mortgage was duly recorded in said county of Humboldt. The chattel mortgage authorized the mortgagee, upon default in the payment of the promissory note, to take possession of all the mortgaged property and dispose of the same according to law.

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[1] Reversed in banc. See 41 Pac. 1008, 109 Cal. 197.

In the early history of California as a state, section 17 of the statute of frauds provided that "no mortgage of personal property hereafter made shall be valid against any other person than the parties thereto, unless possession of the mortgaged property be delivered to and retained by the mortgagee." In 1857 an act was passed under which certain personal property might be mortgaged by complying with its provisions, one of which involved recording, which should be valid without delivery of the property to the mortgagee. St. 1857, p. 347. This act provided also that such mortgages should not be valid (except between the parties) unless the statute was complied with. This act was again amended in 1861. St. 1861, p. 197. This last act also left mortgages of personal property absolutely void, except between the parties, save upon a compliance with its provisions, or where accompanied by a delivery of the property to the mortgagee and retention of possession by him. Under these statutes, the decisions of this court were to the effect: (1) The provisions of the statute only applied to the specific articles of personal property therein enumerated; (2) that where the provisions of the statute were not complied with, and as to mortgages of personal property not therein provided for, the mortgage was absolutely void (except between the parties thereto), unless accompanied by a delivery of the property to the mortgagee. Gassner v. Patterson, 23 Cal. 299; Meyer v. Gorham, 5 Cal. 323; Stringer v. Davis, 30 Cal. 318; Glenn v. Arnold, 56 Cal. 631. Under our Civil Code (section 2957), "a mortgage of personal property is void as against creditors of the mortgagor and subsequent purchasers and incumbrancers of the property in good faith and for value, unless (1) it is accompanied by the affidavit of all the parties thereto that it is made in good faith and without any design to hinder, delay, or defraud creditors; (2) it is acknowledged or proved, certified and recorded in like manner as grants of real property." The distinction between the former statute and the section of the Code quoted supra is this: Under the former law, a mortgage which failed to comply with its provisions was void as against purchasers. Now it is only void as against subsequent purchasers in good faith and for value; that is to say, against those who purchase without notice and for a valuable consideration. A mortgage of personal property not specified in section 2955 of the Civil Code may be made, and, if possession of the mortgaged property is delivered to the mortgagee, it is good against all the world. If no such possession is delivered to the mortgagee, it is still valid between the parties and against purchasers with notice. Tregear v. Water Co., 76 Cal. 537, 18 Pac. 658; Works v. Meritt (Cal.; decided Jan. 5, 1895) 38 Pac. 1109. Recording a chattel mortgage upon articles provided to be mortgaged by section 2955, Civ. Code, takes the place of and serves in lieu of the delivery of possession essential to the validity of the mortgage in other cases. Berson v. Nunan, 63 Cal. 550; Cardenas v. Miller (Cal.; decided March 13, 1895) 39 Pac. 783.

The case, then, stands thus: Plaintiff had a chattel mortgage, which at the date of its execution was valid between it and the mortgagor, and as against purchasers with notice, or without value, but which was void as against creditors or purchasers in good faith and for value, for two reasons: (1) Because the property mortgaged was not such as is specified in section 2955, Civ. Code, and the recordation thereof would not therefore have imported constructive notice; and (2) because possession of the mortgaged property was not delivered to the mortgagee. Subsequently, and before any purchaser intervened, the statute (section 2955, Id.) was amended so as to include among the articles which might be mortgaged under it neat cattle and sheep. Thereafter plaintiff recorded its mortgage, and, subsequently thereto, defendant Drew purchased the sheep without other notice than that imparted by the record. Did she take subject to the chattel mortgage of plaintiff, the appellant here? We are of opinion the question should be answered in the negative. Section 3 of the Civil Code provides that "no part of it is retroactive unless expressly so declared." We find no declaration showing a legislative intent to apply the amendment of 1893 to section 2955 of the Civil Code to past transactions, and hence must hold that it does not so apply. The case then stands thus: Plaintiff had an attempted chattel mortgage upon certain sheep, which, as against creditors and subsequent purchasers in good faith and for value, was absolutely void as a statutory mortgage, for the reason that it was given upon property not provided for in the statute, and therefore incapable of being mortgaged. Jones, Chat. Mortg. § 122; Stringer v. Davis, 30 Cal. 318; Gassner v. Patterson, 23 Cal. 299; Glenn v. Arnold, 56 Cal. 631; Dufficy v. Shields, 63 Cal. 333; In re Fischer, 94 Cal. 523, 29 Pac. 961. Such a mortgage, not being accompanied by possession in the mortgagee, lacked, as against innocent purchasers and creditors, the vitalizing force of law requisite to give to it effect, and fell stillborn. The amendment to section 2955, adopted March 9, 1893, made it possible thereafter to give chattel mortgages upon neat cattle and sheep, but did not and could not, unless it had a retroactive effect, breathe life into a dead mortgage of the past. To make a chattel mortgage of an instrument, which was not and could not possibly be such at the date of its execution, by force of a law subsequently passed, is to give a retroactive effect to such law. In Pennsylvania, a statute passed in 1833 required that a testator's mark to his name, at the foot of a testamentary paper, should be accompanied by his express direction to the person who wrote his name to write the same; and the court had decided that, without proof that the name was written by the express direction of the testator, the will was invalid. In 1848 the legislature passed a statute declaring that "every last will and testament heretofore made, or hereafter to be made, * * * to which the testator's name is subscribed by his direction, or to which the testator has made his mark or cross, shall be deemed and taken to be valid." Laws 1848, p. 16. In Greenough v. Greenough, 11 Pa. St. 489, the supreme court of that state held the amendatory statute invalid, so far as applicable to last wills executed before its passage. This ruling was upon constitutional grounds, and in the absence, so far as appears, of any statute like the third section of our Code, confining statutes to prospective action.

It follows that (1) independent of the chattel mortgage act, the mortgage was valid as against Gibson, the mortgagor, and Welden, who purchased with actual notice of its existence; (2) that as against the respondent Mrs. M. C. Drew, who was an innocent purchaser of the sheep for value, without notice, the mortgage was void, both as a common-law and a statutory mortgage of personal property. The judgment appealed from should be affirmed.

We concur: BELCHER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

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## BANK OF UKIAH v. GIBSON et al. (No. 15,663.)[1]

(Supreme Court of California. April 3, 1895.)

Department 1. Appeal from superior court, Mendocino county; R. W. Crump, Judge.

Action by the Bank of Ukiah against E. S. Gibson and others. From a judgment in favor of defendant Drew, plaintiff appeals. Affirmed.

J. A. Cooper, for appellant. J. W. Oates, J. Q. White, J. H. Seawell, T. L. Carothers, and J. M. Mannon, for respondents.

PER CURIAM. This is an action in claim and delivery, to recover the neat cattle and sheep described in the mortgage to foreclose which the action was brought in No. 15,662, this day decided by this court. 39 Pac. 1069. Plaintiff recovered the neat cattle described in its complaint. Defendant Drew had judgment in her favor for the sheep, wool, etc. Plaintiff appeals from so much of the judgment as is in favor of said defendant Drew. The judgment is affirmed, for the reasons given and upon the authority of No. 15,662, so this day decided.

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## BANK OF UKIAH v. GIBSON et al. (No. 15,722.)

(Supreme Court of California. April 3, 1895.)

Department 1. Appeal from superior court, Mendocino county; R. W. Crump, Judge.

Action by the Bank of Ukiah against E. S. Gibson and others. From the part of the judgment for plaintiff, defendant T. J. Weldon appeals. Affirmed.

J. W. Oates, J. Q. White, J. H. Seawell, T. L. Carothers, and J. M. Mannon, for appellant. J. A. Cooper, for respondent.

PER CURIAM. This is an appeal by defendant T. J. Weldon from so much of a judgment in claim and delivery as awards 64 head of neat cattle to the plaintiff, as against him. It is the same judgment as that from which plaintiff appeals in No. 15,663 (ubi supra), and, like that case, is affirmed, upon authority of No. 15,662, between the same parties, this day decided (39 Pac. 1069).

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106 Cal. 673

## BANK OF UKIAH v. MOORE et al. (No. 15,595.)

(Supreme Court of California. April 3, 1895.)

CHATTEL MORTGAGE — RECORD AS NOTICE — STATUTE — RETROACTIVE EFFECT — RIGHTS OF MORTGAGEE — INTERFERENCE BY THIRD PERSONS — EQUITABLE REMEDY.

1. Civ. Code, § 2955, provides for mortgages on certain kinds of property, and section 2957 provides that the record of such mortgages shall be constructive notice. *Held*, that since Civ. Code, § 3, provides that no part of the Code shall be retroactive unless it is expressly so pro-

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[1] Reversed in banc. 41 Pac. 1010.

vided, Act March 9, 1893, amending section 2955 so as to authorize mortgages on sheep and neat cattle, does not make a mortgage on such stock, executed before the passage of the act, a statutory mortgage, so as to render the record of it constructive notice.

2. A chattel mortgage on property other than that authorized by Civ. Code, § 2955, to be mortgaged, is valid as a common-law mortgage against all persons except creditors of the mortgagor and bona fide purchasers.

3. Since Civ. Code, § 2927, provides that a chattel mortgagee shall not have possession, unless the mortgage expressly so provided, the mortgagee has no remedy at law before default, in the absence of such a provision, against persons interfering with the mortgaged property, and therefore equity will interfere to protect it for him.

Commissioners' decision. Department 1. Appeal from superior court, Sonoma county; R. F. Crawford, Judge.

Action by the Bank of Ukiah against Reuben Moore and others. There was a judgment for defendants, and plaintiff appeals. Reversed in part.

J. A. Cooper, for appellant. J. W. Oates, J. H. Seawell, J. Q. White, J. M. Mannon, and T. L. Carothers, for respondents.

SEARLS, C. This is a bill for an injunction by the corporation plaintiff in aid of the preservation of certain personal property (neat cattle, sheep, etc.) upon which said plaintiff holds a chattel mortgage. Defendants demurred to the complaint, and moved the dissolution of an injunction issued in the cause, and for the discharge of a receiver appointed therein. The demurrers (two in number) to the complaint were sustained by the court, upon the grounds stated therein, viz. that the complaint did not state facts sufficient to constitute a cause of action. The injunction was dissolved, the receiver discharged, and, plaintiff having failed to amend, final judgment went for defendants. Defendant Mahulda C. Drew filed an answer with her demurrer. The other defendants did not answer. The appeal is by plaintiff from the final judgment and from the order dissolving the injunction.

The complaint to which the demurrers were interposed avers, in addition to the more formal portions thereof: (1) The execution, June 30, 1892, of a promissory note for $29,917.88, with interest, payable one year after date, by defendant Gibson to plaintiff, and the execution of a chattel mortgage as security for the payment thereof by said Gibson upon certain neat cattle and sheep described therein and upon the ranch of defendant Gibson in the county of Mendocino. (2) The mortgage complied with the requirements of section 2956 of the Civil Code, stated the occupation of the parties, and was accompanied by the affidavit, and was acknowledged and certified as required by said section, and was afterward, and on the 9th day of May, 1893, recorded as a chattel mortgage, etc. (3) All the mortgaged property is inadequate to pay the note, and the defendants are insolvent. (4) In violation of the covenants of the mortgage, and for the purpose of depriving plaintiff of its security, and since the recording of the mortgage, defendant Gibson has made a pretended sale of the mortgaged property to the other defendants, who have taken possession thereof, and are threatening to appropriate and convert the same to their own use, and will do so, and deprive plaintiff of its security, unless restrained by an order of court. (5) The value of the said property is $12,000. (6) Said pretended sale was without consideration, and was made and threatened to deprive plaintiff of its security. (7) Plaintiff is the owner of the note and mortgage, and is without remedy, unless the court shall interpose, grant an injunction, and appoint a receiver. The prayer is for an injunction, and for an order appointing a receiver, etc. The complaint was filed herein May 24, 1893, and consequently the note and mortgage of plaintiff were not then due and payable. This case grows out of the same transaction involved in Nos. 15,662, 15,663, and 15,722, this day decided (Bank v. Gibson, 39 Pac. 1069, 1071), and much that is said in the opinion in No. 15,662 is applicable here, and will not be repeated at length.

It will be observed from the foregoing statement that while the complaint avers the execution and recording of the mortgage as provided for by sections 2955 and 2957 of the Civil Code, in cases of mortgages on personal property, yet the articles mortgaged—sheep and neat cattle—were not among the articles provided to be mortgaged under said section 2955. It follows that the mortgage was not one the recording of which imparted constructive notice to the world. It is claimed by appellant that as section 2955 was amended March 9, 1893, so as to include, within the articles which under it can be mortgaged, neat cattle and sheep, the recording thereof, after the passage of the amendment, rendered it in all respects valid as a statutory mortgage. The answer to this proposition is that such a construction would give to the Code a retroactive effect, to make a statutory mortgage of that which was not such when it was executed. Section 3 of each of our four Codes declares that "no part of it is retroactive, unless expressly so declared." The amendment does not so declare, and cannot therefore be so construed. But, says the appellant, a mortgage or other instrument recorded before the existence of any registry law will be held to impart notice when thereafter a registry law is enacted authorizing the recordation of such instruments; and authorities are cited in support of the contention. Registry laws are usually not held to have a retroactive effect, except so far as they may affect vested rights. The theory of appellant, however, presupposes a valid instrument to record; and in the present instance the objection is, there was no valid statutory mortgage to be recorded, and as the statute provides for recording only those which may be made pursuant to section 2955, and in the manner designated in section 2957, the record could impart no constructive notice. But plaintiff had a mortgage upon the personal property described in its complaint, which was valid as a common-law mortgage between the parties, and as against all other persons except creditors of the mortgagor and subsequent purchasers in good faith for value. Tregear v. Water Co., 76 Cal. 537, 18 Pac. 658; Works v. Merritt (decided Jan. 5, 1895) 38 Pac. 1109; Civ. Code, §§ 679, 2924. The mortgage not being due at the date of suit brought, and not providing, so far as appears, for a change of possession of the mortgaged property, plaintiff, under section 2927 of the Civil Code, was not entitled to possession, and was without remedy at law. In many of the states it is held, as at common law, that a mortgage of personal property transfers the title and the right to immediate possession in the mortgagee, unless otherwise provided in the mortgage. Jones, Chat. Mortg. § 426. In such cases the mortgagee may bring replevin or trover for an interference with the mortgaged chattels, and, having a remedy at law, equity will not intervene. Such is not the rule in this state.

The complaint does not aver that the defendants had actual notice of the existence of the mortgage, but does aver that they were purchasers without consideration, which, if true, rendered the mortgage valid as against them. "The power of a court of equity to preserve the mortgaged property from destruction, so that it may answer the purpose of the mortgage, is undoubted. A bill for an injunction may be sustained where it is shown that this remedy is proper for the mortgagee's protection, although the time of payment set out in the mortgage has not arrived." Jones, Chat. Mortg. § 459, citing Dock Co. v. Mallery, 12 N. J. Eq. 93, 431; Rose v. Bevan, 10 Md. 466; Clagett v. Salmon, 5 Gill & J. 314; Maish v. Bird, 59 Iowa, 307, 13 N. W. 298. The complaint in this case states all the facts essential to invoke action by a court of equity for the preservation of the mortgaged chattels, and the demurrer should have been overruled; and, as the order dissolving the injunction was, except as to the defendant Drew, based upon the supposed insufficiency of the complaint, its dissolution was error.

As to the defendant Mahulda C. Drew, who answered denying the equities of the complaint, and showing that she was a purchaser of the sheep in good faith, without notice and for a valuable consideration, and who moved a dissolution of the injunction upon the complaint and her answer, the order of dissolution was proper.

The judgment appealed from should be reversed, and the court below directed to overrule the demurrer to the complaint; and the order dissolving the injunction should be reversed as to all the defendants except Mahulda C. Drew, and as to her it should be affirmed.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is reversed, and the court below directed to overrule the demurrer to the complaint, and the order dissolving the injunction is reversed as to all the defendants except Mahulda C. Drew, and as to her it is affirmed.

106 Cal. 628

## PEOPLE v. BUTTON. (No. 21,127.)

(Supreme Court of California. April 2, 1895.)

HOMICIDE—SELF-DEFENSE—INSTRUCTIONS.

1. One who makes a violent assault upon another is not justified in killing him in self-defense, after he has endeavored to abandon the difficulty, if the injuries inflicted by him were such as to deprive the person assaulted of his capacity to receive impressions concerning the assailant's design and endeavor to cease further combat.

2. It is error to give an instruction that a plea of necessity is a shield for those only who are without fault, and which assumes that, if the defendant was the aggressor, the quarrel could subsequently assume no form or condition whereby he would be justified in taking the life of the person assaulted by him in self-defense.

3. An instruction that defendant is entitled to an acquittal if, after he assaulted deceased, he endeavored in good faith to withdraw from the struggle, and, after an interval had elapsed between the first and final assaults, deceased attempted to shoot defendant, causing him reasonable apprehension of danger, is misleading in intimating that, if the affray was but one connected quarrel or altercation, defendant would have no right to kill in self-defense under any circumstances.

In bank. Appeal from superior court, San Bernardino county; G. E. Otis, Judge.

Prosecution against Charles Button for murder. From a conviction of manslaughter and the refusal of a new trial, defendant appeals. Reversed.

Byron Waters, Wm. A. Harris, and Waters & Shoup, for appellant. Atty. Gen. Hart, for the People.

GAROUTTE, J. The appellant was charged with the crime of murder, and convicted of manslaughter. He now appeals from the judgment and order denying his motion for a new trial. For a perfect understanding of the principle of law involved in this appeal, it becomes necessary to state in a general way the facts leading up to the homicide. As to the facts thus summarized there is no material contradiction. The deceased, the defendant, and several other parties were camped in the mountains. They had been drinking, and, except a boy, were all under the influence of liquor, more or less; the defendant to some extent, the deceased to a great extent. The deceased was lying on the ground, with his head resting upon a rock, when a dispute arose between him and the defendant, and the defendant thereupon kicked or stamped him in the face. The assault was a vicious one, and the injuries of deceased occasioned thereby most serious. One eye was probably destroyed, and some bones of the face broken. An expert testified that these injuries were so serious as likely to produce in the injured man a dazed condition of mind, impairing the reasoning faculties, judgment, and powers of perception. Immediately subsequent to this assault, the defendant went some distance from the camp, secured his horse, returned and saddled it, with the avowed intention of leaving the camp to avoid further trouble. The time thus occupied in securing his horse and preparing for departure may be estimated at from 5 to 15 minutes. The deceased's conduct and situation during the absence of defendant are not made plain by the evidence, but he was probably still lying where assaulted. At this period of time the deceased advanced upon defendant with a knife, which was taken from him by a bystander, whereupon he seized his gun, and attempted to shoot the defendant, and then was himself shot by the defendant, and immediately died. There is also some further evidence that deceased ordered his dog to attack the defendant, and that defendant shot at the dog, but this evidence does not appear to be material to the question now under consideration.

Upon this state of facts, the court charged the jury as to the law of the case, and declared to them in various forms the principle of law which is fairly embodied in the following instruction: "One who has sought a combat for the purpose of taking advantage of another may afterwards endeavor to decline any further struggle; and, if he really and in good faith does so before killing the person with whom he sought the combat for such purpose, he may justify the killing on the same ground as he might if he had not originally sought such combat for such purpose, provided that you also believe that his endeavor was of such a character, so indicated as to have reasonably assured a reasonable man that he was endeavoring in good faith to decline further combat, unless you further believe that in the same combat in which the fatal shot was fired, and prior to the defendant's endeavoring to cease further attack or quarrel, the deceased received at the hands of the defendant such injuries as deprived him of his reason or his capacity to receive impressions regarding defendant's design and endeavor to cease further combat." It is to that portion of the foregoing instruction relating to the capacity of the deceased to receive impressions caused by the defendant's attack upon him that appellant's counsel has directed his assault, and to which our attention will be addressed. The recital of facts indicates to some extent, at least, that the assault upon deceased was no part of the combat subsequently arising in which he lost his life; yet the events were so closely connected in point of time that the court was justified in submitting to the jury the question of fact as to whether or not the entire trouble was but one affray or combat. Section 197 of the Penal Code, wherein it says in effect that the assailant must really and in good faith endeavor to decline any further struggle before he is justified in taking life, is simply declarative of the common law. It is but the reiteration of a well-settled principle, and in no wise broadens and enlarges the right of self-defense, as declared by courts and text writers ever since the days of Lord Hale. It follows that the declaration of the Code above cited gives us no light upon the matter at hand, and from an examination of many books and cases we are unable to find a single authority directly in point upon the principle of law here involved. It is thus apparent that the question is both interesting and novel.

The point at issue may be made fairly plain by the following illustrations: If a party should so violently assault another by a blow or stroke upon the head as to render that party incapable of understanding or appreciating the conditions surrounding him, and the party assailed should thereupon pursue the retreating assailant for many hours and miles with a deadly weapon and with deadly intent, and, upon overtaking him, should proceed to kill him, would the first assailant, the party retreating, be justified in taking the then aggressor's life in order to save his own? In other words, did the first assault, producing the effect that it did, debar defendant (after retreating under the circumstances above depicted) from taking his opponent's life, even though that opponent at the time held a knife at his throat with deadly intent? Or, putting it more concisely, did the aggressor by his first assault forfeit his life to the party assaulted? Or, viewing the case from the other side, should a man be held guiltless who without right assaults another so viciously as to take away his capacity to reason, to deprive him of his mind, and then kill him because, when so assaulted, his assailant is unable to understand that the attacking party is retreating, and has withdrawn from the combat in good faith? In other words, may a defendant so assault another as to deprive him of his mind, and then kill him in self-defense, when he is in such a condition that he is unable to understand that his assailant has withdrawn in good faith from the combat? In order for an assailant to justify the killing of his adversary, he must not only endeavor to really and in good faith withdraw from the combat, but he must make known his intentions to his adversary. His secret intentions to withdraw amount to nothing. They furnish no guide for his antagonist's future conduct. They indicate in no way that the assault may not be repeated, and afford no assurance to the party assailed that the need of defense is gone. This principle is fairly illustrated in Hale's Pleas of the Crown (page 482), where the author says: "But, if A. assaults B. first, and upon that assault B. reassaults A., and that so fiercely that A. cannot retreat to the wall, or other non ultra, without danger of his life, nay, though A.

falls upon the ground upon the assault of B., and then kills B., this shall not be interpreted to be se defendendo." The foregoing principle is declared sound for the reason that, though A. was upon the ground and in great danger of his life at the time he killed B., still he was the assailant, and at the time of the killing had done nothing to indicate to the mind of B. that he had in good faith withdrawn from the combat, and that B. was no longer in danger. In Stoffer v. State, 15 Ohio St. 47, in speaking to this question, the court said: "There is every reason for saying that the conduct of the accused relied upon to sustain such a defense must have been so marked in the matter of time, place, and circumstance as not only clearly to evince the withdrawal of the accused in good faith from the combat, but also such as fairly to advise his adversary that his danger had passed, and to make his conduct thereafter the pursuit of vengeance, rather than measures taken to repel the original assault." It is also said in State v. Smith, 10 Nev. 106, citing the Ohio case: "A man who assails another with a deadly weapon cannot kill his adversary in self-defense until he has fairly notified him by his conduct that he has abandoned the contest; and, if the circumstances are such that he cannot so notify him. it is his fault, and he must take the consequences." It is therefore made plain that knowledge of the withdrawal of the assailant in good faith from the combat must be brought home to the assailed. He must be notified in some way that danger no longer threatens him, and that all fear of further harm is groundless. Yet, in considering this question, the assailed must be deemed a man of ordinary understanding. He must be gauged and tested by the common rule,—a reasonable man. His acts and conduct must be weighed and measured in the light of that test, for such is the test applied wherever the right of self-defense is made an issue. His naturally demented condition will not excuse him from seeing that his assailant has withdrawn from the attack in good faith. Neither his passion nor his cowardice will be allowed to blind him to the fact that his assailant is running away, and all danger is over. If the subsequent acts of the attacking party be such as to indicate to a reasonable man that he in good faith has withdrawn from the combat, they must be held to so indicate to the party attacked. Again, the party attacked must also act in good faith. He must act in good faith towards the law, and allow the law to punish the offender. He must not continue the combat for the purpose of wreaking vengeance, for then he is no better than his adversary. The law will not allow him to say, "I was not aware that my assailant had withdrawn from the combat in good faith," if a reasonable man so placed would have been aware of such withdrawal. If the party assailed has eyes to see, he must see; and, if he has ears to hear, he must hear. He has no right to close his eyes or deaden his ears.

This brings us directly to the consideration of the point in the case raised by the charge of the court to the jury. While the deceased had eyes to see and ears to hear, he had no mind to comprehend, for his mind was taken from him by the defendant at the first assault. Throughout this whole affray, it must be conceded that the deceased was guilty of no wrong, no violation of the law. When he attempted to kill the defendant, he thought he was acting in self-defense, and, according to his lights, he was acting in self-defense. To be sure, those lights, supplied by a vacant mind, were dim and unsatisfactory; yet they were all the deceased had at the time, and not only were furnished by the defendant himself, but the defendant, in furnishing them, forcibly and unlawfully deprived the deceased of others which were perfect and complete. But where does the defendant stand? It cannot be said that he was guilty of no wrong, no violation of the law. It was he who made the vicious attack. It was he who was guilty of an unprovoked and murderous assault. It was he who unlawfully brought upon himself the necessity for killing the deceased. It cannot be possible that in a combat of this character no crime has been committed against the law. Yet the deceased has committed no offense. Neither can the defendant be prosecuted for an assault to commit murder, for the assault resulted in the commission of a homicide as a part of the affray. For these reasons, we consider that the defendant cannot be held guiltless. Some of the earlier writers hold that one who gives the first blow cannot be permitted to kill the other, even after retreating to the wall, for the reason that the necessity to kill was brought upon himself. 1 Hawk. P. C. 87. While the humane doctrine, and especially the modern doctrine, is more liberal to the assailant, and allows him an opportunity to withdraw from the combat, if it is done in good faith, yet it would seem that, under the circumstances here presented, the more rigid doctrine should be applied. The defendant not only brought upon himself the necessity for the killing, but, in addition thereto, brought upon himself the necessity of killing a man wholly innocent in the eyes of the law; not only wholly innocent as being a person naturally non compos, but wholly innocent by being placed in this unfortunate condition of mind by the act of the defendant himself. We conclude, therefore, that the instruction contains a sound principle of law. The defendant was the first wrongdoer. He was the only wrongdoer. He brought on the necessity for the killing, and cannot be allowed to plead that necessity against the deceased, who at the time was non compos by reason of defendant's assault. The citations we have taken from Hale, the Ohio case, and the Nevada case all declare that the assailant must notify the assailed of his withdrawal from the combat in good faith before he will be justified in taking life. Here the defendant did not so notify the deceased. He could not notify him, for by his own unlawful act he had placed it out of his power to give the deceased such notice. Under these circumstances, he left no room in his case for the plea of self-defense.

2. The court gave the following instruction to the jury as to the law bearing upon the facts of the case: "And no man by his own lawless acts can create a necessity for acting in self-defense, and then, upon killing the person with whom he seeks the difficulty, interpose the plea of self-defense, subject to the qualification next hereinafter set out. The plea of necessity is a shield for those only who are without fault in occasioning it and acting under it. The court instructs the jury that if you are satisfied that there was a quarrel between the defendant and deceased, in which the defendant was the aggressor, and first assaulted the deceased by means or force likely to produce and actually producing great bodily injury to the deceased, and that the defendant thereafter in the same quarrel fatally shot the deceased, then you must find the defendant guilty, subject to this qualification." This instruction appears to have been given subject to some qualification, and as to the extent and character of the qualification the record is not plain. But, whatever it may have been, the vice of the instruction could not be taken away. The instruction is bad law, and no explanation or qualification could validate it. It is not true that the plea of necessity is a shield for those only who are without fault in occasioning it and acting under it. As we have already seen, this is the rigid doctrine declared by Sergeant Hawkins, but not the humane doctrine of Lord Hale and modern authority. The latter portion of the instruction is in direct conflict with the Stoffer Case, already cited, where the declaration of the same principle in a somewhat different form caused a reversal of the judgment. It was there said: "If this is a sound view of the matter, the condition of the accused would not have been bettered if he had fled for miles, and had finally fallen down with exhaustion, provided Webb was continuous in his efforts to overtake him. But this view is consistent with neither the letter nor the spirit of the legal principle." The instruction assumes that, if the defendant was the aggressor, the quarrel could subsequently assume no form or condition whereby the defendant would be justified in taking the life of the party assailed. The law of self-defense is to the contrary, and is clearly recognized to the contrary by the provision of the Penal Code to which we have already referred.

3. The court also gave the jury the following instruction to guide them in their deliberations: "If you find from the evidence that, prior to the time of the shooting of the deceased by the defendant, they had a quarrel and altercation, and that the defendant stamped or kicked the deceased in the face, and that defendant thereafter really and in good faith, although he was the assailant, endeavored to decline any further struggle before the homicide was committed, and that [after the first assault had ceased, and there had an interval elapsed between said first assault and the final assault, making said assaults respectively, although in some degree related to each other, yet substantially distinct transactions, each attended with its own separate circumstances] the deceased procured his gun, and made such an attempt to shoot defendant as gave the defendant reasonable ground to apprehend and fear that the deceased was about to take his life, or do him great bodily injury, and that, acting under such reasonable apprehension alone, defendant shot the deceased, then you will acquit the defendant; and this will be your duty, notwithstanding the defendant may have been in the wrong in first assailing or attacking the deceased." That portion of the charge inclosed in brackets embodied a modification of the original charge, as asked by counsel, and we think should not have been inserted. It had a tendency to mislead the jury, and the instruction was perfectly sound without it. The question as to the capacity of the deceased's mind to understand and appreciate was not an element involved in this charge, and with that the court was not then dealing; but, by the modification, it deprived the defendant of the right to go before the jury upon the plea of self-defense, if there was but one assault which led up to the homicide. The right of the defendant to act in self-defense was in no way dependent upon the commission of two assaults. If there was but one assault which caused the combat, even though that assault was a part of the combat, and was made by the defendant, still he had the right of self-defense if his subsequent conduct was such as to indicate to the assaulted party that he had withdrawn in good faith from the struggle. The effect of the modification was to plainly intimate to the jury that, if the whole affray was but one connected quarrel or altercation, then the defendant under no possible set of circumstances could be justified in law in killing his adversary. This is wrong. As to the true solution of the question by the jury which the court was then discussing, it was entirely immaterial whether or not there was one or two assaults.

We think the questions we have discussed dispose of all material matters raised upon the appeal.

For the foregoing reasons, the judgment and order are reversed, and the cause remanded for a new trial.

We concur: BEATTY, C. J.; HARRISON, J.; McFARLAND, J.; VAN FLEET, J.

(106 Cal. 638)

## PEOPLE v. JOCHINSKY. (No. 21,140.)

(Supreme Court of California. April 2, 1895.)

BURGLARY—INFORMATION—DUPLICITY—SUFFICIENCY OF EVIDENCE—FORM OF VERDICT.

1. An information for burglary, alleging that defendant entered a store with intent to steal in one county, and that he stole certain property, and removed it to another county, where the venue is laid, is not bad, as charging both burglary and grand larceny, under Pen. Code, § 786, providing that when property taken in one county by burglary has been brought into another county the jurisdiction of the offense is in either county.

2. A conviction of burglary is sustained by evidence that defendant was seen looking into a certain store on the evening before it was burglarized, and on being noticed walked rapidly away, and that some of the stolen goods were sold by him and some of his associates, who represented themselves as being merchants from a distant city, and that other portions were found on the premises occupied by defendant.

3. A verdict of guilty of burglary under an indictment charging burglary of a store in a certain county is not fatally defective in form because it does not specify the county in which the offense was committed; nor is it defective, as being both general and special, because it also contains the unnecessary statement, also alleged in the information, that the goods stolen were taken by defendant into another county, where the venue is laid.

Commissioners' decision. In bank. Appeal from superior court, city and county of San Francisco; Wm. R. Daingerfield, Judge.

Information against Martin Jochinsky for burglary. From a conviction of burglary in the first degree, and the overruling of a motion for a new trial, defendant appeals. Affirmed.

Robert Ferral, for appellant. Atty. Gen. Hart, for the People.

BELCHER, C. The information in this case was filed in the superior court of the city and county of San Francisco on the 15th of November, 1893. It charges that in March, 1893, the defendant and one Alexander Schenkovsky did feloniously and burglariously enter the store of one Morris Prince, known as the "IXL Dry Goods Store," in the city of Santa Rosa, county of Sonoma, state of California, with the felonious intent then and there and therein to commit larceny. It further charges that in the commission of the burglary the parties accused did then and there willfully, unlawfully, and feloniously steal, take, and carry away as proceeds of said burglary 15 suits of men's clothing, of the value of $15 per suit, and certain other described articles of clothing, all of the aggregate value of $434, lawful money of the United States, and the personal property of the said Morris Prince; and that thereafter in October, 1893, they brought, carried, and removed the said personal property into the city and county of San Francisco. The defendant demurred to the information upon the ground that it "charges more than one offense, to wit, burglary and grand larceny." The demurrer was overruled, and the defendant then pleaded not guilty. The case was tried, and the verdict was: "We, the jury, find the defendant guilty of burglary in the first degree; and we further find that the goods taken from Prince's store on the night of the 13th or 14th of April, 1893, were brought from Sonoma county into the city and county of San Francisco, state of California, by the defendant." A motion for new trial was subsequently made and denied, and thereupon judgment was entered that the defendant be punished by imprisonment in the state prison at San Quentin for the term of 10 years. From this judgment and the order denying his motion for a new trial the defendant appeals.

1. The first point made for a reversal is that the demurrer to the information should have been sustained; and in support of this point sections 954 and 1004 of the Penal Code are cited and relied upon. These sections provide that the indictment or information must charge but one offense, and that the defendant may demur to the indictment or information when it appears upon the face thereof that more than one offense is charged. But section 786 of the same Code also provides that "when property taken in one county by burglary, robbery, larceny or embezzlement has been brought into another, the jurisdiction of the offense is in either county," etc. Ordinarily, of course, the offense of burglary can be tried only in the county in which it is committed, but under the last-named section it can be tried in any county into which the property burglariously taken has been brought. To give the court in the latter county, however, jurisdiction of the offense, the facts showing that a burglary was committed and that property was burglariously taken and carried to the said county must be set out. It was so held in People v. Scott, 74 Cal. 94, 15 Pac. 384, where the court quoted, as indicating the true rule in such cases, the following language used in deciding the case of Haskins v. People, 16 N. Y. 344: "The difference between the two cases is this: Burglaries may be tried out of their proper counties in certain special cases, that is, where the goods burglariously taken are carried into another county by the offenders; but this is by positive law, and not because the burglary was actually committed in the county where the indictment is found, or in judgment of law is considered to have been committed there. The fact must, therefore, be set out which brings the case within the statute; but in the case of an indictment for a simple larceny, found in a county into which the thief has carried the property stolen in another county, the law adjudges that the offense was in truth committed there, and hence there is no occasion for a statement in the pleading of what occurred in the other county." The information complained of here simply complied with the rule thus indicated,

and hence the demurrer to it was properly overruled.

2. It is contended that the verdict was not justified by the evidence, because there was no sufficient evidence to prove that the burglary in the county of Sonoma was committed by the defendant, or that the property taken was carried by him into the city and county of San Francisco. The evidence to establish the defendant's guilt was circumstantial, and it would subserve no useful purpose to set out the circumstances in detail. It was proved, however, that during the nights of April 13 and 14, 1893, the store of Morris Prince in Santa Rosa was burglariously entered, and goods, consisting of various kinds of clothing, of the value of about $2,000, were stolen therefrom. It was also proved that in the evening before the burglary was committed the defendant was seen in Santa Rosa looking into the said store, and on being noticed he walked rapidly away. It was further proved that some of the stolen goods were sold in San Francisco by the defendant and his associate, who represented themselves to be Chicago merchants, and that they had brought the goods from Chicago, and that other portions of the goods were found in trunks and closets in a room occupied by defendant in San Francisco. Looking at all the testimony, we think it must be held sufficient to warrant the jury in finding that the burglary was committed by the defendant, and that the property taken had been brought by him into the city and county of San Francisco.

3. The last point made is as to the form of the verdict. It is objected that the verdict is both general and special, and that it is faulty because it does not specify where the burglary was committed. Burglary is divided into two degrees (Pen. Code, § 460), and it was necessary, therefore, for the jury to find, as it did, the degree of the crime of which the defendant was guilty. The information charged that the burglary was committed in the county of Sonoma, and the general verdict imported a conviction of the offense charged. It was not necessary that the verdict specify the county in which the offense was committed. Neither was it necessary for the verdict to specify that the goods were taken by defendant into the county of San Francisco, although, of course, there must have been proof of that fact. A general verdict of guilty implies proof of all facts necessary to a conviction. But the latter part of the verdict was mere surplusage, and results in no prejudice to appellant. We find no prejudicial error in the record. The judgment and order appealed from should be affirmed.

We concur: VANCLIEF, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

106 Cal. 682

## JAMESON v. HAYWARD et al. (No. 15,743.) [1]

(Supreme Court of California. April 3, 1895.)

PARTITION—SALE—REVERSIONARY INTEREST—EVIDENCE—MERGER.

1. In partition by an owner of an undivided interest in an estate for years against the owners of other undivided interests, one of whom is also the sole owner of the reversion, it is not error to order a sale of the estate for years without ordering that the reversion be sold with it, under Code Civ. Proc. § 752, providing for the partition of property which cotenants hold and are in possession of.

2. The mere opinions of witnesses that it would be prejudicial to the interests of the parties to sell the estate for years alone are properly excluded.

3. Where a cotenant on an estate for years is also the owner of the reversion, the estate for years will not be deemed merged in his reversionary interest, so as to prevent a separate sale in partition of the estate for years, where his interests would be jeopardized by the sale of such reversionary interest.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; J. M. Seawell, Judge.

Action by James S. Jameson against Alvinza Hayward and others for the partition of lands in which plaintiff and defendants were owners in common of an estate for years, the defendant Hayward being also the sole owner of the reversion. From a decree ordering a sale of the estate for years, and refusing to order a sale of the reversion, plaintiff and defendant George Brown appeal. Affirmed.

Wm. H. Chapman, Edwin G. Knapp, and Wm. B. Sharp, for appellants. Estee & Miller, for respondents.

SEARLS, C. This is an action for the partition of three 50-vara water lots in the city and county of San Francisco. The court found that the plaintiff was the owner of an undivided tenth of an estate for years, viz. an estate for 99 years, from March 16, 1851, in and to two of the three lots; that defendant George Brown is the owner of an undivided tenth interest of an estate for years, viz. an estate for 99 years, in the third lot; that the defendant Alvinza Hayward is the owner of the remaining nine-tenths of said estate for 99 years, in all the three lots, and is also the owner of the whole of the remainder or reversion, after the termination of said estate for 99 years. The court further found that actual partition could not be made of said property without great prejudice to the owners thereof, and ordered a sale to be made of 99-years estate. At the trial, plaintiff introduced evidence tending to show the relative values of the said estate for years and the reversion, and also as to the value of both titles, and testimony tending to show that the two, if sold separately, would realize less than if sold together. Testimony was also offered and rejected by the court tending to show that it would be prejudicial to the interests of the parties to sell the title for years without ordering a sale of the reversionary interest. Plaintiff and defendant Brown thereupon requested and moved the court to ascertain and settle the proportionate value of the future right and interest claimed by the defendant Hayward in said land, which the court refused to do, and the plaintiff and defendant Brown then and there excepted to such refusal by the court. The appeal by plaintiff is from the interlocutory judgment and decree determining the rights of the parties, and from an order denying his motion for a new trial. Defendant Brown appeals from the same decree only. By stipulation of the parties, the two appeals are brought up on the same record.

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[1] Rehearing denied.

The sole question involved in these appeals is this: Did the court below err in ordering a sale of the estate for 99 years in the land in which all the parties were tenants in common, and in refusing to order a sale of the reversion of which defendant Hayward is the sole owner? The contention of appellants is that a sale of both the common property of all the parties and the exclusive interest or property of Hayward should have been decreed. Section 752 of the Code of Civil Procedure reads as follows: "When several co-tenants hold and are in possession of real property as parceners, joint tenants or tenants in common, in which one or more of them have an estate of inheritance, or for life or lives, or for years, an action may be brought by one or more of such persons for a partition thereof according to the respective rights of the persons interested therein, and for a sale of such property or a part thereof, if it appear that a partition cannot be made without great prejudice to the owners." It will be observed from the foregoing section that in this state it is only the cotenants mentioned, who hold and are in possession of real estate, who can bring the action for partition, and it is only that real property which is thus held by them that can be partitioned. In some of the states their statutes are broad enough to include the holders of nearly every estate which can exist in lands as proper parties plaintiff in this statutory action. It is the cotenancy which gives the right to a partition. Several persons together may own a thing without being cotenants thereof, and in such a case, under a statute like our own, no partition can be had. McConnel v. Kibbe, 43 Ill. 12; Freem. Coten. § 431. It was the evils and inconveniences of cotenancy which gave rise to the writ of partition in the English courts, and it was to avoid these detriments to full and complete enjoyment of realty that statutes have been created to enforce partition. This court has gone to great length in upholding the right of a tenant in common to maintain the action where he had a right to the present possession, although not in actual possession. Martin v. Walker, 58 Cal. 590; De Uprey v. De Uprey, 27 Cal. 329; Morenhout v. Higuera, 32 Cal. 290; Hancock v. Lopez, 53 Cal. 371. Martin v. Walker has been followed by other decisions, and is the settled law of this state upon the question involved. It does not, however, go to the extent of holding that any person having an estate in land, but not holding as a coparcener, joint tenant, or tenant in common, can maintain an action for partition. It has often been said by the courts that the first inquiry in an action of partition is, is there such a cotenancy established as warrants the action? This question answered in the affirmative, the court must then determine the rights of the parties to the action, so far as it can be done. The power of the court in case a sale becomes necessary is not greater, nor its discretion to be exercised different, than in cases where a partition is made. It would, we think, hardly be contended in this case that, if the court had ordered a partition of the rights of the parties to the property as tenants for years, it would have been incumbent on the court, or even proper, to have awarded to either plaintiff or defendant Brown any share or interest with Hayward in the reversion. It is hard to comprehend how it becomes any more proper to do so in the case of a sale.

To trace the history of proceedings for partition from an early period in the jurisprudence of England to the present time, both at law and in equity, and to note the growth and development of the action, would consume much space, and be productive of but little good. It is sufficient to say that, while in this state the action is statutory, still the powers conferred upon courts by the statute are substantially those formerly exercised by the chancery courts in pursuit of the same object, and the methods employed by our Code are in the main but a reflex of those pursued under the former equity practice. It is equitable practice prescribed by law. Under it property may be divided in whole or in part. Compensation may be required of one for the greater value which he receives over that awarded to another. The statute evidently contemplates that a given estate or interest in the property may be sold, and the residue not sold. Section 755, Code Civ. Proc., which prescribes the manner of sale and the notice to be given, provides as follows: "The notice must state the terms of sale, and if the property or any part of it is to be sold subject to a prior estate, charge or lien, that must be stated in the notice." The estate for years in which all the parties have an interest has nearly half a century to run. Plaintiff and defendant Brown have no interest, legal or equitable, in the reversion, and no reason is perceived why a court, proceeding upon equitable principles, should enforce at their request the sale of the reversionary interest which does not concern them. But it is said that, when the estate for years and the reversion vested in defendant Hayward, there was a merger, and that as to him the estate for years has ceased to exist. In Dall v. Mining Co., 3 Nev. 535, the court, by Beatty, C. J., said: "Though partition had its origin in the common-law courts, it is a subject over which the courts of equity assume almost exclusive jurisdiction; and in disposing of the cases for partition the equities of the respective parties growing out of their ownership of the property, as tenants in common or otherwise, are taken into consideration, and disposed of upon the broad principles which govern its courts in the administration of justice." In consonance with these principles, equity will prevent or permit a merger as will best subserve the purposes of justice and the actual and just intent of the parties. McClain v. Sullivan, 85 Ind. 174; Fowler v. Fay, 62 Ill. 375; Andrus v. Vreeland, 29 N. J. Eq. 394; Watson v. Investment Co., 12 Or. 474, 8 Pac. 548. In other words, equity is not guided by rules of law as to merger. Rumpp v. Gerkens, 59 Cal 496; Bailey v. Richardson, 66 Cal. 416, 7 Pac. 910. In the absence of an expression of intention, if the interest of the person in whom the several estates have united, as shown from all the circumstances, would be best subserved by keeping them separate, the intent so to do will ordinarily be implied. Such is the rule enunciated in the cases cited supra. It needs but little argument to show that the interests of Hayward would be jeopardized by the sale of an interest in land vested in him, but which cannot be enjoyed by the purchaser for 45 years; and, as no corresponding benefit is discernible to any of the parties, the court below did not err in refusing to order a sale of the reversionary interest of defendant Hayward, or in rejecting the mere opinions of witnesses in the proffered testimony.

The judgment appealed from by plaintiff and defendant Brown, and the order appealed from by the plaintiff, and each of them, should be affirmed.

We concur: BELCHER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from by plaintiff and defendant Brown, and the order appealed from by the plaintiff, and each of them, are affirmed.

# CALIFORNIA REPORTER

## 40 PACIFIC REPORTER

106 Cal. 651

## GISELMAN et al. v. STARR. (No. 15,893.)

(Supreme Court of California. April 2, 1895.)

MORTGAGES—ASSIGNMENT BY TRUSTEE—GIFT—ACTION BY EXECUTORS—REAL PARTY IN INTEREST—MISTAKE IN DESCRIPTION.

1. Where a mortgage is executed to a trustee, "his assigns and successors," the trustee has implied power to assign the mortgage.

2. Evidence that a father, as guardian of his daughter's estate, included in the inventory thereof a note and mortgage, and that he had stated that he intended to give them to her, will not, in the absence of evidence of a formal assignment or indorsement, establish a gift to her.

3. In an action to foreclose a mortgage by executors who are prima facie owners of the instrument, defendant's objection that the action was not brought in the name of the real party in interest is without force, where there is no showing of a counterclaim or set-off against the real owner which is not available against plaintiffs, and it appears that the judgment in the action would protect defendant against other claimants.

4. In a suit to reform a mortgage which described the land as beginning "on line between sections 2 and 25 in township 14," and recited that the property so described was the same as that formerly conveyed by T. to Y., it appeared that T.'s deed described the land beginning "on line between sections 24 and 25 in township 14," and that sections 2 and 25 in township 14 were not contiguous, but that sections 24 and 25 were contiguous. *Held*, that a decree changing "2" to "24," on the ground of mistake, was justified.

Department 2. Appeal from superior court, Lake county; R. W. Crump, Judge.

Action by William Giselman and another, executors of the will of S. C. Hastings, deceased, against M. Starr, to foreclose a mortgage. Judgment for plaintiffs, and defendant appeals. Affirmed.

Thos. B. Bond and Woods Crawford, for appellant. Hudson & Sayre and W. W. Sanderson, for respondents.

HENSHAW, J. The appeals are from the judgment and from an order denying a new trial. Action by plaintiffs, as executors of the last will of S. C. Hastings, deceased, to reform, and, as reformed, to foreclose, a mortgage executed by defendant. Starr executed the note and mortgage in suit to William Giselman, trustee, in payment and cancellation of an existing note, also secured by mortgage, made by him to S. C. Hastings. A few days thereafter, Giselman indorsed the note, "Pay to the order of S. C. Hastings, without recourse. William Giselman, Trustee,"—and delivered it to Hastings. At the same time he executed, as trustee, an assignment to Hastings of the mortgage. These papers, upon the death of Hastings, coming into the hands of the executors, of whom Giselman is one, this action was in due time commenced. The defendant meets it by answer and cross complaint, whereby he claims that he executed the note and mortgage to Giselman as trustee for the use and benefit of the daughters of said Hastings; that, at the time of the assignment to Hastings, he knew this fact, and, so knowing, took the note and mortgage without consideration; that thereafter Ella Hastings, daughter of S. C. Hastings, acquired by gift all of the interest of S. C. Hastings in the note and mortgage; and that the action is not prosecuted by the real parties in interest. The named beneficiaries of the trust and the widow of S. C. Hastings are interpleaded as having or claiming some interest in the mortgage and note, and are brought in under averments that, without a determination of their rights, defendant cannot tell to whom to pay the amount found due, nor with safety redeem in the event of a sale. Plaintiff's answer to the cross complaint does not, in terms, deny that the note and mortgage were executed to Giselman as trustee for the use and benefit of the named children of S. C. Hastings, but does deny that they are or ever have been the property of the children, or any of them. Upon all other material averments of the cross complaint it joins issue. The children and others interpleaded by defendant, one and all, filed disclaimers, and in this state of the pleadings the trial was had. The death of Hastings and their appointment as executors admitted, plaintiffs introduced the note with its indorsement, the mortgage and the assignment of it, and rested upon this direct evidence and the presumptions arising from it. Code Civ. Proc. § 1963, subds. 8, 11, 21, 22; Civ. Code, §§ 1614, 3104, 3122–3124.

1. The first point presented by appellant is that the transfer by Giselman to Hastings is void, since the note and mortgage are the only instruments creating and containing the terms of the trust, and there is nothing in them to show that Giselman had the power to sell or assign. If the note and mortgage are the only instruments creating the trust, then is the trust radically defective in naming no beneficiaries. Civ. Code, § 2221. But aside from this, and treating the instruments as defining the powers of the trustee, there is contained in them, by necessary implication, the power to the trustee to sell or assign; for the promissory note is made payable to Giselman, trustee, or order, and the mortgage was also to Giselman, trustee, his assigns and successors. No evidence having been offered to overcome the presumption that Hastings took the note and mortgage for value, the transfer to him was not in violation of the trust but was valid.

2. In support of the contention that the interest of S. C. Hastings in the note and mortgage passed by gift to his daughter Ella, it is shown that Ella was incompetent, and that the father applied for and obtained letters of general guardianship over her and her estate. In the inventory of her estate, which is duly verified by the guardian, the note and mortgage are entered as the property of the incompetent. The note was exhibited to the appraisers by or at the instance of Hastings, and by them appraised at a valuation suggested by him. The clerk of the court testified that, at the time of the application for letters of guardianship, the father expressed sympathy and anxiety for his afflicted child, and said he was making provision for her, and desired to make such provision while he was living. "He said he had not yet turned over anything, but expressed his desire to do so." This array of facts and circumstances makes a strong presentation of the intent of Hastings to give the note and mortgage to his daughter. It is established that upon one occasion, under oath, he declared them to be her property. But such a declaration, how-

ever binding in good morals, is not of itself sufficient to establish a gift. No legal duty was imposed upon Hastings to give this particular property to his daughter, and, if the intended donation lacked anything of consummation, the promises or declarations were but nudum pactum, and not enforceable. It is not here a question of acceptance of the gift by the incompetent, which, the gift being advantageous to her, the law would presume; but the question is whether the gift was so completely made as to enable the law to presume its acceptance. To every gift delivery is essential. Says Chancellor Kent, speaking of negotiable instruments: "Delivery in this, as in every other case, must be according to the nature of the thing. * * * It must be the true and effectual way of obtaining the command and dominion of the subject. * * * If the thing given be a chose in action, the law requires an assignment or some equivalent instrument, and the transfer must be actually executed." The Civil Code declares that "a verbal gift is not valid, unless the means of obtaining possession and control of the thing are given, nor if it is capable of delivery, unless there is an actual or symbolical delivery of the thing to the donee." Section 1147. Hastings' attempted or intended gift fell short of these requirements. Lacking his indorsement of the note, his possession remained a possession in his personal, and not in his representative, character, and the gift failed of completion. What has been said renders unnecessary any consideration of the points presented by appellant, that Ella Hastings' guardian was a volunteer, who appeared without service of summons or cross complaint upon either the ward or herself, and that she had no power to disclaim or to bind the ward by disclaimer.

3. The defendant has a statutory right to have a cause of action against him prosecuted by the real person in interest (Code Civ. Proc. § 367); and it was in the exercise of that right that he pleaded lack of title in plaintiffs, and asked to have determined the conflicting claims of those whom he asserted to be the owners. But the purpose of the statute is readily discernible, and the right is limited to its purpose. It is to prevent a defendant against whom a judgment may be obtained from further harassment or vexation at the hands of other claimants to the same demand. It is to prevent a claimant from making a simulated transfer, and thus defeating any just counterclaim or set-off which defendant would have to the demand if pressed by the real owner. But where the plaintiff shows such a title as that a judgment upon it satisfied by defendant will protect him from future annoyance or loss, and where, as against the party suing, defendant can urge any defenses he could make against the real owner, then there is an end of the defendant's concern, and with it of his right to object; for, so far as he is interested, the action is being prosecuted in the name of the real party in interest. The cases which seemingly lay down the broad rule that it is not a good plea to allege that the note sued upon is the property of another, and not of plaintiff, without showing some substantial matter of defense against the one asserted to be the owner, are to be read in the light of their facts, and so read they will be found to be in strict accord with what is here said. They are cases where prima facie legal title is shown in plaintiff, such a title as would protect defendant if judgment were obtained upon it. If, under such circumstances, the defendant claims another to be the real owner, he must support his right to make that claim by showing that he has some equity or defense against the real owner which he cannot maintain against the prima facie legal owner. Such is the meaning of Price v. Dunlap, 5 Cal. 483, and Gushee v. Leavitt, Id. 160. In the case under consideration the plaintiffs are prima facie legal owners, as executors, of the note and mortgage. Defendant is fully protected against those whom he names as owners and claimants by the judgment in favor of plaintiffs, and, in addition, he neither pleads nor shows any defense or set-off which he could make against the real owner, were Ella Hastings declared to be such. Therefore, by satisfying the present judgment, defendant is discharged from liability to all of the alleged conflicting claimants; and, since he does not dispute the debt nor its amount, this is all that in equity he can ask or should desire.

4. The complaint sufficiently pleaded facts which, if proved, would entitle plaintiffs to a reformation of the description of the second tract of land mortgaged. In the mortgage the description began "at meander post on line between sections 2 and 25 in township 14 north, of range 10 west, M. D. M.," etc. It was sought to change "2" to "24," making it read "between sections 24 and 25." This reformation the court ordered. The evidence, it is contended, does not support the finding. The evidence is in some respects confusing and unintelligible. The witness Starr speaks of the land by descriptions foreign to that of the mortgage, and without the judicial knowledge of this court, though doubtless well understood by the trial judge and counsel. We cannot be expected to know judicially where the "mill property" is, or where "the fence stood about where the west line of Main street is now," nor much about a description "which goes about down to the China House, and runs west along the section line about 700 feet," and other such discussions of boundaries with which the record abounds. But through the mists enough can be discerned to show that the finding is justified and supported. The mortgage declares that the tract described is the same heretofore conveyed by A. F. Tate to L. A. Young. Tate's deed contains the description contended for by plaintiffs. Defendant is given the description claimed, and asked if, assuming it correctly

describes the property on which the flour mill rests, he meant to mortgage it. He replies, "Yes," but says he "understands it is not a proper description." The Young deed would seem to show that it is. He also says that the meander corner must be on the north line of section 25, "the section line between 24 and 25." Construing the description given in the mortgage, sections 2 and 25 of township 14 are not contiguous sections, while sections 24 and 25 are. Altogether there is sufficient evidence to support the finding of mistake, and to justify the decree of correction.

The averments in the cross complaint, which it is complained were not found upon by the court, were either admitted or sufficiently covered by the findings actually made. The judgment and order appealed from are affirmed.

We concur: McFARLAND, J.; TEMPLE, J.

106 Cal. 621

## PEOPLE ex rel. SCHNELL v. SAUSALITO LAND & FERRY CO. (No. 15,847.)

(Supreme Court of California. April 2, 1895.)

Review on Appeal—Findings.

Where the findings of the court are supported by the evidence, the judgment based thereon will not be disturbed on appeal.

Department 2. Appeal from superior court, Marin county; F. M. Angellotti, Judge.

Action by the people on the relation of John Schnell against the Sausalito Land & Ferry Company to abate a nuisance. Judgment for defendant, and plaintiff appeals. Affirmed.

Atty. Gen. Hart and Hepburn Wilkins, for appellant. Robert Harrison, for respondent.

McFARLAND, J. This is an action brought in the name of the people, at the request of the relator, Schnell, to obtain a judgment declaring certain obstructions alleged to have been put in a public street by defendant to be a nuisance, and decreeing that they be abated, and that defendant be enjoined from further maintaining them. Judgment was rendered for defendant, and plaintiff appeals from the judgment and from an order denying a new trial. The things alleged as constituting the obstructions are that respondent wrongfully erected a fence and some buildings upon and across a certain public street in the town of Sausalito, known as and called "Water Street" or "Water Avenue." But the court found "that defendant at no time built or erected, placed or maintained, on any part of said Water street, or on any other public way, any structure or obstruction whatever," or that it threatened so to do. This finding is entirely determinative of the case against appellant, unless the latter can show that it has no reasonable support in the evidence, and this it fails to do. The court finds (in brief) that Water street runs northerly and southerly along the edge of the water on the westerly shore of the bay; that the fence and buildings complained of were erected on an artificial wharf and ferry landing which respondent constructed, partly of rock and dirt and partly of wooden piles and frame work, between Water street and deep water; that said wharf and ferry landing are east of the easterly line of Water street, and are the private property of respondent, free from any public right or easement; and that said fence and buildings do not "in any manner prevent the free and comfortable use and enjoyment by the public of said Water street, and of every part thereof." We are satisfied that these findings are amply supported. The evidence could not be intelligibly reviewed without making references to maps, deeds, ordinances, dedications, and other documents, in addition to considerable oral testimony, and such a review of the evidence here would serve no useful purpose. There are only two errors of law assigned in rulings upon the admissibility of evidence, and they are of no substantial importance. The judgment and order appealed from are affirmed.

We concur: TEMPLE, J.; HENSHAW, J.

106 Cal. 646

## EMERIC v. ALVARADO et al. (No. 52.)

(Supreme Court of California. April 2, 1895.)

Dismissal of Appeal—Failure to File Transcript.

Where an appeal is to be considered as to certain parties upon the judgment roll alone, without a bill of exceptions, and no transcript is filed or served within the time fixed by the rules of the court, the appeal as to such parties will be dismissed, upon their motion, notwithstanding the fact that a bill of exceptions, to be considered as to other parties in the same appeal, has not yet been settled.

In bank. Appeal from superior court, city and county of San Francisco.

Motion by Emily S. Tewksbury and other defendants to dismiss an appeal taken on behalf of Leota K. T. Gutierrez in an action by Henry T. Emeric against Henry V. Alvarado, administrator, and others. Motion sustained.

T. M. Osmont, for appellant. C. H. Lindley, for respondents.

PER CURIAM. Motion to dismiss the appeal. An appeal from certain portions of the final decree in partition entered herein was taken on behalf of Leota K. T. Gutierrez, one of the defendants, March 23, 1894, and certain of the respondents have moved to dismiss the appeal, under rule 5 of this court, upon the ground that the transcript on appeal has not been filed. The appellant seeks to avoid the effect of the rule by showing that she has served upon the attorney for the plaintiff the draft of a bill of exceptions containing the errors of the trial court, and matters relating thereto, which she desires to have considered upon the appeal, and that the trial judge has not yet settled this bill of exceptions. The draft of this bill of exceptions was not served upon the attorneys for the parties moving herein, and the affidavits on their behalf that no statement or bill of exceptions has been proposed to or served upon them are not controverted by the appellant. As the record to be considered upon the appeal as to these respondents consists of the judgment roll alone, without any bill of exceptions, it was incumbent upon the appellant to file the transcript within the time prescribed by rule 2. The right of the respondents to have the appeal dismissed as to them, for failure to file the transcript within this time, cannot be prejudiced by the fact that the appellant has included with them, in the same notice of appeal, another party to the action, between whom and herself she desires a bill of exceptions to be considered in connection with the judgment roll, and which has not been settled.

The motion must be granted, and it is ordered that the appeal be dismissed as to the respondents Emily S. Tewksbury; George Leviston; W. W. Sanderson; Lafayette I. Fish; Simon Blum; Isabella Castro De O'Neil; Frank Silveira Soito; Frank Silveira Soito, as administrator of the estate of Rosa G. Moitozo De Soito, deceased; Philip G. Galpin; Victor Castro; Richard O'Neill; and John P. Prendergast; Richard O'Neill and William Gleason, as trustees and cestuis que trustent; and Richard P. Hammond, Jr., Albert E. Crane, and John F. Sheehan, referees in partition; George F. Allardt, surveyor in partition; Bernardo Andrada; Dolores Castro De Barovich; Frederich Blume; James Curry; John Fay; Ann S. Galvin, executrix of the will of William Galvin; Kate Griffins, administratrix of Owen Griffins; Theodore H. Hittell; Thomas R. Horton; William H. Horton; Eugene Le Roy; Georges Le Roy; John McLure; Thomas W. Mulford; James Mulholland; Northern Railway Company; Francisco Silveria De Rose; Rene De Tocqueville; Anita Castro De Soto; and Thomas B. Wright.

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106 Cal. 623

## LION v. McCLORY. (No. 15,787.)

(Supreme Court of California. April 2, 1895.)

RESCISSION OF CONTRACT.

Defendant, in an action to foreclose a purchase-money mortgage, sought to rescind the purchase on the ground of fraudulent representations. It was found that he had purchased the land from a real-estate agent, without the knowledge of the owner, who afterwards ratified the sale; that no representations were made by the owner; that the defendant had resided within a short distance of the land for several years, and had ample opportunity to judge of its value; that he had placed the land on the market after purchasing it, and had made no complaint for two years, and until after suit was begun to foreclose the mortgage. *Held*, that judgment for plaintiff was sustained by the findings.

Department 2. Appeal from superior court, Santa Clara county; John Reynolds, Judge.

Action by Lazard Lion against Henry McClory. Judgment for plaintiff, and defendant appeals. Affirmed.

Wm. F. Veuve, for appellant. Jackson Hatch and E. M. Rosenthal, for respondent.

McFARLAND, J. This is an action to foreclose a mortgage executed by defendant to plaintiff to secure purchase money of the mortgaged premises, which had been sold and conveyed by the latter to the former. The defendant, in a cross complaint, set up that he had been induced to purchase the premises by certain false and fraudulent representations concerning the same made by the plaintiff, and prayed that the sale be rescinded, and that the mortgage, as well as a certain cash payment, be delivered up and restored to said defendant. The court rendered judgment for plaintiff, foreclosing the mortgage, and denying the prayer of the cross complaint. Defendant appeals from the judgment. The appeal is based entirely upon the judgment roll, which includes findings, and we see nothing on the face of the record to warrant a reversal. The findings negative some of the averments of the cross complaint, but appellant contends that upon the facts found the judgment should have been for the defendant. The facts found are, briefly, these: Respondent never made any representations of any kind to appellant; but in the spring of 1891 an enterprising real-estate agent, without any authority from respondent, who was the owner of the land, and without the knowledge of respondent, commenced negotiating with appellant for the sale of said land to the latter. He (the agent) represented to appellant that the land "was worth sixteen or seventeen thousand dollars"; and he, at the time he made the representation, believed that it was worth that amount "for the purpose of subdivision into lots." The appellant believed said representation and relied thereon in making the purchase. On April 10th a written receipt was signed, which showed that appellant was to purchase the land for $13,500,—$3,000 to be paid in cash, and two notes, for $5,250 each, to be given and secured by mortgage. This receipt was shown to respondent on said April 10th, who before that had known nothing of the matter, and he wrote on it, "I approve this sale." The transaction was not completed until June 2, 1891, when appellant paid respondent $3,000, and executed the said two notes and mortgage upon which this action was brought. It is found that on June 2, 1891, "the actual market value" of the said land was $8,188.83. At that time the appellant resided, and for many years prior thereto had resided, "within one-third of a mile of said land," and was "well acquainted with the same," and "might easily" have "ascertained the true market value of said land." On said June 2, 1891, the appellant "entered upon said land, and has remained in possession ever since, collecting the issues, rents, and profits thereof, and applying them to his own use"; and at no time until after the commencement of this action, which was August 25, 1893, more than two years afterwards, did appellant make known to respondent any objection to said purchase, or to the price, or "any objection connected with or arising out of said purchase." Respondent knew nothing of the representations made by said real-estate agent, although it is found that he knew "the actual market value of said land." The appellant, immediately after he took possession, on June 2, 1891, employed said real-estate agent to sell said land, who kept the same exposed for sale for two years and until his death, which occurred just before the commencement of this action. When the action was commenced the appellant for the first time undertook to repudiate the purchase and to demand a rescission. Upon these findings judgment was properly rendered for respondent. Conceding that respondent was responsible for the representations of the agent, who had acted without his authority or knowledge, still the case is barren of any right of appellant to repudiate the purchase after the commencement of the suit. The representation as to the value of the land was clearly a mere expression of opinion, upon which appellant had no business to rely. The representation was not of the value of land in Texas, or some other remote place. The land was right under appellant's nose; he had known it for years, and had as good opportunity as the agent to form an opinion of its character and value; and to set aside a sale of land because the vendor or the real-estate agent who sold it had exaggerated its value would be to invalidate nearly every sale which a real-estate agent ever made. Moreover, the appellant waited for more than two years to see if his speculation would turn out successfully before he made any sign of dissatisfaction, and this he could not do. The court found that there was no misrepresentation as to the quantity of the land. Appellant contends for a reversal because there is no finding as to the averment of the cross complaint that the agent falsely represented "that plaintiff's sons did not wish plaintiff to sell the same because they desired to build homes for themselves thereon." Whether this omission was from inadvertence, or from a belief of the court that the averment was immaterial, does not appear. It was clearly of no consequence; and a finding that the averment was true would, under the circumstances, have made no difference in the result. The judgment is affirmed.

We concur: HENSHAW, J.; TEMPLE, J.

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(5 Cal. Unrep. 5)

## In re WALKERLEY'S ESTATE. (S. F. No. 6.) [1]

Appeal of DOUGHTY et al.

(Supreme Court of California. April 2, 1895.)

APPEAL—NOTICE—DISMISSAL.

An appeal will be dismissed, where notice was not served on all parties interested.

Department 2. Appeal from superior court, Alameda county; W. E. Greene, Judge.

Appeal by Mary S. Doughty and others in the matter of the estate of William Walkerley, deceased. Dismissed.

Fox, Kellogg & Gray and B. B. Newman, for appellants. H. Firebaugh, Fred. E. Whitney, and Rogers & Paterson, for respondents.

PER CURIAM. The order heretofore made, denying the motion to dismiss three certain appeals of Mary S. Doughty and others, is hereby vacated; for, upon further examination of the papers and records, it appears that notice of the first appeal—that from the decree of distribution—was not served upon all of the parties in interest, for that it was not served upon F. E. Whitney, Esq., representing William Bacon and others, and that, therefore, it should be dismissed. Also, as to the appeals attempted to be taken from "the order, judgment, and decree settling the final account of executors," no opposition being made to the motion to dismiss, and it being conceded upon argument by appellants' attorney that the said last-mentioned appeals are imperfect, and have been abandoned, it is hereby ordered that each and all of said appeals be, and the same are hereby, dismissed.

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(106 Cal. 648)

## PEOPLE v. REILLY. (No. 21,172.)

(Supreme Court of California. April 2, 1895.)

CRIMINAL LAW — DEPOSITION TAKEN AT PRELIMINARY EXAMINATION—ADMISSIBILITY.

1. An objection to a deposition, taken at the preliminary examination of accused, on the ground that Pen. Code, § 869, subd. 5, requiring the reporter to transcribe his notes into longhand within 10 days after such examination, and file the same with the county clerk, has not been complied with, cannot be heard on appeal, where the record contains nothing to show that the statute was violated.

2. Under Pen. Code, § 686, which provides that a deposition taken on preliminary examination in the presence of accused, who had opportunity to cross-examine, may be read on the trial if it is satisfactorily shown to the court that the witness could not be found in the state, the admission of such deposition will be assumed, on appeal, to have been based on satisfactory evidence.

Commissioners' decision. In bank. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

John Reilly, convicted of robbery, appeals. Affirmed.

Alexander Campbell, Jr., for appellant. Atty. Gen. Hart, for the People.

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[1] Rehearing granted.

BELCHER, C. The defendant was convicted of the crime of robbery, and sentenced to be imprisoned in the state prison for the term of 20 years. He appeals from the judgment and from an order denying his motion for a new trial. The only point made for reversal is that the court below erred in permitting the deposition of John O'Brien, taken at the preliminary examination of defendant, to be read in evidence. O'Brien was the prosecuting witness, and when his deposition was offered counsel for defendant objected that it was inadmissible under section 686 of the Penal Code; and again, that it was incompetent and inadmissible, and that no foundation had been laid for its introduction. The objection was overruled and an exception reserved.

1. It is urged here that no foundation for the introduction of the deposition was laid, because "no showing was made that the purported deposition ever was filed in the superior court, or with the county clerk of the city and county, or that the reporter had transcribed his shorthand notes into longhand, or that he ever certified to the same," as required by subdivision 5 of section 869 of the Penal Code. That section provides that when testimony, given at a preliminary examination, has been taken down by a shorthand reporter, "the reporter shall, within ten days after the close of such examination (if the defendant be held to answer to the charge), transcribe into longhand writing his said shorthand notes, and certify and file the same with the county clerk of the county, or city and county, in which the defendant was examined." The record shows that the deposition produced was the testimony of O'Brien, the complaining witness, which had been taken down by question and answer before the committing magistrate, in the presence of the defendant, upon the preliminary examination of defendant touching this charge of robbery, including the cross-examination of the witness in behalf of said defendant by his counsel; but it fails to show whether or not the testimony was taken down by a shorthand reporter, and, if it was, whether or not the reporter transcribed his shorthand notes into longhand writing, or ever certified or filed the same with the county clerk. So far, therefore, as we are advised, the testimony may have been properly transcribed, certified, and filed, and this may have appeared on the deposition. And, if not, specific objection on this ground should have been taken, and the record should have been made to show the facts. But the rule is that, unless the record clearly shows error, no presumption will be indulged that error was committed. We must presume, therefore, that the court rightly performed its duty, and that the ruling complained of was proper. People v. Gibson (Cal.) 39 Pac. 864.

2. It is also urged that no foundation for the introduction of the deposition was laid, because there was no sufficient showing that the witness could not with due diligence be found within the state. Section 686 of the Penal Code provides that in a criminal action the defendant is entitled to be confronted with the witnesses against him, in the presence of the court, except that where the charge has been preliminarily examined before a committing magistrate, and the testimony taken down by question and answer in the presence of the defendant, who has, either in person or by counsel, cross-examined, or had an opportunity to cross-examine, the witness, "the deposition of such witness may be read, upon its being satisfactorily shown to the court that he is dead or insane, or cannot with due diligence be found within the state." It was proved that a subpoena for the witness O'Brien was placed in the hands of an officer, who knew him, for service, and was returned with the following indorsement: "I hereby certify that, after searching diligently for John O'Brien, I could not find him. [Signed] John Guilfoy." It was also proved that O'Brien was an old man, who had been engaged in peddling rags, sacks, and bottles, and that up to a short time before he had stopped at a boarding house on Fourth street, in San Francisco, which had then been closed, and that its former occupants did not know where he had gone, or what had become of him; that diligent efforts to find him had been made in all those portions of the city where he had been accustomed to wander, and where he would be likely to be found, but that all such efforts had been unsuccessful. Without rehearsing the evidence in detail, it is enough to say that, as it was satisfactorily shown to the court below that due diligence had been used, and the witness could not be found, its conclusions in this regard must be accepted as correct. Certainly we cannot say that it abused its discretion in so holding. It follows that the judgment and order appealed from should be affirmed.

We concur: VANCLIEF, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

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106 Cal. 643

## VAN EMAN v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO. (No. 10.)

(Supreme Court of California. April 2, 1895.)

CRIMINAL LAW—SETTLEMENT OF CASE—WAIVER OF NOTICE.

The state's attorney, who had actual notice of the date first set for the settlement of defendant's bill of exceptions, several days prior thereto appeared at the hearing and procured a continuance, subsequently agreeing to call at the office of defendant's attorney and settle the exceptions there, but on the day named sent his clerk to ask a continuance until the following day. *Held*, a waiver by the state's attorney of the service on him of the written notice of two days required by Pen. Code, § 1171.

In bank.

Application for writ of mandate to W. R. Daingerfield, judge of the superior court of city and county of San Francisco, commanding him to settle a bill of exceptions. Granted.

Bruner & Bruner, for petitioner. Eugene N. Deuprey, for respondent.

GAROUTTE, J. This is a motion, upon previous notice, for a peremptory mandate to W. R. Daingerfield, judge of the superior court of San Francisco, commanding him to settle a bill of exceptions. The petitioner was convicted of a felony in the department of the superior court presided over by the respondent, and upon December 12th duly served and filed his notice of appeal from the judgment and order denying his motion for a new trial. On January 11, 1895, and within due time, defendant's counsel presented to respondent, in open court, his proposed bill of exceptions. At that time respondent stated that such matters usually came up regularly on the last Saturday of each month, and he thereupon caused it to be placed upon the calendar for Saturday, the 26th day of January, for a hearing. Before handing the proposed bill of exceptions to respondent on January 11th, counsel for petitioner verbally notified the district attorney that he was about to do so, and requested him to examine the draft as soon as possible, in order to expedite its settlement. Being referred by the district attorney to special counsel for the people, Mr. Deuprey, he also gave him verbal notice that he was about to present the draft to respondent, and requested him to examine it and prepare his amendments as soon as possible, to which request Mr. Deuprey replied that he would. On Friday, January 25th, affiant called on said Deuprey at his office, and inquired of him personally if he would be ready on the following day to settle said proposed bill, to which said Deuprey replied that he would be ready at 11 o'clock a. m. next day. At 11 o'clock on January 26th affiant attended in court, and, upon said matter being called for settlement, a clerk from said Deuprey's office stated that Mr. Deuprey could not be present that day, and requested that the matter go over to a future day. It was then agreed by affiant and said clerk that said Deuprey should call at affiant's office on Monday, January 28th, at 1:30 p. m., to settle said bill, if possible, out of court. That on said last-named hour and day said clerk of Mr. Deuprey called at affiant's office and requested that the settlement of said bill be continued to January 29th, at 10 o'clock a. m., before said judge. On the matter coming on to be heard at that time, said Deuprey objected to the settlement of said proposed bill of exceptions upon the ground that the two days' written notice required to be served upon the district attorney by the provisions of section 1171 of the Penal Code had not been given. The court sustained the objection, and refused to settle the bill.

Section 1171 of the Penal Code marks out the procedure to be followed in the preparation and settlement of bills of exceptions in criminal cases; and, while this statute should be liberally construed in the interest of a defendant's right of appeal upon a bill of exceptions, we do not think the exigencies of the present case even demand a construction of the statute. The object and purpose of service of notice upon the district attorney is to give that official an opportunity to prepare and offer his amendments to the bill at the hearing. The facts summarized show that the hearing was set for January 26th, and counsel for the people had actual notice of it several days prior to that time. He was directly informed of it by the judge, had the proposed bill of exceptions in his possession, and was engaged in the labor of preparing his amendments thereto. He stated to defendant's counsel upon January 25th that he would be ready to proceed with the settlement of the bill upon the following day. At that time Mr. Deuprey's clerk appeared in court and requested a continuance, which was granted, and it was thereupon agreed between said clerk and defendant's counsel that Mr. Deuprey should call at the office of defendant's counsel upon January 28th, and they should then attempt to settle said bill without the assistance of the court. At that time Mr. Deuprey, by his clerk, requested a continuance until the following day at 10 a. m., before the judge, at which time the bill was refused settlement. The defendant should seldom, if ever, be deprived of his right of appeal upon a bill of exceptions, or otherwise, by any failure upon his part to comply with the technical requirements of the statute. The law should be liberally construed as to such matters in his favor, and in this case, upon the showing made, we think it may well be held that the conduct of counsel for the people was such as to constitute a waiver upon his part of the service upon him of the written notice of two days required by said section 1171. For these reasons it is ordered that the writ issue as prayed for.

We concur: BEATTY, C. J.; McFARLAND, J.; VAN FLEET, J.; HARRISON, J.; TEMPLE, J.; HENSHAW, J.

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(107 Cal. 1)

## In re COMASSI'S ESTATE. (No. 18,393.)[1]

(Supreme Court of California. April 3, 1895.)

REVOCATION OF WILL—MARRIAGE—ADOPTION OF CHILD.

1. Under Code Civ. Proc. § 1970, which declares that a will cannot be revoked otherwise than as provided by the Civil Code, and Civ. Code, § 1292, providing that no will can be re-

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[1] Rehearing denied.

voked except by declaring such revocation in a subsequent will, or by canceling or destroying with intent to revoke, a will executed by a married woman will not be revoked by the death of her then husband and her subsequent marriage.

2. An adopted child is not "issue of the marriage," within the meaning of Civ. Code, § 1298, providing that if a testator marry, and have issue of such marriage, his former will is revoked.

In bank. Appeal from superior court, Sacramento county; Matt. F. Johnson, Judge.

Appeal from an order denying an application for probate of the will of Clara G. Comassi, deceased. Reversed.

A. C. Searle, for appellant. Armstrong, Bruner & Platnauer, for respondent.

HARRISON, J. Clara G. Comassi died in the city of Sacramento July 31, 1892, and thereafter a document bearing date June 23, 1877, purporting to be her last will and testament, was presented to the superior court for probate. The probate was contested by Mabel Delphina Comassi, formerly Mabel Delphina Eric, claiming as heir to the deceased, by virtue of an adoption; and upon the hearing of the contest the court found that in May, 1886, upon proceedings had in the superior court for Yuba county, that court made an order declaring that Mabel should thenceforth be regarded as the child of said Clara G. Comassi, and that the said Mabel and the said Clara should sustain towards each other the legal relation of parent and child. The court also found that the will was properly executed, and that at the time of its execution the deceased was in all respects competent to make a will; that she was at that time a married woman, the wife of one G. Comassi; that her husband died on the 26th of December, 1878, and that on the 25th of August, 1886, she was again married to Joseph O. Barbeau, from whom she was subsequently divorced. The court held that her marriage subsequent to the execution of the will had the effect to revoke it, and denied the application for its probate. From this order the petitioner has appealed.

The right of any person to execute a will, as well as the form in which the will must be executed, or the manner in which it may be revoked, are matters entirely of statutory regulation. The power of the legislature to limit the class of persons who shall be competent to make a will, or to declare that a change in the personal status of such persons after its execution shall operate as a revocation of the will, or be a sufficient reason for denying it probate, is unquestioned. "The Civil Code establishes the law of this state upon the subjects to which it relates" (section 4); and in order to determine whether a will has been properly executed or revoked, or whether, after its execution, there has been such a change in the status or personal relations of the testator as in law will effect its revocation, we have only to determine whether, in the one case, there has been a compliance with the requirements of the statute, or, in the other case, whether the changed condition of the testator is within the conditions named in the statute. By the common law a married woman had no power to make a will, and the marriage of a woman revoked any will that she had previously made. In this state, however, there is no restriction upon the power of a married woman to make a will, and upon proof of its execution it is entitled to probate, the same as the will of any other person, unless it is shown to have been revoked in one of the modes prescribed by the statute. Section 1292 of the Civil Code declares: "Except in the cases in this chapter mentioned, no written will, nor any part thereof, can be revoked or altered otherwise than: (1) By a written will or other writing of the testator, declaring such revocation or alteration, and executed with the same formalities with which a will should be executed by such testator; or, (2) by being burnt, torn, canceled, obliterated or destroyed, with the intent and for the purpose of revoking the same, by the testator himself, or by some person in his presence, and by his direction." And section 1970, Code Civ. Proc., declares: "A written will cannot be revoked or altered otherwise than as provided in the Civil Code." The effect of these provisions is to do away with the doctrine of implied revocation, which was for so many years a subject of controversy in the English courts, and which, in many of the states of this country, is still permitted, under a clause in their statutes authorizing a revocation to be "implied by law from subsequent changes in the condition or circumstances of the testator."

The respondent does not controvert the effect of these provisions, but contends that, under the provisions of section 1300 of the Civil Code, the subsequent marriage of the testatrix had the effect to revoke her will. That section is as follows: "A will executed by an unmarried woman is revoked by her subsequent marriage, and is not revived by the death of her husband." By its own terms, this section is applicable only to a will "executed by an unmarried woman," and can have no application to the present case, for the reason that at the time of the execution of her will the testatrix was a married woman, whose husband was at that time living. The argument of the respondent that this section controls the present case, for the reason that at the time of her subsequent marriage her will was the will of an unmarried woman, fails to cover all the conditions which the section prescribes as essential to the revocation of a will previously executed. The section does not declare that every will of an unmarried woman shall be revoked by her subsequent marriage, but, by its terms, limits such revocation to "a will executed by an unmarried woman";

and, unless she was unmarried at the time she executed her will, the section has no application. A will is "executed" when it is signed and attested in the manner prescribed by section 1276, and the will in the present case was so executed in 1877, at a time when Mrs. Comassi was a married woman. The Code is silent respecting the effect of a subsequent marriage upon a will executed by a married woman; and, as the present will is not within any of the cases named in the chapter on "Wills," it is not excepted from the provisions of section 1292, and could be revoked only in one of the modes therein specified. In many states it has been held that the statutes which enable a married woman to execute a will have taken away the reason for the common-law rule which held that the marriage of a woman revoked a will previously made by her, and that consequently the rule itself is no longer applicable. Webb v. Jones, 36 N. J. Eq. 163; Will of Ward, 70 Wis. 251, 35 N. W. 731; Roane v. Hollingshead, 76 Md. 369, 25 Atl. 307; Emery, Appellant (In re Hunt's Will), 81 Me. 275, 17 Atl. 68. In Ohio it is expressly declared by statute that such marriage shall not revoke her will. In this state the legislature has seen fit to adopt a different policy, but has limited the effect of marriage to a will executed by an unmarried woman. It is as useless to conjecture the motives that may have governed the legislature in singling out an unmarried woman as the only person whose will shall be affected by her subsequent marriage, as it is to conjecture why there should be a difference in the effect of a subsequent marriage upon a will executed by an unmarried man and upon one executed by an unmarried woman. It has conferred upon each the same ability to make a will after marriage as before, and a woman can, immediately after her marriage, make a will identical with the one made by her before her marriage. The legislature has, however, made these distinctions, and courts have no alternative except to give effect to them. If it had been the purpose of the legislature that the will of any woman should be revoked by her subsequent marriage, it could have readily expressed that purpose in apt words, as has been done by the wills act of England (1 Vict. c. 26), the eighteenth section of which provides that "every will made by a man or woman shall be revoked by his or her marriage." The same provision is found in the statutes of many states in this country. Instead of so doing, however, the legislature of this state has limited this result to a will executed by an unmarried woman, in language which gives no opportunity for construction. To hold that a will executed by a married woman will, upon her subsequent marriage, be attended with the same result as that executed by an unmarried woman, would be to interpolate into the statute words that the legislature has industriously omitted. The provision of section 1300 is the same as section 13 of the wills act of 1850 (St. 1850, p. 178), and was evidently taken from the Revised Statutes of New York, and in that state the precise question here presented has been determined in accordance with this opinion. In re Burton's Will (Surr.) 25 N. Y. Supp. 824. See, also, In re Kaufman, 131 N. Y. 620, 30 N. E. 242.

Section 1298 of the Civil Code has no application. The conditions required by this section are that the testator shall not only have married, but shall also have issue of such marriage, in order to a revocation of his will. The adoption of a stranger in blood is not the issue of the marriage, and cannot be treated as its equivalent. Davis v. Fogle, 124 Ind. 41, 23 N. E. 860. Section 1299 is, by its terms, limited to a survival of the testator by the "wife," whereas in the present case it is the wife who has died. The judgment denying probate to the will is reversed.

We concur: GAROUTTE, J.; VAN FLEET, J.; McFARLAND, J.

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5 Cal. Unrep. 17

## JONES v. SHUEY et al. (No. 15,727.)

(Supreme Court of California. April 3, 1895.)

MECHANIC'S LIEN—PLEADING AND PROOF—VARIANCE—TENDER.

1. Where the claim of mechanic's lien, and the complaint in an action to foreclose the lien, alleged a contract to pay plaintiff $3.50 per day, and a contract to pay the reasonable value of his services was proved, and such value was shown to be $2.84 per day, the variance is fatal.

2. A tender, to be valid, must be unconditional.

Department 1. Appeal from superior court, Contra Costa county; Joseph P. Jones, Judge.

Action by L. S. Jones against J. A. Shuey and the Southern Pacific Company. From a judgment for plaintiff, and an order denying a new trial, defendants appeal. Reversed.

W. S. Tinning, for appellants. R. H. Latimer, for respondent.

PER CURIAM. This is an action to foreclose a mechanic's lien. The defendant Shuey is the lessee of the land upon which the building is situated, and his codefendant is the owner thereof. The contractor is not made a party to the action. The plaintiff is a carpenter who was hired by the contractor, and he subsequently filed his notice of lien, wherein he stated that he was "to work on the building or structure then being erected on said land, for the sum of three and fifty one-hundredths dollars per day, for each and every day said L. S. Jones worked on said building or structure." The allegations of the complaint as to the character of the contract were in line with the claim of lien, but upon the evidence offered at the trial the court in effect found the contract not to be express, but implied, as to the amount of wages to be paid; and, as we construe the finding, found that plaintiff was to be paid whatever sum his services were reasonably worth; and also further found that such services were reasonably worth the sum of $2.84 per day. It thus appears that the contract proven is not the contract alleged, neither is it the contract set out in the notice of lien, and the variance is so broad and so material as to demand a reversal of the judgment. The identical question here presented arose in the very recent case of Wagner v. Hansen, 103 Cal. 104, 37 Pac. 195, and a reversal of the judgment was the result. See, also, Reed v. Norton, 90 Cal. 599, 26 Pac. 767, and 27 Pac. 426. The court was justified in holding that no valid and legal tender had been made. A tender must be unconditional. Brown v. Gilmore, 22 Am. Dec. 223. We also think the demurrer to the complaint was properly overruled. The court found as a fact that Walton, the contractor, was the agent of both defendants, and rendered judgment against them accordingly. There is no evidence whatever in the record to support a finding to that effect. For the foregoing reasons, the judgment and order are reversed, and the cause remanded.

(106 Cal. 690)

## GOODWIN v. SCHEERER et al. (No. 15,560.)[1]

(Supreme Court of California. April 3, 1895.)

JUDICIAL NOTICE — LOCATION OF LAND — EJECTMENT—BURDEN OF PROOF—SUFFICIENCY OF EVIDENCE—ADVERSE POSSESSION.

1. A court will not take judicial notice that a certain tract of land is or is not included within the boundaries of a particular patent.

2. Proof by plaintiff that his grantors held undisputed possession of the land in controversy for more than five years before they were dispossessed by the defendant entitles him to recover against a defendant in possession who offers no evidence in support of his right to the land, or the title of those under whom he claimed.

3. Where the city under which defendant holds as lessee, before the making of the lease, granted all its rights in occupied lands within a territory including the disputed premises, the burden of showing that the lands in controversy were unoccupied, and so not included in the grant, is on defendant relying on that fact as an affirmative issue.

Department 1. Appeal from superior court, city and county of San Francisco; James M. Troutt, Judge.

Ejectment by James W. Goodwin against Joseph Scheerer and the city and county of San Francisco. From a judgment for plaintiff, and an order denying a motion for a new trial, defendants appeal. Affirmed.

H. T. Creswell, for appellants. J. W. Goodwin and Geo. T. Wright, for respondent.

HARRISON, J. Ejectment for certain lands in the city and county of San Francisco. The cause was tried by the court without a jury, findings of fact were waived, and judgment rendered in favor of the plaintiff. A motion for a new trial was denied, and from this order and the judgment the defendants have appealed.

The evidence offered by the plaintiff showed that his grantors had been in the undisturbed possession and occupancy of distinct parcels of the land described in the complaint,—one of them from April, 1885, and the other from July, 1885,—until December, 1890, when the defendant Scheerer took forcible possession of the entire land, and ousted them therefrom, and remained in possession until after the commencement of this action. The action is brought against Scheerer and the city and county of San Francisco. The defendant Scheerer testified that a short time before taking possession he had obtained a lease of the property from the board of supervisors of the city, and had been put in possession thereof by the deputy superintendent of streets. The lease itself was not offered in evidence, nor was there any evidence given in support of the right of the city to make the lease, except the testimony of one of the witnesses that the property is a part of the old Mission or Channel creek land, reclaimed by the city, and that it had been always understood that it was city property.

It is contended by the appellants that it was incumbent upon the plaintiff to show that the land had not been reserved by the city for public use, and that, as no such evidence was given, the plaintiff was not entitled to judgment. The reasons urged in support of this proposition are that the court should take judicial notice that the land in question is a part of the Pueblo lands which were confirmed to the city of San Francisco by the decree of the circuit court of the United States May 18, 1865, and that as such confirmation was "in trust for the benefit of all lot holders under grants from some competent authority, and as to any residue in trust for the use and benefit of the inhabitants of the city," it is incumbent upon a claimant in ejectment against the city for any of the lands within the limits of the Pueblo to show that such lands had not been granted or reserved; and that a failure to show these facts is fatal to the action, even though the evidence on behalf of the plaintiff is in other respects sufficient to establish his right of recovery. It would be carrying the rule of judicial notice further than it has ever been carried to hold that the knowledge of the court includes the precise lines upon the surface of the earth which define the boundaries of a patent, or that any particular parcel of land is within or without those boundaries, or that any designated tract of land within the city and county of San Francisco is a portion of the lands which were confirmed to the city by the terms of the aforesaid decree. The boundaries of the city and county of San Francisco include a large quantity of territory that is not included within the limits of the Pueblo grant; and within the limits of the Pueblo grant, as confirmed by the decree, are many other tracts of land for which patents have been granted by the United States upon confirmed Mexican grants, and whose title is independent of the city and of the Pueblo claim. The city has itself become the owner by purchase of different parcels of these lands, and its title thereto is in no respect connected with the confirmation of the Pueblo claim. Since the entry of the decree by the circuit court confirming this claim the United States has itself granted to the city a portion of the lands which had been reserved by the decree for military purposes. Act July 1, 1870 (16 Stat. p. 186). The rule contended for by the appellant would require us to hold that in any action of ejectment against the city and county of San Francisco the court may determine, without the introduction of any evidence, that the land in controversy is not only within the limits of the patent for the Pueblo claim, but also that the city's claim to the demanded land is derived through the decree of the circuit court. Such a rule of evidence finds no support either in principle or precedent. The city is not precluded from acquiring land from other sources, and it has become the owner of different parcels of land by exchanging its own lands for those of other owners, as well as by purchase and by donation. See Mun. Rep. of S. F. 1867–68, pp. 459–463; also, St. of 1867–68, p. 60. In an action by the city and county, as plaintiff, to recover possession of a parcel of land from the occupant, it would not be contended that she could rest her case upon her complaint, and that the burden would be upon the defendant to show that she was not entitled to a judgment of recovery. If no evidence were introduced in the case, the court would not be justified in giving judgment against the defendant upon the theory that by virtue of its judicial knowledge the demanded land was established to be a part of the Pueblo claim which had never been granted by any competent authority. The same rule must obtain when the city and county is a defendant, and the plaintiff has introduced evidence sufficient, in the absence of any evidence on her part, to entitle him to a recovery. The possession of land is itself prima facie evidence of ownership, and in an action of ejectment proof of such possession prior to the intrusion of the defendant is, in the absence of any evidence in support of the defendant's right to the possession, sufficient to authorize a judgment of recovery. If the plaintiff shows that such possession has been continued for a period long enough to bar an action for the recovery, he establishes a title by prescription. Civ. Code, § 1007. Upon such proof the burden is thrown upon the defendant to show that his right to retain the possession has not been overcome. After the plaintiff had shown in the present case that his grantors had been in the quiet and undisturbed possession of the lands in controversy for a period of more than five years, and had been forcibly dispossessed by the defendant Scheerer, he was entitled to a judgment in his favor, unless the defendants should offer evidence in support of their claim to retain the possession. The defendants, however, offered no evidence in support of such claim, nor did they offer any evidence of the character of the title claimed by the city, or even that it claimed any title to the land, except as it may be inferred from the statement that it had made a lease to Scheerer.

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[1] Rehearing denied.

It is, moreover, contended on behalf of the appellants that it was incumbent on the plaintiff to show that the land in question was in the possession of some one at the date of the Van Ness ordinance; otherwise, the land was a portion of the "residue" which, by the decree of the circuit court, was confirmed to the city in trust for the use and benefit of its inhabitants. The appellants have not, however, in their assignments of error, specified any insufficiency of evidence in this respect; their specification being that there is no evidence to show that the city "has not reserved the premises described in the amended complaint for public parks, streets, sites of schoolhouses, city hall, or other public building." Waiving the question, however, whether this objection is available to the appellants, we are of the opinion that the contention itself is untenable. If, as is claimed by them, the premises are within the territory covered by the Van Ness ordinance, the reservations provided for by that ordinance are only those which are delineated upon the map or plan provided for therein, which was subsequently ratified and confirmed by the state. St. 1858, p. 56. It is not claimed by the appellants that the land in controversy is delineated upon this map as one of the reservations thus made by the city; and by the terms of that ordinance the city granted all its right to the lands embraced within this territory, subject to those reservations, to the parties who were in the actual possession thereof on or before the 1st day of January, A. D. 1855, and who had continued in possession until the introduction of the ordinance. There is no presumption that any portion of the land covered by the ordinance was or was not in the actual possession of any one during this period; but, in any legal proceeding in which the fact whether a particular parcel of land was or was not then held in actual possession becomes material, it must be established by that party who relies upon the fact as an affirmative issue in support of his claim or defense. Code Civ. Proc. § 1981. The judgment and order are affirmed.

We concur: GAROUTTE, J.; VAN FLEET, J.

(107 Cal. 33)

## RANDALL v. DUFF et al. (No. 15,718.)[1]

(Supreme Court of California. April 4, 1895.)

RATE OF INTEREST—APPEAL.

1. A direction by the appellate court to allow interest to plaintiff, who was entitled, as purchaser under an ineffectual foreclosure of mortgages, to receive all that was equitably due mortgagees, entitles him to interest at legal, and not at conventional, rates.

2. When there is a question whether or not the lower court has entered the judgment directed on remand, an appeal lies.

Department 2. Appeal from superior court, Humboldt county; G. W. Hunter, Judge.

Action by A. W. Randall against Julia R. Duff and others to quiet title. From a judgment amending a decree, plaintiff appeals. Affirmed.

S. M. Buck and W. C. Belcher, for appellant. W. L. Duff, H. S. Foote, and L. D. McKissick, for respondents.

TEMPLE, J. This case has been here twice before. 79 Cal. 115, 19 Pac. 532, and 21 Pac. 610; 101 Cal. 82, 35 Pac. 440. For a fuller statement of facts, reference may be had to those appeals. Plaintiff was appellant in the appeal reported in 101 Cal. and 35 Pac. He then complained of the judgment in various respects,—among others, that the trial court allowed interest only up to March 15, 1885, the date of the filing of the cross complaint, because that court thought the cross complaint contained a sufficient tender to stop interest; this court thought the offer or tender in the cross bill insufficient for that purpose, and that interest should have been allowed on the amounts credited to appellant down to March 1, 1892, at which time the whole amount was compensated or paid by damages allowed to the defendants for plaintiff's occupation of the mortgaged premises. The judgment of this court was: "Wherefore the judgment of the superior court is affirmed in all respects, except as to this matter of interest, as to which the judgment is reversed; and the cause is remanded to the superior court, with directions to amend its decree by allowing interest to the plaintiff down to March 1, 1892, and by reducing the judgment against him correspondingly." Interest had been allowed in the decree then appealed from at legal rates, but the court held that, as to a portion of the moneys with which plaintiff was credited in the accounting, he was entitled to be subrogated to the rights of the mortgagees under an ineffectual foreclosure of whose mortgages he had purchased, and by so purchasing had paid off the mortgages. In stating the subrogation, the court used the following language: "But plaintiff was also successor to the mortgagees, and entitled, as against the defendants, to receive all that was equitably due on the mortgages, including interest on the amount secured up to the date of payment or tender." When the remittitur reached the lower court, counsel for appellant claimed that the judgment of this court, interpreted in the light of the general tenor of the opinion and of the above language in particular, entitled appellant to interest on the amount of the mortgage debt at conventional rates rather than at the legal rate. The superior court, however, declined to grant the relief, and amended its decree by computing interest on the credits allowed appellant down to March 1, 1892, at legal rates. From the judgment so entered this appeal was taken.

I do not think the judgment of the court is ambiguous, and therefore it needs no interpretation. Nor do I think the opinion must necessarily receive the construction placed upon it by appellant. Subrogation is allowed by courts of equity to secure justice. Ordinarily, it takes place when one has paid a debt which some one else ought to have paid. In such cases, sometimes, the person so paying succeeds to the securities which the original creditor held for his debt. This is allowed when justice requires it, and the securities which a person so obtains are held by him merely to insure reimbursement. He will not be permitted to make a speculation out of it. Often a lien is thus kept alive which, but for the purpose of enabling the court to do equity, would be considered released. Obviously, a court of equity will not allow a resort to such securities beyond what is necessary to effectuate the purpose. It is not clear that plaintiff was entitled to recover as indemnity the principal and interest on the mortgage, and evidently no such question was discussed or decided in the opinion. It is true, undoubtedly, that the plaintiff was entitled to recover the entire sum due on the mortgage for principal and interest (if the attempted foreclosure was wholly void) so far as this was necessary to protect him. I cannot see why indemnity in his case should go beyond reimbursement with legal interest. His equity against the defendants is based upon the fact that he was misled by the apparent authority vested by defendants in an unfaithful agent, and thereby induced to purchase at the foreclosure sale. Defendants were permitted to recover upon reimbursing plaintiff for the money so paid. Perhaps, under such circumstances, it was not necessary for plaintiff's security to resort to the doctrine of subrogation. But the matter need not be pursued further. The fact that none of these matters are noticed in the opinion, and that the judgment of this court seems unambiguous, demonstrates that the construction contended for by appellant cannot be maintained.

A motion was made to dismiss the appeal, and was submitted when the case was argued on the merits. It is contended that the judgment entered in the court below was in effect the judgment of this court, and that no appeal can be taken from it. For some purposes the judgment may be deemed on a par with the judgment which might have been entered here. But great injustice might be done if it were held that such a judgment cannot be appealed from. Serious doubts may ar as to whether the judgment entered was the judgment ordered; and such a judgment is as plainly within the language allowing appeals as any other. I think there can be no doubt of the right to appeal. Nor do I think the appeal frivolous. The judgment is affirmed.

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[1] Rehearing denied.

I concur: HENSHAW, J.

McFARLAND, J. I concur in the judgment and in the opinion of Mr. Justice TEMPLE. Of course, when the lower court enters the judgment directed by this court, there is an end of the litigation; but, when there is a question whether or not the lower court has entered the judgment directed, then an appeal lies. If the appeal be frivolous, and not taken bona fide, the remedy is the imposition of heavy damages.

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(107 Cal. 49)

## STEEN v. HENDY et al. (No. 15,644.)[1]

(Supreme Court of California. April 4, 1895.)

ACTION AGAINST EXECUTOR—PRESENTATION OF CLAIM.

Failure of the plaintiff, in an action against an executor, to prove that his claim against decedent had been presented to such executor, the latter having duly objected and excepted to the proceeding on that ground, warrants a reversal of the judgment rendered against the executor for such claim.

In bank. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

Action by E. T. Steen, substituted for J. W. Falkner, against Joshua Hendy and the Joshua Hendy Machine Works, a corporation. The defendant having died after the action was begun, it was continued against his executors. From a judgment for plaintiff, the executors appeal. Reversed.

Boyd, Fifield & Hoburg, W. H. H. Hart, and Nowlin & Fassett, for appellants. Wm. H. Jordan, for respondent.

PER CURIAM. This appeal is from the judgment, with a bill of exceptions. The action was brought to obtain a dissolution of an alleged partnership, to have an account taken, and for other relief. It was commenced March 11, 1876. At the first trial plaintiff recovered judgment, and defendants appealed, and that appeal was disposed of here, October, 1889. 80 Cal. 636, 22 Pac. 401. The facts of the case appear in the opinion then rendered. It was found that the partnership—if the relations between the parties could be so called—had ended before the suit was brought, leaving in Hendy's hands property in which Steen had a contingent interest, and which Hendy continued to sell from time to time after this suit was begun. By stipulation, however, it was found that Hendy had in his hands something more than $10,000 which belonged to Steen. The question left to be determined was what interest or what share of the profits of Hendy's business Steen was entitled to. After the remittitur was filed from this court, Steen amended his complaint, made for the first time the corporation a defendant, and claimed that Hendy had actually realized a large amount of money from the use of the trust funds, which he (Steen) was entitled to recover. The corporation was created September 29, 1882, and it was made a party to the suit November 26, 1889. The supplemental and amended complaint, by which the corporation was brought in, charged, in effect, that Hendy owned all the stock of the corporation, and that it was organized to carry on Hendy's business, to hide plaintiff's property, and to defraud plaintiff. A money judgment was demanded against both defendants. Soon after Hendy paid the amount found due, exclusive of interest, and the cause was referred to a referee to try, with directions to report findings and a judgment. While the trial was in progress, October 21, 1891, Hendy died. The record does not show when letters of administration were issued in the estate of Hendy, but it appears by order made August 10, 1892, that the death of Hendy was suggested by plaintiff, and it was ordered that the case be continued in the names of the executors; and the bill of exceptions recites that "at the first session after his death and said substitution, to wit, on the 19th day of November, 1891, said defendants objected to further proceeding with the trial, or the taking of any further testimony in the case, upon the ground that the claim upon which the action is based has not been presented for allowance to the executors and executrix of Joshua Hendy, deceased; but the referee, notwithstanding such objection, proceeded with said trial and the taking of testimony in the case, to all of which the defendants duly excepted, and the said trial and taking of testimony was then proceeded with by said referee. The trial was concluded, and the case argued and submitted to the referee for decision in February, 1892, and the said referee rendered his decision and filed his findings of fact and conclusions of law on the 5th day of November, 1892, with the clerk of the court, and judgment and decree were made thereon on December 30, 1892. There was no evidence that the claim upon which this action was based was ever presented to the executors and executrix of the estate of Joshua Hendy, deceased, and no claim whatever was ever presented to them, or either of them. And the defendants, and each of them, excepted, and now excepts, to the decision, on the ground that it is against law in the following particulars: * * * (3) The decision is against law in giving judgment against defendants, to wit, the executors and executrix of the estate of Joshua Hendy, deceased, inasmuch as no claim was presented to them." This appeal was not taken within 60 days after the rendition of judgment, and it is contended by the respondent that this objection to the judgment cannot now be entertained; that the point is, really, that the judgment is not sustained by the evidence, and if such a point could be made at all it cannot be raised on this appeal, because it was not taken within 60 days after the rendition of the judgment. It is plain that this case is not within the rule in section 939, Code Civ. Proc., where it is by implication provided that an exception to the decision or verdict, that it is not supported by the evidence, may be reviewed on an appeal from the judgment if the appeal be taken within 60 days after the rendition of judgment. The Code provides for no exception to a judgment on the ground that it is not sustained by the evidence. Mazkewitz v. Pimentel, 83 Cal. 450, 23 Pac. 527. Nor could such a point be urged on a motion for a new trial. Exceptions of that character are directed to the findings of fact. In this case there was no finding upon the subject. Nor does the exception appear to be aimed at a finding. The exception was to the entry of judgment against the executors and executrix on the ground that no claim had been presented to them. Section 1502, Code Civ. Proc., provides that, if an action is pending against a decedent at the time of his death, it must be presented to the executor or administrator, as in other cases; "and no recovery shall be had in the action unless proof be made of the presentations required." Regularly, in such cases, a supplemental complaint should be filed, alleging the death and due presentation of the claim. There are cases, however, which seem to hold, at least by implication, that a judgment would not be void though these facts were neither alleged nor proven. Such a judgment would be erroneous only, and would not be reversed even on appeal, unless the objection was first made in the trial court. In Bank v. Howland, 42 Cal. 129, the objection was made for the first time on the motion for a new trial. The court said: "It was too late at that time for the plaintiff to have supplied the requisite proof. The objection must therefore be disregarded." In Drake v. Foster, 52 Cal. 225, the objection was made for the first time in this court, and it was held that it was too late. In Derby v. Jackman, 89 Cal. 1, 26 Pac. 610, the supplemental complaint averred the due presentation of the claim. This was denied in the answer, and, as it was held, was the only good denial in the answer. Judgment was, on motion, entered for plaintiff on the pleadings. This court held the judgment erroneous, and said: "The effect of that section (1502) plainly is that, although due presentation of the claim be not denied, still it must be proven." The effect of these cases is that proof of the presentation of the claim is not a fact essential to the validity of the judgment, where no issue has been made upon that question, but that the failure to make the proof is ground for reversal, when objection is made in the trial court, and the exception is properly preserved. It must be held that the exception here was made in due time, and has been properly brought here.

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[1] For motion to modify judgment, see 40 Pac. 386.

Respondent's counsel suggests that Hendy died October 21, 1891, and the objection to proceeding because the claim had not been presented was first made November 19, 1891, and the record fails to show that at that time letters testamentary had been issued. If that be so, so much the worse for respondent. It shows that he had timely warning, and yet failed to preserve his rights. The referee should not have proceeded at all with the case until letters had been issued and the representatives brought in. If he did so, that would alone constitute ground for reversal. Litigants must know, at their peril, of the death of an adversary. Negligence cannot be attributed to the dead, and, although the heirs may sometimes lose by failure to have administration properly made, those having claims against the estate acquire no rights by the delay except the extension of the time to collect their demands. Undoubtedly respondent had the right to present his claim to the representatives of Hendy at any time within the period allowed by law for the presentation of claims, but he was not entitled to recover a judgment which will bind the estate of Hendy until such presentation had been made. That the claim of plaintiff was one which would require presentation respondent does not deny. The matter was fully considered by this court in Lathrop v. Bampton, 31 Cal. 17, and in Rowland v. Madden, 72 Cal. 17, 12 Pac. 226, 870. This result certainly seems a great hardship in this case, but we are powerless to save the plaintiff from the consequence of his neglect. The judgment is reversed.

BEATTY, C. J., and HARRISON, J., not participating.

(107 Cal. 27)

## HORGAN v. ZANETTA. (No. 15,838.)[1]

(Supreme Court of California. April 4, 1895.)

MORTGAGE ON GROWING CROPS—ESTOPPEL.

1. The removal of a mortgaged crop from the land of the mortgagor, on which it was grown, is prima facie an extinguishment of the mortgage lien, section 2972, Civ. Code, as amended in 1878, continuing such lien only so long as the crop remains on the land of the mortgagor.

2. A creditor of a lessee who, without knowledge of the fact that the lessor had a mortgage on such lessee's crop, induced the lessee, without false representations, to remove his grain to the creditor's farm to be threshed, and afterwards attached it, was not estopped to deny the continuance of the mortgagor's lien on the crop after it had been removed from the land on which it was grown.

Department 2. Appeal from superior court, San Benito county; James F. Breen, Judge.

Action by T. J. Horgan against E. Zanetta. Judgment for plaintiff, and defendant appeals. Reversed.

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[1] Rehearing denied.

N. C. Briggs, John L. Hudner, S. F. Geil, and John Wyatt, for appellant. Geo. P. Burke, for respondent.

McFARLAND, J. In 1893, James Murphy was the lessee of a parcel of inclosed land called "Field No. 1." D. W. Cole owned adjoining land, called "Field No. 2." Murphy had executed a chattel mortgage of the crop of grain growing on his said leased land to the plaintiff, Horgan, to secure $800. In July, Murphy commenced harvesting the crop and hauling it away from the land on which it had grown onto the said land of Cole, and finished doing so in the early part of August. On September 1st, Cole brought suit against Murphy, and attached the grain. Jensen and Lauritzen also brought suit against Murphy, and upon either the 1st or 2d of September attempted to levy an attachment on said grain, but it is contended that for certain reasons this last attachment was invalid. However, Cole recovered judgment in his case against Murphy on September 7th, and Jensen and Lauritzen recovered judgment on September 8th; and executions in both cases were immediately issued and levied on the grain,—the one on September 7th, and the other on September 8th,—and the grain was sold to satisfy these executions by the defendant, Zanetta, who was constable, and who justifies under these attachments and executions. On September 15th plaintiff served a notice upon defendant, claiming "the possession of or a lien" upon the grain by virtue of the said chattel mortgage. Defendant proceeded and sold the grain under the executions without regarding the alleged mortgage lien; and thereafter plaintiff commenced this action to recover the $800 secured by said mortgage, with interest and damages. The court rendered judgment for plaintiff for $535.07, being the value of the grain as found by the court, together with damages, attorney's fees, and costs. Defendant appeals from the judgment, and from an order denying a new trial.

Section 2972 of the Civil Code, as amended in 1878, provides that the lien of a mortgage on a growing crop continues "as long as the same remains on the land of the mortgagor." Prior to 1878 the lien continued only until the crop was severed from the land. In the case at bar the crop had been removed from the land of the mortgagor at the time the attachments and executions were levied on it by the appellant. Therefore, the lien of the mortgage had prima facie been extinguished. It, therefore, devolved upon respondent to remove this prima facie case by showing that the case at bar is an exception to the general rule. This he attempted to do by evidence of facts which, he contends, estop appellant from denying the continuance of the lien. The facts substantially are these: The land on which the crop was raised was rough and hilly, and not suited to the placing of a machine for threshing; and, after Murphy had commenced harvesting, there were conversations between him and Cole which resulted in Murphy hauling the grain onto Cole's land, which was level and adapted to the use of a threshing machine. The court finds that Cole "represented" to Murphy these facts about the character of these two different tracts of land as to their respective adaptability to threshing, and requested him to take the grain onto Cole's land; and, as there was a conflict of evidence on the point, the finding must be taken as correct. It is quite evident, however, that Murphy, who lived on field No. 1, must have had as full a knowledge of the situation as Cole; and the court finds that "the fact was as represented by Cole, owing to the roughness of the ground in said field No. 1." It is not found that Cole made any false representation in the premises. The court, however, found that Cole made the representation, "having then actual knowledge of said mortgage," and for the purpose of defeating the same; but we find no evidence to support said finding in the statement on motion for a new trial which expressly declares that it contains "all the testimony given by both parties on the subject of the removal of the grain or the knowledge of Cole of plaintiff's mortgage." Cole testified positively that he knew nothing of the mortgage when the grain was removed, and did not know of it until about the time of the attachment, which was September 1st. The only other evidence on the subject is the testimony of the witness J. W. Rowe, who said that he "had a talk with Cole about September 4, 1893, and about one week before, when Cole came to see me about threshing his grain. The first talk I had with Cole was about the 19th of August. This was on the Saturday two weeks before the day I threshed. I threshed on September 4, 1893." He further said that at this conversation Cole said that "I guess Murphy has done me up for the rent"; that Horgan had a mortgage on record, and that he (Cole) had been to Hollister and had seen it; but that he was going to town to see his lawyer, and would try to hold the grain, and would "run a bluff on Horgan anyhow." This witness (Rowe), in an affidavit made on motion for a new trial, specifically states that Cole did not say that he knew of the mortgage before the removal of the grain onto his land, and that the conversation was on the second Saturday before September 4th; but, leaving that out of view, his testimony as given at the trial is not at all to the point that Cole knew of the mortgage at the time he talked with Murphy about moving the grain. That was in July, and the conversation between Rowe and Cole—putting it at the very earliest period—was the 19th of August, which was some time after all the grain had been removed by Murphy to Cole's land, and long after Murphy had commenced to remove it. Indeed, the conversation with Rowe is strong to the point that Cole had then just discovered the existence of the mortgage, and was going to ask his lawyer if he could not hold the grain for the rent notwithstanding the mortgage. We must therefore take the facts to be that Cole did not know of the mortgage until after the grain had been removed by Murphy to his (Cole's) land, but that he did know of the mortgage at the time he sued out the attachment. It does not appear that the mortgagee used any care or diligence in looking after the crop when harvested, or paid any attention to the grain until after it had been attached, which was about a month and a half after Murphy commenced to harvest it, and nearly a month after he had removed it from his land.

We think that, under these facts, Cole was not estopped from denying the continuance of the mortgage lien, and that, at the time of the attachment, the said lien had been extinguished by the removal of the grain from the land of the mortgagee on which it was raised. Goodyear v. Williston, 42 Cal. 11; Waterman v. Green, 59 Cal. 142. The cases cited by respondent are cases where there was a tortious removal of the crop from the land on which it grew by third persons, or where the mortgagor had stored the crop at a warehouse in the name of the mortgagee at the latter's request. We see no ground upon which Cole was estopped from asserting his right as attaching creditor, or from denying the continuance of the lien. He made no false representation. The person to whom the representation was made knew the fact represented, and the respondent, who is the party asserting the estoppel, was not influenced by the representation to change his position, or to do any act to his prejudice. The case arises out of a mere contest between hostile creditors of Murphy, each standing upon his legal rights. It is true that, when Cole attached, he knew that there had been a mortgage on the crop; but he also knew that the lien had been extinguished by the removal of the crop from the land of the mortgagor, and he was not bound to look after the former rights of the mortgagee who had lost them by his own carelessness. These views make it unnecessary to consider appellant's justification under the execution of Jensen and Lauritzen, against whom no claim of estoppel is made. The judgment and order denying the motion for a new trial are reversed.

We concur: HENSHAW, J.; TEMPLE, J.

107 Cal. 42

## EICHHOFF v. EICHHOFF et al. (No. 15,-957.)

(Supreme Court of California. April 4, 1895.)

BILL TO ANNUL JUDGMENT—BURDEN OF PROOF.

1. In an action to annul a judgment for want of jurisdiction, where the record shows summons issued, but fails to show that defendant was served or appeared in the action, the plaintiff has the burden of showing affirmatively the facts constituting want of jurisdiction.

2. An action brought in equity to annul a judgment at law, though not collateral, is an indirect attack upon the judgment.

Department 2. Appeal from superior court, Marin county; F. M. Angellotti, Judge.

Action by Melocene W. Eichhoff, by her guardian ad litem, against Magdalena Eichhoff and others, to annul a judgment of divorce. From a judgment for defendants, plaintiff appeals. Affirmed.

J. J. Paulsell and Kile & Plummer, for appellant. Jas. H. & J. E. Budd and Nicol & Orr, for respondents.

TEMPLE, J. This action was brought to set aside a judgment and decree rendered by the superior court of Marin county in 1882, annulling the marriage between Gustave Eichhoff and Melocene Eichhoff. The complaint shows as a cause of action that in the suit for the annulment of the marriage this plaintiff (defendant in that action) was not served with summons, had no notice of the suit, and never appeared therein, and that said judgment was procured by the fraudulent practices of said Gustave Eichhoff. At the trial, the plaintiff, to sustain her allegations, put in evidence the judgment roll in the action for the annulment of the marriage, the petition for the appointment of a guardian ad litem, and the order appointing the guardian ad litem, and rested. The defendant put in no evidence, and the court thereupon rendered judgment for defendant, and the plaintiff appeals from the judgment. The appeal was taken within 60 days after the rendition of judgment. The judgment roll put in evidence shows that a summons was issued, but there was no proof of service. There was no memorandum that the default of the defendant had been entered, as required by the Code. There was no appearance for the defendant in the case by answer or demurrer. There is no recital in the judgment to the effect that summons had been served; but it is stated that a guardian ad litem had been duly appointed for the defendant, and that such guardian appeared in open court, and consented that the action be tried. Neither in the petition for the appointment of a guardian ad litem nor in the order appointing the guardian is there a recital to the effect that the summons had been served on the defendant.

The only question presented on this appeal is whether, under these circumstances, the burden was cast on the plaintiff of proving that summons had not in fact been served on the defendant in the former action, or whether the defendant had the laboring oar. The question as to the validity of this judgment was once before considered by this court. In re Eichhoff's Estate, 101 Cal. 600, 36 Pac. 11. There the attack upon the judgment was collateral. It was held by this court that the judgment was not void. It was said: "The fact that the court has rendered a judgment implies a determination by it, before it assumed to hear the controversy, that it had jurisdiction over the subject-matter of the action, and of the defendant against whom the complaint was directed. * * * The judgment roll in the present case is consistent with the fact that proper service was made upon the defendant before the hearing upon the complaint, and as any condition of facts consistent with the validity of the judgment will be presumed to have existed, rather than one which will defeat the judgment, it must be presumed, in support of the action of the court, that such service was shown to it, although it has not preserved any record thereof." This conclusion is determinative of the question here submitted. The presumption that the court did have jurisdiction of the person of the defendant must be overcome by proof. Plaintiff's action is based upon the well-established grounds of the jurisdiction of courts of equity to grant relief in cases of fraud, accident, or mistake. She set forth her equities in her complaint; but it is incumbent upon her, as plaintiff, not only to aver the facts constituting her case, but, if they are denied, to prove them. The judgment roll did not prove want of service of summons, but the contrary. Under the decision, the fact presumed is a fact adjudged. She was in this action allowed to prove that this adjudication was procured through fraud, or was a mistake; that she never was in fact served, and had no opportunity to be heard in the action. The mere bringing of this suit does not change the presumptions arising from the fact of the rendition of the judgment. Apparently, counsel have been misled by some cases in which judgments have been reversed on appeal. In McKinlay v. Tuttle, 42 Cal. 570, and in some other cases in which that case has been followed, it was held, in effect, that on an appeal the judgment would be reversed for irregularities which would not render the judgment void if attacked collaterally. In Sichler v. Look, 93 Cal. 600, 29 Pac. 220, it is said "that upon a direct appeal it is essential for the party seeking to sustain the judgment to show by the record itself that the court had jurisdiction of the defendant, whereas in a collateral attack the entry of the judgment is itself conclusive of such jurisdiction. Upon a direct attack there is no presumption in favor of the existence of any fact essential to the jurisdiction of the court over the defendant, but in all matters of which the judgment contains a record, its verity, in the absence of any contradictory evidence, will be presumed as fully as upon a collateral attack." The phrase "direct attack," in the above quotation, evidently refers to appeals from the judgment. In fact, when an action is brought in a court of equity to set aside a judgment at law, the attack, although not collateral, is always indirect. Freem. Judgm. § 485. The judgment is not under review, but an issue is being tried as to whether the plaintiff is entitled to have a court of equity interpose in his behalf. The judgment is not conclusive in such a case. The question to be determined is whether the adjudication was not procured by fraud or mistake. It may be said that in such a case the legal validity of the judgment is admitted, and it is because of its validity or apparent validity that the plaintiff requires to be relieved from it. Says Freeman, at section 495, speaking of judgments entered without notice to defendant: "But proceedings in equity are peculiarly appropriate for the exposure of this infirmity. They permit of the formation of issues upon the question of service of process, and of the trial of those issues after full opportunity has been given to those who seek to sustain, as well as those who seek to avoid, the judgment. If, at such trial, it satisfactorily appears that the defendant was not summoned, and had no notice of the suit, a sufficient excuse is shown for his neglect to defend, and equity will not allow the judgment, if unjust, to be used against him, no matter what jurisdictional recitals it contains." It will be seen that the burden is on the plaintiff in such an action to excuse himself for not defending when the judgment shows that he was in default for not doing so. By such an attack upon a judgment the plaintiff does not question or dispute its effect as an adjudication, but he seeks to be relieved from its operation upon equitable grounds. The judgment is affirmed.

We concur: McFARLAND, J.; HENSHAW, J.

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107 Cal. 102

MILLETT et al. v. LAGOMARSINO et al.
(No. 15,586.)

(Supreme Court of California. April 5, 1895.)

ADVERSE POSSESSION BY TENANT—COLOR OF TITLE.

1. The possession of a tenant holding under a landlord, who is not the real owner of the premises, is adverse to such real owner, without a surrender of possession to the landlord and a re-entry by the tenant.

2. A deed to a tenant in possession, by one who has purchased the premises at a tax sale, but to whom no tax deed has been issued, gives such tenant color of title, which renders applicable to his possession the provisions of Code Civ. Proc. § 323, prescribing the essentials of adverse possession by a person claiming title founded upon a written instrument.

In bank. Appeal from superior court, San Mateo county; George H. Buck, Judge.

Action by Martin M. Millett and another against Thomas Lagomarsino and another. Judgment for plaintiffs, and defendants appeal. Affirmed.

Nowlin & Fassett and Aylett R. Cotton, for appellants. Nagle & Nagle, for respondents.

TEMPLE, J. Action brought to quiet title. The answer denies plaintiffs' ownership, and avers title in one of the defendants, John B.

Cronan, under whom the other defendant holds. Plaintiffs recovered judgment, the court finding the allegations of the complaint true, and all the allegations of the answer untrue. Plaintiffs' sole claim of title is from adverse possession. The lot in question is known as "Lot 2," and is one of many lots comprising about 10 acres, which belonged at one time to the City Extension Homestead Association, and which with other lands were subdivided by the association prior to 1870. Lot 2 was conveyed to John Tenney by the association prior to 1873, and the others to different owners. Lot 2 was 100 feet square. In November, 1873, Michael Millett entered into possession of the 10-acre tract, and other lands under a lease for 3 years, executed by 10 owners of lots in the tract, or in some portion of the lands formerly owned by the association; for the lease included other lands besides the 10-acre tract, which last-mentioned tract, however, was inclosed by itself. The lessors did not claim undivided interests in the demised premises, but each owned the land which had been conveyed to him by the association. The lease was in writing, and purported to lease to Millett their interest in the lands known as the "City Extension Homestead Association." Millett remained in possession of the premises up to some time in 1891, when lot 2 was entered upon by defendant Lagomarsino, who claimed under defendant Cronan, who had obtained a deed for the lot from John Tenney. For the first three years Millett paid rent as stipulated in his lease, and after that he still retained possession, but paid no rent. In July, 1882, Millett obtained a deed for the lot from one Jason Wight, who had purchased the property at a tax sale, although it does not appear that a tax deed was ever executed to him. Millett recorded this deed, and then—as plaintiffs contend—commenced to assert title to the land, and to hold the same adversely to all the world. Appellants contend that, as Millett entered into possession as a tenant, he cannot initiate an adverse possession without first surrendering possession to his landlord; and, further, that, if he can do so, Tenney and his grantees should have some notice of the change in the manner in which Millett was holding before his possession could become adverse to Tenney, so as to set the statute of limitations in operation. The rule that it is necessary to surrender possession, and again enter, before the possession can become adverse, obtains only where the person claiming to hold adversely was put into possession by the owner, or has at least held possession under such owner. No such relation ever existed between Millett and Tenney. The lease from McNear and others did not render Millett's possession of lot 2 less hostile to Tenney. Had Tenney sued Millett for trespass in entering upon it, the lease would have constituted no defense. On the contrary, if it is properly construed as including lot 2, and thereby authorizing Millett to enter into possession of it as tenant, it would have made the lessors joint trespassers with Millett. The only effect of the lease affecting this case was—conceding that it included lot 2—to show that while Millett was occupying the premises under it he was not in possession, claiming to be the owner. As the relation of landlord and tenant never existed between Tenney or his grantees and Millett, section 326, Code Civ. Proc., has no application to this case. It was not contended that Millett acquired any title through the deed from Wight, but simply that it brought him within the provisions of section 323, Code Civ. Proc. It seems sufficient for that purpose. Packard v. Moss, 68 Cal. 123, 8 Pac. 818; Wilson v. Atkinson, 77 Cal. 485, 20 Pac. 66. The possession of Millett was sufficient to establish an adverse holding under the statute, and there was no conflict in the evidence. As to Tenney, Millett had all the time been a trespasser, and his possession was sufficient notice of an adverse claim. There is some claim that McNear, when he made the lease as one of the lessors, was the agent for all who had owned lots in the homestead, and was acting for Tenney in making the lease. There is really no evidence which tends to show this, and the terms of the lease disprove the claim. If the law be as announced in this opinion, there is nothing whatever in the affidavits used on the hearing of the motion for a new trial. The evidence set out in them would not have tended to prove a defense. The judgment and order are affirmed.

We concur: BEATTY, C. J.; HARRISON, J.; GAROUTTE, J.; VAN FLEET, J.; HENSHAW, J.

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107 Cal. 92

## FAIRCHILD v. BOARD OF EDUCATION OF CITY AND COUNTY OF SAN FRANCISCO et al. (No. 15,828.)

(Supreme Court of California. April 5, 1895.)

REMOVAL OF TEACHER.

Plaintiff, who for more than 10 years had been a principal in the public schools of S. F., was granted a leave of absence by the board of education. During her absence the position was filled by the election of another teacher, and upon her return she was assigned to the head of a school of a lower grade, and at a lower salary. *Held* an unlawful removal of a teacher without cause.

In bank. Appeal from superior court, city and county of San Francisco; J. M. Seawell, Judge.

Mandamus by Harriet M. Fairchild against the board of education of the city and county of San Francisco and others. From a judgment for plaintiff, and an order denying a new trial, defendants appeal. Affirmed.

Wm. Grant, for appellants. Horace W. Philbrook, for respondent.

HENSHAW, J. Appeal from judgment of superior court in mandamus, and from order denying a new trial. Plaintiff was, and for more than 10 years before the 14th day of September, 1892, had been, a principal teacher in the public schools of San Francisco, elected for no definite term. Upon that day she obtained a leave of absence until July 1, 1893. Upon the expiration of her leave of absence she reported for duty, and asked to be allowed to resume the position of principal of the Potrero school, which position she was filling at the time of her vacation. That position had been filled during her absence by the election of another teacher to it. Her request was therefore refused, and she was assigned to the head of the day-school substitute class, under rule 124 of the board of education, which rule, so far as applicable to the case at bar, is as follows: "When a principal or assistant has been employed in the public schools of San Francisco for a period of not less than ten years, the board may grant such principal or assistant a leave of absence for a period not exceeding one year, and the teacher to whom such leave is granted shall, at the expiration of the leave of absence, be entitled to a position of the same grade as he or she held when the leave was granted. When a teacher returns from a leave of absence, if there be no suitable vacancy, the teacher shall be assigned to the head of day-school substitute class." This rule was in force at the time plaintiff obtained her leave of absence. The compensation allowed teachers in the day-school substitute class is much less than that which attached to the grade and position to which plaintiff had been elected.

Under this state of facts, it is apparent that the case is parallel in its essential features with Kennedy's Case, 82 Cal. 483, 22 Pac. 1042. The board of education, in regulating vacations, could pass no rules in contravention of the statutory provisions. Upon returning from her vacation, plaintiff was entitled to enter upon the performance of the duties of a principal teacher, if not in her former school, at least in one of like grade. She was likewise entitled to receive the compensation belonging to her grade. To fill her position by election when she was in the enjoyment of her leave of absence, and to assign her, under less pay, to the substitute class, was but doing in another form what this court declared unlawful when Kate Kennedy, upon her return, was removed to a position in a school of lower grade, at less salary. The board of education may make all reasonable rules regulating vacancies and leaves of absence; but it cannot provide, as an implied condition to accepting such vacations, that the teacher shall run the risk of forfeiting school or salary, and, by enforcing the condition, accomplish by indirection that upon which the statute had placed its ban. Section 1793, Pol. Code. The judgment and order appealed from are affirmed.

We concur: BEATTY, C. J.; TEMPLE, J.; GAROUTTE, J.; VAN FLEET, J.; HARRISON, J.

McFARLAND, J. I concur, but solely upon the authority of the Kennedy Case, 22 Pac. 1042.

(106 Cal. 547)

## ALVORD et al. v. SPRING VALLEY GOLD CO. et al. (No. 18,305.)

(Supreme Court of California. March 21, 1895.)

RECITAL IN DEED — ASSUMPTION OF MORTGAGE—EFFECT—CONSTRUCTION OF ASSUMPTION CLAUSE—SECONDARY EVIDENCE — LAYING OF FOUNDATION.

1. A recital in a deed that the land is subject to a mortgage which the grantee agrees to pay is conclusive of the validity of the mortgage as against the grantee.

2. A deed recited that it was subject to a mortgage, and also subject to a large indebtedness of the grantor, and that the grantee agreed to pay all the debts of the grantor above specified, and to discharge all the "lawful obligations" of the grantor. *Held*, that the grantee was bound to pay the mortgage debt even if it was not a lawful obligation.

3. Secondary proof of the contents of a missing document not in the possession of the adverse party cannot be given when the proof shows that no inquiry has been made of a person who might probably have it.

In bank. Appeal from superior court, Butte county; J. E. Prewett, Judge.

Action by William Alvord and another against the Spring Valley Gold Company and another to foreclose a mortgage. From a judgment for defendants, plaintiffs appeal. Reversed.

T. Z. Blakeman, for appellants. C. W. Cross, J. M. Allen, A. F. Jones, and F. C. Lusk, for respondents.

VAN FLEET, J. This was an action to foreclose a mortgage alleged to have been given by the Spring Valley Hydraulic Gold Company, a New York corporation, on its mining property in California, to secure payment of certain bonds of that corporation. The court below held the mortgage invalid for want of a compliance with the act of April 23, 1880 (St. 1880, p. 131), which requires the ratification of the holders of at least two-thirds of the capital stock. Many interesting questions have been argued by counsel, but only one of them need be considered.

The complaint contained, among other things, the following allegations: "That on or about the 23d day of July, 1886, the said Spring Valley Hydraulic Gold Company duly granted and conveyed unto the defendant the Spring Valley Gold Company all of the property described in said indenture of mortgage, together with other property, in consideration of which grant and conveyance the Spring Valley Gold Company assumed, undertook, and bound itself to pay, and agreed to pay, all of the indebtedness then existing of the Spring Valley Hydraulic Gold Company, and particularly the indebtedness represented by the aforesaid bonds, and secured as aforesaid by the said indenture, of mortgage, and undertook and agreed to assume towards all the creditors and obligees of said Spring Valley Hydraulic Gold Company the position of debtor and obligor, and to be substituted in the place and stead of said Spring Valley Hydraulic Gold Company as such debtor and obligor." This allegation was not denied by the answer, but the execution of the mortgage therein referred to was put in issue. The evidence showed that in July, 1886, a deed was executed from the Spring Valley Hydraulic Gold Company to the defendant the Spring Valley Gold Company (which is a California corporation) for the property in question, which deed was executed by both of the parties thereto, and contained the following clause: "Subject, nevertheless, to a certain mortgage or deed of trust on said premises, bearing date May 14, 1881, made by the said Spring Valley Hydraulic Gold Company to William Alvord, F. F. Low, and Henry B. Laidlaw, trustees, to secure the payment of $200,000 and interest thereon, and recorded in the office of the recorder of Butte county, California, June 3, 1881, in Book M of Mortgages, pages 773 to 782, and subject also to an indebtedness of the said the Spring Valley Hydraulic Gold Company of about $165,000, in addition to the above-mentioned indebtedness of $200,000, secured by said mortgage or deed of trust, as aforesaid. And the party of the second part, in consideration of the conveyance to it of the property aforesaid, does hereby agree and undertake and bind itself to pay all present indebtedness of the party of the first part, above specified, and all other indebtedness whatsoever of the party of the first part, and to perform and discharge all the liabilities and lawful obligations now incurred by or imposed upon the party of the first part; and the party of the second part does hereby further undertake and agree to assume towards all the creditors and obligees of the party of the first part the position of debtor and obligor, and to be substituted in the place and stead of the party of the first part, as such debtor and obligor." The action of the board of directors of the Spring Valley Gold Company, in executing and accepting that deed, was expressly approved and ratified by the unanimous vote of the stockholders of that company, cast at a meeting at which the entire subscribed capital stock was duly represented.

Conceding, then, that the act of 1880 applied to foreign corporations, and that a compliance with its provisions on the part of the New York company was not proven (on which points we express no opinion), we are, nevertheless, of opinion that neither the Spring Valley Gold Company, nor the other defendants who claim under that company by title subsequent, are in a position to avail themselves of that defense. The deed referred to contains an unequivocal recognition of the mortgage in question as a valid and subsisting obligation and lien on the property, and a promise to pay it as a part of the consideration for the conveyance. It is settled by an almost unanimous line of decisions in this country, approved by all text writers, that such a recital in a deed, even when the deed is not executed by the grantee, is conclusive evidence, in favor of the mortgagee and against the grantee in the deed, of the existence and validity of the mortgage. The effect of such a recital is to charge the land with the lien as effectually as if the purchaser had himself executed a mortgage of that purport. It is contended by respondents that the case of Biddel v. Brizzolara, 64 Cal. 354, is in conflict with this rule, but we are unable to perceive any such conflict. The judgment in that case was in accordance with section 1559 of the Civil Code, which section, however, does not appear to have been there brought to the attention of the court. See, also, Flint v. Cadenasso, 64 Cal. 83. Under that section, it is clear that the mortgagee has the right to enforce such a contract as was contained in the deed in question, and the grantee is estopped by its recitals. The estoppel being by deed, it was not necessary to plead it.

Respondents contend that the effect of the covenants in the deed in question is to be limited to "lawful obligations" of the grantor, and such was the construction adopted by the court below. Such a construction is contrary to the plain meaning of the language used. The deed recites the existence of a specific bonded indebtedness, and that it is "subject to" a specific mortgage given to secure that indebtedness, and contains a covenant on the part of the grantee "to pay all of the present indebtedness of the party of the first part, above specified," and also all other indebtedness. This specific language cannot be controlled by the general language following, by which the grantee undertakes to perform all the "lawful obligations" of the grantor. The latter expression must be taken to constitute a covenant additional to the specific covenant with relation to this mortgage, and not as in any way limiting it.

The deed itself was put in evidence, and was competent, and, as we have seen, conclusive, evidence as against the grantees and those claiming under them of the due execution and validity of the mortgage. The finding of the court, therefore, that the mortgage was never executed was against the evidence, and the judgment must, for that reason, be reversed. As the matters assigned as errors of law will probably not arise on another trial, we need not notice them. It is, however, proper to remark that secondary evidence of the contents of a missing document not in the possession of the adverse party cannot be given when the proof shows that there is a person who might probably have it, and of whom no inquiry has been made.

The preliminary proof should show that inquiry has been made, without result, of every person who, according to the evidence, would be likely to have the document, or to know of its whereabouts. The judgment appealed from is reversed, and the cause remanded for a new trial.

We concur: BEATTY, C. J.; GAROUTTE, J.; HARRISON, J.; McFARLAND, J.

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107 Cal. 8

## PAULY v. PAULY et al. (No. 19,505.)

(Supreme Court of California. April 4, 1895.)

CORPORATIONS—RATIFICATION OF UNAUTHORIZED ACT—ASSUMPSIT—DOCUMENTARY EVIDENCE.

1. The unauthorized act of the secretary of a corporation cannot be ratified at a special meeting of which all the directors were not notified.

2. Where plaintiff loaned money to a corporation, which applied the same to its own use, he may recover, though the notes on which the loan was made are void because unauthorized.

3. The unauthorized notes of a corporation, though not evidence of liability on the express contract appearing on the face thereof, are admissible to show that the money which they represent was furnished by plaintiff.

4. In an action by a bank against a corporation on an account, it appeared that it was customary for the manager of defendant company, when bills were presented, to "O. K." them, and that they were then presented to the bank, paid by the latter in the same manner as checks, and charged on its books to defendant's account; that defendant had no pass book, but at stated periods the bank would present a statement, and surrender the paid vouchers, and that these were transcribed to defendant's ledger. *Held*, that the books of the bank and the statements in defendant's ledger were prima facie evidence that the account of the bank was correct, and that the vouchers were admissible to show that the sums named therein were applied to the proper use of defendant.

5. In an action by a bank against a corporation for money loaned, the acts and admissions of the latter's financial managers are admissible against it, though such persons are also officers of the bank.

Commissioners' decision. Department 2. Appeal from superior court, San Diego county; E. S. Torrance, Judge.

Action by Frederick N. Pauly, receiver of the California National Bank of San Diego, against Charles W. Pauly, assignee of the San Diego Cable Railway Company, and another. From a judgment for defendants, plaintiff appeals. Reversed.

M. A. Luce, for appellant. James E. Wadham, for respondents.

HAYNES, C. The complaint contains several causes of action, the first four being upon promissory notes alleged to have been executed by the San Diego Cable Railway Company to the California National Bank of San Diego, aggregating $57,330. Another cause of action is for attorneys' fees and expenses in a certain action brought by the bank against the cable company in the United States circuit court; and the last cause of action is for the sum of $359,000, for moneys alleged to have been paid by the bank to various persons, at the request of the cable company, for its use and benefit, and upon its order. The $359,000 includes the moneys evidenced by the promissory notes sued upon in the antecedent counts. The answer consists of specific denials of the allegations of the complaint, and a counterclaim to recover the sum of $50,000, the alleged value of certain shares of the capital stock of the cable company, and the further sum of $119,000 for moneys alleged to have been had and received by the bank to and for the use of the cable company. The cause was tried by the court without a jury, and the court found against the plaintiff upon each of its causes of action, and also against the defendants upon their counterclaim, and judgment was entered accordingly. This appeal is taken by the plaintiff from the judgment against him, and from an order denying his motion for a new trial. There is no appeal from the judgment upon the counterclaim. The bank became insolvent and suspended business November 12, 1891, and the cable company was adjudged insolvent March 15, 1892.

Appellant specifies certain particulars in which the findings are claimed to be not justified by the evidence, but the principal questions arise upon rulings made upon questions of evidence; and the more important of these hinge upon the relations existing between these corporations through their respective boards of directors. The board of directors of the cable company consisted of Dare, Collins, Havermale, Palmerston, and Fisher. Of these, Dare, Collins, and Havermale were officers and directors of the bank, Havermale being president and Collins cashier, while Dare was president of the cable company, Havermale vice president, and Collins treasurer. The promissory notes in question were executed in the name of the cable company by O'Brien, secretary, but he does not appear to have been authorized to do so by any previous resolution or formal direction of the board, nor does there appear to have been any general power conferred by the board upon the secretary to execute promissory notes or other obligations of that character on its behalf. It is claimed by appellant, however, that these notes were ratified by the cable company—First, by a failure of that company to dissent; and, second, by express action of the board of directors of the cable company, at a special meeting held November 28, 1891, at the house of Vice President Havermale, at which meeting there were present Havermale, Collins, and Palmerston, of whom Palmerston only was not interested in the bank; Dare being absent in Europe, and Fisher not having been notified. As evidence of such ratification, plaintiff offered in evidence the minutes of said special meeting, as follows: "On motion of Mr. Palmerston, seconded by Mr. Collins, the following resolution was unanimously adopted: 'Resolved, that the San Diego Cable

Railway, a corporation, by and through its board of directors, regularly assembled, does hereby acknowledge and agree to pay the sum of $84,330, being due the California National Bank of San Diego, and evidenced as follows: One note of $20,000, dated September 3, 1891, due December 3, 1891; one note of $10,000, dated September 3, 1891, and due December 3, 1891; one note of $10,130, dated September 3, 1891, and due December 3, 1891; one note, $17,200, dated June 30, 1891, and due on demand. The sum of $27,000, placed to the credit of the S. D. Cable Railway Co. in their account with the California National Bank, on February 12, 1891, being carried in the form of a note, as a cash item, signed by Dare & Collins, for $28,500; also, an overdraft for the sum of $9,444.27,—the total principal sum being $93,774.27.'" Counsel for plaintiff also stated that he expected to follow with further evidence going to show that the cable company received the money, and that it went into the construction of the road; that the business had been transacted at the bank; that the cable company obtained its money there, and that these notes were given for the debt. Several objections were made to the introduction of said minutes, to the effect that the meeting was not called by competent authority; that it was not held at the office of the company; that the minutes do not show that notice was given to Fisher; that Fisher was in fact not notified; and that two of the three directors present were directors of the bank, and could not bind the cable company by an acknowledgment of an indebtedness to the bank.

Appellant does not rely upon the authority of the secretary to execute these notes to sustain their validity. No such authority was shown; and, as to the attempted express ratification, it appearing affirmatively that the meeting was special, and that the directors were not all notified, the meeting was not duly assembled, and its action did not bind the corporation as a valid corporate act. The other objections to the admission of the minutes as an express ratification of the execution of the notes need not be considered. The court, therefore, did not err in the exclusion of the resolution as evidence of express ratification, nor in refusing to receive the promissory notes in evidence in support of the causes of action based thereon. Whether they could be received, in connection with other evidence, for any purpose, need not be considered in this connection. This, however, is not conclusive of the right of the plaintiff to recover for money loaned or advanced by the bank, so far as it was applied to the proper uses of the cable company. The liability of defendant does not rest upon the express contract appearing upon the face of these notes, but upon the right of the lender to recover money which has gone to swell the assets of the cable company. If the bank in fact furnished to the cable company moneys, whether as loans upon unauthorized promissory notes or upon account, or paid money for construction of its road, or in discharge of its legal liabilities, so far as the same were in fact applied to the proper use and benefit of the cable company, such moneys may be recovered by the plaintiff to the extent to which they have not been repaid. Plaintiff in the last count of his complaint pleaded facts which, if proved, would entitle him to such a recovery. In support of this proposition see the following authorities: Mor. Priv. Corp. §§ 526, 616, 715; Gardner v. Butler, 30 N. J. Eq. 702, 721, 724; Oil Co. v. Marbury, 91 U. S. 587; Railroad Co. v. Spreckles, 65 Cal. 193, 3 Pac. 661, 802; Seeley v. Lumber Co., 59 Cal. 22. In Railroad Co. v. Simpson, 23 Fed. 214, it was held that the corporation must account to the contractor for benefits received under an ultra vires contract, with interest on the amount found to have been due when the work was stopped. In Leavenworth Co. Com'rs v. Chicago, R. I. & P. Ry. Co., 134 U. S. 688, 707, 10 Sup. Ct. 708, Mr. Justice Blatchford, speaking for the court, said: "I am unable to see anything in the fact that some of the same men were found to be trustees in this deed and directors in the Rock Island Company, and that directors in the Southwestern Company were also directors in the Rock Island Company, which should block the course of justice, paralyze the power of the court, and deprive the creditor corporation of all remedy for the enforcement of its lien. If it could show that the Southwestern Company did not owe this interest, or that the Rock Island Company had in its hands the means of the Southwestern Company to meet this obligation, and that by reason of collusion between those who controlled both companies this fact was suppressed or concealed, it would present a strong case for relief. But this would be actual fraud, and one not necessarily growing out of the influence of the Rock Island directory over that of the Southwestern. Notwithstanding this commingling of officers, the corporations were distinct corporations. They had a right to make contracts with each other in their corporate capacities, and they could sue and be sued by each other in regard to these contracts; and the question is not, could they do these things? but, have the relations of the parties—the trust relations, if, indeed, such existed—been abused to the serious injury of the Southwestern Company?" The money that was paid, from whomsoever it was obtained, was obtained by and disbursed through the proper financial officer of the cable company, viz. its treasurer, through the agency of the bank, and, if applied to the proper uses of that company, there at once arose an implied promise to repay it.

The remaining controversies, so far as they involve the rulings of the court upon questions of evidence, require a general statement of the facts disclosed by the record. The bank was in existence before the cable company was organized. Who the stockholders of the cable company were, aside from the directors, is not disclosed. It is shown that on February 15, 1890, certificate No. 2, 500 shares, was issued to Collins, and certificate No. 3 to Dare, for 500 shares, and to Palmerston July 8, 1890, 100 shares; that Fisher originally held 500 shares, but on March 17, 1890, he sold all but 1 share to Dare and Collins. During part of the time covered by these transactions, Collins was cashier of the bank, and part of the time president, and all of the time treasurer of the cable company. Dare and Havermale were also directors of the bank, and were also president and vice president, respectively, of the cable company, and Palmerston and Fisher, who were not connected with the bank, were the remaining directors, Fisher being the general manager. An account was opened by the bank with the cable company, and all moneys, whether acquired by loans or otherwise, were credited to the company's account by the bank as deposits. Fisher had charge of the construction and general business, and bills and accounts of labor and materials were presented to him, he would "O. K." them, signing his name thereto, and direct the holder to go to the bank for payment; and these bills, accounts, time warrants of the laborers, etc., were paid by the teller of the bank as though they were checks, stamped "Paid," and charged to the company's account. From the organization of the cable company, through all these transactions, J. E. O'Brien was bookkeeper of that company, and during the latter part of the time was also its secretary. The company had no pass book as a depositor, but generally twice a week the bank would deliver to O'Brien a statement of the company's account, and surrender the paid vouchers, and from these statements and vouchers O'Brien kept a ledger account with the bank in the books of the company, which was thus practically a rescript of the bank's books. Some of the machinery was purchased by Dare, and the bills for such did not pass through Fisher's hands, but would be audited and settled for at the bank; and part of the time, instead of giving time checks to laborers, a pay roll would be made out, and money to pay the same would be drawn from the bank in bulk, and a check would be the voucher in such case, but by whom drawn does not appear. At the time of the trial, Dare had long been absent in Europe, Collins was dead, and two of the three bookkeepers of the bank who made entries in the company's account in the books of the bank were absent from the state. The cashier of the bank and the bookkeeper who had charge of the general books of the bank testified as to the manner in which the accounts were kept, and Brimhall, one of the three who kept the books in which this account appeared, testified to the handwriting of the absent bookkeepers, as well as his own, that the entries were made in the usual course of business on the day of the several transactions, as they occurred, and that he believed the account to be correct. Some testimony was also given by one or more other parties who had settled their private accounts with the bank and found the bank's accounts to be correct. The court eventually received in evidence, first, the statements of account furnished to the bookkeeper of the cable company by the bank, and afterwards the ledger of the cable company, showing the account with the bank made up from said statements; but refused to receive in evidence the books of the bank and the vouchers returned to the cable company's bookkeeper with the statements. Plaintiff again offered in evidence each of the notes set out in the complaint, and these were again excluded. Plaintiff then offered in evidence the note of $17,200, dated June 30, 1891, as explanatory of an item of the same date and amount appearing in the statement admitted in evidence, said item being, "Note for $17,200," for the purpose of showing that that entry was of the note offered; and that note was thereupon received in evidence. The ledger account of the cable company, which was received in evidence, showed that said credit, "Note for $17,200," was carried through the stated accounts to the final balance as a credit to that amount, and these statements also showed a final balance or overdraft against the cable company of $9,444.27. This balance, added to the credit, "Note for $17,200," makes $26,644.27, and for this amount appellant insists he should have had judgment, and that the finding that the cable company was not indebted to the bank in any sum whatever is not justified by the evidence; and this contention I think must be sustained.

The evidence was meager in regard to the financial resources of the cable company. Mr. Fisher testified, when called by defendants, that: "Collins and Dare looked after the financial part of the road entirely, and I never saw any of the accounts after I passed on the bills, as I have stated here before. I would 'O. K.' them, and that is the last I would ever see of them." That he did not examine the books. That he had implicit confidence in Mr. Dare and Mr. Collins. That after the failure of the bank he only knew of any balance being due the bank through reports in the newspapers, but he never said anything to the officers of the bank about it. That, prior to the failure of the bank, he heard rumors that the bank was carrying the cable company, and the officers of the bank denied it, and said the cable company had a balance in the bank. When these conversations occurred does not appear, but it does appear that after March 17, 1890, he held but 1 share of stock, having sold 499 shares to Collins and Dare, and admitted that after that time, though he remained a director, he had no financial interest in the corporation, and gave that as the reason why he made no inquiries as to the truth of the newspapers' reports, after the bank's failure, to the effect that the cable company owed the bank "ninety-odd thousand dollars." It would therefore appear probable, at least, that the former inquiries were made in the early stages of the work. All the notes mentioned in the record were made after Fisher parted with his interest in the corporation. It further appeared that, though Mr. Fisher had procured the books for the bookkeeper in which to keep the company's accounts, he had never looked into them, or sought to inform himself of the state of the company's accounts. In Morse on Banks and Banking (3d Ed., p. 513, § 295) it is said: "The sound rule would seem to be that the depositor's bank book, if it has been returned to him, and he has not within a reasonable time objected to it, should be regarded as prima facie evidence of the way the account stood between him and the bank at the date of the last balancing. It settles the presumption in the case, and leaves the onus on the party disputing it." This prima facie evidence was not rebutted, and judgment for the sum stated should have been for the plaintiff.

There are other grounds justifying a reversal, and, as they involve questions which will doubtless arise upon another trial, they should be noticed.

The vouchers delivered with the statements to the cable company are not only prima facie evidence of the payment by the bank of the several sums named in them, but these payments, having been made principally upon bills certified by the general manager, to that extent, at least, furnished satisfactory evidence that the money paid thereon was in fact applied to the proper use and benefit of the cable company; and, as we have already held that the plaintiff could not recover upon the notes alone, because of their unauthorized execution, such evidence was material and important to the plaintiff, and he was prejudiced by the exclusion of these vouchers.

The court also erred in excluding the books of the bank. The first objection to this evidence argued by counsel for respondents in his brief is that these books were not "kept in the regular and usual order of business," because the cable company had no pass book, and because the money was not paid out upon checks, but upon bills, etc. Whether or not there was a pass book in no wise affected or changed the mode of keeping the bank's accounts. The statements rendered to the cable company's bookkeeper showed the deposits, as well as the payments, in the same manner as if written up in the pass book. That payments were made upon bills instead of checks could not affect the correctness of the accounts, the bills being treated as checks. I think the preliminary evidence was sufficient to authorize the admission of the books of the bank, especially in view of the fact that statements of the bank's account had been regularly furnished to the cable company, thus giving it the opportunity to examine it and investigate its correctness. These statements, being in evidence, and no objection having at any time been made to them, furnished at least prima facie evidence that the account of the bank was correct. The interest of Dare and Collins as officers of the bank does not seriously, if at all, affect this question. Their interest on behalf of the bank was not greater than in transactions with any other customer, and it is well settled that books of account kept by banks are admissible in evidence. See McLennan v. Bank, 87 Cal. 569, 575, 25 Pac. 760, and cases there cited. The interest of parties to a transaction invites scrutiny just as the interest of a witness invites scrutiny; but such interest goes only to the weight of the testimony, not to its admissibility. Even when a party was disqualified as a witness, because of his interest, he was permitted to testify to the correctness of his account, and put that in evidence.

It has been seen that the notes upon which the first four counts are based, not having been executed by proper authority, are not evidence of a liability upon the express contract appearing upon their face; but, as it is also true that if the money represented by or named in the notes was furnished by the bank, and was received by and applied to the proper use and benefit of the cable company, plaintiff is entitled to recover the same, the question arises whether the notes are admissible in evidence for the purpose of showing that the money represented by them was furnished by the bank. The record does not disclose the circumstances under which, nor by whose direction, the secretary executed the notes. It does appear, however, that Collins and Dare were intrusted with the management of the finances of the cable company, and the only evidence in the record showing that money was received from any other source than the bank was given by Mr. Fisher, to the effect that he understood that the money was borrowed in the East; that he, Collins, and Dare each made notes individually, the other two becoming indorsers, and he thought that in this way about $100,000 was raised, and that he did not know of the cable company borrowing in its own name. The stumbling block in this case, however, seems to have been the double relation or agency of Collins, Dare, and Havermale, being at the same time officers and directors in both corporations. In Mining Co. v. Senter, 26 Mich. 73, Capt. Frue was the agent of the Adams Company, and also of the South Pewabic Company. Frue sold to Senter certain timber belonging to the Adams Company, in payment of a bill which the Pewabic Company owed to Senter, in order that the latter company should be given additional credit, and this action was brought by the plaintiff against the defendant for taking said timber. After discussing other questions, Mr. Justice Campbell said: "The question next arises, how far the double agency of Captain Frue affected his relations to his employers and to third persons. It was claimed that, upon the principle that a man cannot contract with himself, and cannot occupy positions involving a conflict of duties, all of his dealings whereby the property of one company was transferred to or used for the other should be held unlawful. There is no validity in such a proposition. The authority of agents may, where no law is violated, be as large as their employers choose to make it. There are multitudes of cases where the same person acts under power from different principals in their mutual transactions. Every partnership involves such double relations. Every survey of boundaries, by a surveyor jointly agreed upon, would come within similar difficulties. It is only where the agent has personal interests conflicting with those of his principal that the law requires peculiar safeguards against his acts. There can be no presumption that the agent of two parties will deal unfairly with either. And when both deliberately put him in charge of their separate concerns, and there is any likelihood that he may have to deal with the rights of both in the same transactions, instead of lessening his powers, it may become necessary to enlarge them far enough to dispense with such formalities as one man would use with another, but which could not be possible for a single person to go through with alone." Collins and Dare were not the bank, though they were its agents; and in an action by the bank, or its receiver, it is not perceived why their acts and admissions as the agents of the cable company, in charge of its financial affairs, are not admissible in evidence against it in relation to those matters that were intrusted to their management by the latter company. If they had procured the money from another bank, with which they were not connected, assuming that the notes were executed by the secretary by their direction, I think it would not be contended that the notes were inadmissible in evidence, in connection with the other facts, for the purpose of showing that the payee was the party lending the money.

I think the judgment and order should be reversed, and a new trial granted.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, and a new trial granted.

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107 Cal. 78

## Ex parte TYLER. (No. 21,176.)

(Supreme Court of California. April 5, 1895.)

DISBARMENT OF ATTORNEY.

In a proceeding to disbar an attorney, brought under Code Civ. Proc. § 287, subd. 2, authorizing the court to remove or suspend an attorney when guilty of any violation of his professional duties, it is no defense that the violations of the professional obligations or the professional delinquencies charged against the attorney may render him liable to a criminal prosecution, or that his conviction therefor is barred by the statute of limitations.

In bank.

Habeas corpus by George W. Tyler. Writ discharged.

Geo. W. Tyler, in pro. per.

PER CURIAM. By the judgment of this court, made December 3, 1886, the petitioner was suspended from the right to practice law for the period of two years, and until the payment of a certain judgment against him in favor of J. M. Hogan. 71 Cal. 353, 12 Pac. 289, and 13 Pac. 169. A motion made by him in 1889 for a modification of this judgment was denied. 78 Cal. 307, 20 Pac. 674. In October, 1894, the petitioner appeared in the superior court of Alameda county, Hon. John Ellsworth presiding, for the purpose of making a motion in a cause pending in said court, and was informed by the judge that he would not be permitted to make said motion or practice law in said court as an attorney until he should exhibit satisfactory proof that he had paid, or caused to be paid, the aforesaid judgment in favor of Hogan. The petitioner, however, insisted that he had a right to practice law, and appear as an attorney in said court, without making such proof, and thereupon, without leave of the court, and in contempt of its authority, made a motion in said cause, for which he was adjudged by the said court guilty of contempt, and was sentenced to pay a fine, and, in default thereof, to be imprisoned until the same was paid, or was satisfied at the rate of one dollar per day. Petitioner, having been taken in custody by the sheriff under a warrant of commitment issued upon this order, has sued out the present writ of habeas corpus.

The former judgment of this court that the petitioner had been "guilty of a violation of his duty as attorney and counselor, and of his oath of office as such," is a judicial determination of that fact, by reason of which this court is estopped from any investigation of the sufficiency of the proofs to establish the charge, or of the legal effect of those proofs; and the subsequent denial of the petitioner's motion for a modification of this judgment was a determination that the court did not exceed its authority in rendering judgment, and is equally an estoppel against its reexamination. It is, however, contended by the petitioner in support of his application that this court never had any jurisdiction to entertain the proceedings for his disbarment, and that the judgment therein for his suspension from practice is for that reason not entitled to any consideration. If the petitioner is correct in this proposition, his further contention as to the order of the superior court committing him for contempt for his disregard of that judgment is also correct. Having been once admitted to practice law in all the courts of this state, a court could not adjudge him guilty of contempt for the mere act of practicing law in its presence. The grounds urged by the petitioner in support of this contention are that the transactions which were alleged in support of the charges against him constituted felonies, viz. embezzlement and subornation of perjury; that he could not be convicted of these offenses except by the verdict of a jury; that this court could not entertain a motion for his disbarment on account of these transactions until after such conviction had been had; that at the time the proceedings for his disbarment were instituted his conviction for the offenses had been barred by the statute of limitations; and that, as no conviction could be had therefor, this court had no jurisdiction to hear the charges. It has been held in many cases, and the rule is perhaps sustained by the weight of authority, that when an attorney has violated the laws of the state in a matter distinct from his professional conduct, when the act or offense is committed in his private capacity, and not by virtue of his office as an attorney, courts will not entertain any proceedings for his disbarment until after he shall have been convicted of the offense charged. In Tilden's Case (Cal.) 25 Pac. 687, the charge against him was of an act wholly disconnected with his oath or duty as an attorney, nor was the act alleged to have been committed in the discharge of any professional relation; and we held that, as we had no jurisdiction to try him for the offense charged, we would not entertain a motion to suspend or remove him for the commission of the offense until after his conviction, and that we would not anticipate his trial for the offense by taking proceedings for his disbarment. Whether in such a case the court would, under any circumstances, entertain a motion for disbarment when no conviction had been had, was left an open question, and is not involved in the present case. See, however, Weeks, Attys. at Law, § 80; State v. Winton, 11 Or. 456, 5 Pac. 337; Ex parte Wall, 107 U. S. 265, 2 Sup. Ct. 569. The case last cited shows that the petitioner's objection that he was deprived of his office as attorney "without due process of law" is untenable. See also, to the same effect, Hallinger v. Davis, 146 U. S. 314, 13 Sup. Ct. 105. If, however, an attorney is charged with a violation of his professional obligations, either to his client or to the court, or with professional delinquency in matters pertaining peculiarly to the relations between him and his client, it is no defense to a proceeding for his suspension or disbarment that the same transactions may render him liable to a criminal prosecution. The court is authorized to strike him from its roll of attorneys, notwithstanding the same cause may form a basis for an indictment. Its power in this respect is not suspended until after his conviction, although the court may in its discretion withhold the exercise of this power, as the facts of any particular case may suggest would be appropriate. Upon this proposition it was said in Treadwell's Case, 67 Cal. 358, 7 Pac. 724: "In the exercise of this power the court deals with the attorney only as an officer of the court in investigating charges against him for the purpose of determining whether, under the proofs, he is a fit person to be allowed to continue to practice as an attorney and counselor in the courts under the license which has been granted to him, and not for the purpose of judging whether he is guilty of the commission of a crime for which he ought to be convicted and punished. That can only be done in a criminal court of competent jurisdiction by due process of criminal law. Previous conviction of a crime is not necessary to a proceeding to disbar an attorney. If an attorney be found by a court guilty of acts indicating professional moral depravity, the court can, without previous conviction of a criminal offense, prevent the repetition of such official acts by taking away the license under which they have been committed." In Stephens' Case, 102 Cal. 264, 36 Pac. 586, we held that we would not entertain a charge against an attorney at the instance of a client who claimed that he had failed to pay over certain moneys that had been collected until the client had first established his claim against the attorney.

The provisions in the Code of Civil Procedure for the disbarment of an attorney are based upon these principles. Subdivision 1 of section 287 renders his conviction of a felony or misdemeanor involving moral turpitude a ground for his disbarment, whether such offense was committed in his private capacity or by virtue of his professional relation. The provisions of the two succeeding sections, that the clerk of the court in which such conviction is had shall transmit a copy of the record to the supreme court, and that upon the receipt thereof proceedings must be taken for his removal, leave this court no alternative, under section 299, to striking his name from the roll of attorneys. Subdivision 2 of section 287 authorizes the court to take action for the removal or suspension of an attorney whenever he is shown to have been guilty of "any violation of the oath taken by him, or of his duties as such attorney." There is no limitation upon the power of the court to entertain a motion under this subdivision for the removal or suspension of an attorney, nor is it required to defer its action until after the conviction of the attorney of a charge which might be sustained by the same evidence.

An examination of the proceedings under which the petitioner was suspended, and also of the opinion of the court rendered therein, shows that the charges against him were brought under subdivision 2 of section 287. There was no accusation that he had been convicted of any offense, nor was it sought to convict him of any offense. The charges against him were of the violation of his duties as attorney and counselor, and of unprofessional conduct. Whether the evidence offered in support of these charges would have sustained an indictment or not was immaterial, nor was this question considered by the court. The court found that the evidence was sufficient to sustain the charges, and under subdivision 2 of section 287 its jurisdiction to entertain the charges and to render the judgment it pronounced must be regarded as unquestioned. The same principles which authorize the court to entertain charges against an attorney of violating his professional duties, irrespective of any civil or criminal proceedings against him, render the bar of the statute of limitations against a civil or criminal proceeding an immaterial element. The statute of limitations never deprives a court of jurisdiction, even in cases where it is a defense to the action or proceeding. The writ is discharged, and the petitioner remanded to the custody of the sheriff.

(5 Cal. Unrep. 6)

## In re BURDICK'S ESTATE. (No. 15,869.)[1]

(Supreme Court of California. April 2, 1895.)

SETTLEMENT OF ESTATE—APPEAL BY EXECUTOR—DISTRIBUTION TO TRUSTEES—RIGHTS OF SOLE LEGATEE—COMMUNITY PROPERTY.

1. An executor, who has appealed from all of a decree made in the final settlement and distribution of the estate, except that part settling such executor's account with the estate, cannot, on such appeal, object that the funds in his hands were found to be community property, and distributed accordingly.

2. A distribution of a part of a devised estate to trustees at the special request of the sole devisee will not be declared void on appeal because the record fails to show that such trustees established a legal claim to the property.

3. Under Civ. Code, § 1402, the probate court has jurisdiction to declare certain property devised to testator's son to be community property, and to distribute it to the wife, who is not a legatee or devisee.

4. The additional right acquired in community property by either the husband or the wife upon the death of the other is acquired by inheritance. Civ. Code, §§ 1383–1402.

5. Persons claiming to be trustees of a devised estate, but who are neither heirs, devisees, nor legatees, and who have presented no claim against the estate, cannot appeal from a decree rendered in the final settlement of the estate.

6. An appeal cannot be taken from an order of the probate court refusing to postpone the final decree.

7. A surviving wife cannot be deprived of her rights in community property by an act of the husband subjecting such property to the control of trustees for the use of others.

Department 2. Appeal from superior court, Alameda county; John Ellsworth, Judge.

Appeals by the executor of the estate of Stephen Powell Burdick, deceased, by A. W. Burdick and A. M. Sutton as trustees, and by A. W. Burdick individually, from a decree rendered in the final settlement of the estate, distributing one-half of the funds in the executor's hands to the wife as her interest in the community property. Appeal of the trustees dismissed, and decree affirmed.

J. H. Craddock and R. S. Gray, for appellants. Clarken & Ross, for respondent.

TEMPLE, J. The executor of the above estate filed his final account with a petition for settlement and for a distribution of the estate, December 12, 1892. He reported that he had in his hands, after payment of debts and expenses, $1,855.41, from which he asked to be allowed attorney's fees and accruing costs, and prayed that the balance be distributed to the parties entitled thereto; that the testator left one child, Arthur W. Burdick, and a widow, Alice H. Burdick; that by his will his entire estate was left to his son. January 31, 1893, Alice H. Burdick filed her petition, claiming that there was other property belonging to the estate, and asked to have such property recovered for the estate. August 30, 1893, A. W. Burdick and A. M. Sutton asked to have the money in the hands of the executor distributed to them as surviving trustees of a trust, or that the entire estate be given to A. W. Burdick as sole legatee and devisee. The petitions were submitted, and taken under advisement. July 20, 1893, Burdick and Sutton filed a more elaborate petition, asking the court to distribute the money to them as trustees. October 9, 1893, the court denied the application of the widow to compel the executor to include other property, and ordered a distribution of the estate as community property. One-half of the money, at the special request of A. W. Burdick, was distributed to A. W. Burdick and A. M. Sutton, trustees, and the other one-half to the widow. At that time counsel for A. W. Burdick and A. M. Sutton, trustees, and for A. W. Burdick individually, asked the court to suspend entry of the order of distribution until the title of the fund could be determined by proper action in a court of general jurisdiction. This application was denied, and the court proceeded to settle the final account of the executor, and to distribute the property. Appeals are taken from this decree by the executor, by A. W. Burdick and A. M. Sutton as trustees, and by A. W Burdick individually. The appeals are brought here together, and by stipulation all use the same transcript, and they have been argued and submitted as one appeal.

The executor states in his notice of appeal that he appeals from the whole decree, "except so much of said decree as settles the account of said executor, from which last-named portion he does not appeal." The executor claims that the decree distributes the estate to strangers; that neither the trustees nor the wife, as to community property, are heirs, legatees, or devisees of S. P. Burdick, deceased, and those claiming through them are the only persons to whom distribution can lawfully be made. The executor cannot, on this appeal, claim that the court erroneously found the money to be the property of the estate, rather than the property of the trustee; for the court, in settling the final account, adjudged that he had the amount in his hands belonging to the estate, and from that part of the decree he does not appeal.

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[1] Rehearing granted.

1. At first sight it would appear as though the court could not distribute property to the trustees. They are not named in the will, and could not, as such, be heirs. But the bill of exceptions does not profess to state all the evidence, and, in the absence of a contrary showing, we should presume that they made out a claim through some one legally entitled. If the statement that it was done at the special request of A. W. Burdick shows that there was no other warrant for the distribution, still I think it is not void. It shows that A. W. Burdick was the person entitled to it, and, if the other direction be void, still the distribution complies with the Code. It describes the property, and names the person entitled to it, viz. A. W. Burdick. No other person could complain of it, and he cannot, for it was done at his instance. The executor questions the jurisdiction of the probate court to determine the common property, or to distribute it to the widow. He argues that the wife claims adversely to the estate, and not as heir, legatee, or devisee. The estate can only be distributed to such persons, and those who have acquired title from them. He cites in support of his contention Estate of Rowland, 74 Cal. 525, 16 Pac. 315. It was not decided in that case that the wife does not take one-half the community property upon the death of her husband as his heir, but that, when the community is dissolved by the death of the wife, the probate court, while administering the estate of the wife, has no jurisdiction of the community property. The Civil Code declares that in such case the community property goes to the husband without administration. Civ. Code, § 1401. Notwithstanding some unnecessary language in Estate of Rowland, it was only held that a controversy between the representative of the deceased wife and the surviving husband as to whether certain property was common property or the separate property of the wife could not be determined by the probate court. It would not be necessary to concede that the probate court has not the jurisdiction claimed here, even if the wife does not take as heir. The question, then, would be, has the statute conferred the jurisdiction, and was it within legislative power? The jurisdiction is expressly conferred. Civ. Code, § 1402. For 30 years before the adoption of our present constitution by the people the probate court had exercised the power without question. The constitution gives probate jurisdiction to the superior court. But I think, within the meaning of our laws, both husband and wife take such additional right as they acquire to the common property by the death of the other by inheritance. The disposition to hesitate to accept this conclusion does not arise from any ambiguity in our statutes, which I think, and shall presently show, are very clear upon the subject, but from the fact that during the existence of the community the relation of the wife to the property is, in some respects, quite different from that of a mere heir apparent. She has rights with reference to it which the courts will interfere to protect, and in case of the dissolution of the community by divorce her right to one-half the property immediately attaches, subject to the power of the divorce court to deprive her of it for her delinquency. But these statutory provisions do not show that the additional right which she acquires upon the death of her husband is not as heir, and the Code seems quite clear upon the subject. Section 1334, Civ. Code, reads as follows: "A testamentary disposition to 'heirs,' 'relations,' 'representatives,' 'legal representatives,' or 'personal representatives,' or 'family,' 'issue,' 'descendants,' 'nearest' or 'next of kin' of any person, without other words of qualification, and when the terms are used as words of donation and not of limitation, vests the property in those who would be entitled to succeed to the property of such person, according to the provisions of the title on succession in this Code." Section 1383 defines "succession": "Succession is the coming in of another to take the property of one who dies without disposing of it by will." The next section shows that the person taking by succession is an heir, and that his right is subject to the control of the probate court and the possession of the administrator. Certain provisions then follow in regard to succession, down to section 1400, which is as follows: "The provisions of the preceding sections of this title as to the inheritance of the husband and wife from each other apply only to the separate property of the decedents." The next section provides for the succession to the community property in case of the dissolution of the community by the death of the wife. Section 1402 provides for the succession in the case of the death of the husband. It is as follows: "Upon the death of the husband, one-half of the community property goes to the surviving wife and the other half is subject to the testamentary disposition of the husband, and in the absence of such disposition goes to his descendants, equally, if such descendants are in the same degree of kindred to the decedent; otherwise, according to the right of representation; and, in the absence of both such disposition and such descendants, is subject to distribution in the same manner as the sep-

arate property of the husband. In the case of the dissolution of the community by the death of the husband the entire community property is equally subject to his debts, the family allowance, and the charges and expenses of administration." The sections following provide for other cases of succession, and the heading of the title is "Succession." The statute therefore indicates very plainly that the wife acquires her right of absolute property in one-half of the community property, upon the death of her husband, by inheritance. Nor does this conclusion narrow or in any way limit the views which have hitherto prevailed in regard to the rights of the wife with reference to the community property during the life of her husband. From what has already been said, it is quite obvious that the appeal of the trustees must be dismissed. They are not named in the will, could not be heirs, and have presented no claim against the estate. Nor do they show any right acquired from heir, legatee, or devisee. They are not, and could not have been, aggrieved persons. The order refusing to postpone the final decree is not appealable. Indeed, I do not now think of any order made in the course of the administration from which these trustees could appeal. Arthur W. Burdick, as devisee or heir, was not aggrieved because the court did not distribute the money to the trustees, or because the court erroneously distributed it as part of the estate of S. P. Burdick. On the hearing, Arthur W. Burdick announced through his counsel that he claimed nothing as devisee. Nor has such claim been made on this appeal. But, waiving this, and supposing appellant here contending that the court erred in holding that the property was community property, but should have decided that it was the separate property of S. P. Burdick, deceased, and that, therefore, he was entitled to the whole of it as sole legatee and devisee, there is nothing in the record upon which a decision in his favor could be based. The bill of exceptions does not purport to state all the evidence taken, and the decision may have been fully sustained by evidence not brought up. But, conceding that all the evidence is there set out, the conclusion of the court is correct. There is no evidence tending to show that any property was the separate property of S. P. Burdick, unless it was converted into such by the creation of the trust set out in the petition of the trustees. Conceding that the money there invested was community property, as we must presume it was, we have no difficulty in determining that the surviving wife could not be deprived of her rights with reference to it by any such device. The appeal of the trustees is dismissed, and as to the other appellant the decree is affirmed.

We concur: HENSHAW, J.; McFARLAND, J.

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(107 Cal. 144)

## ROHRBOUGH v. JOHNSON. (No. 15,776.)

(Supreme Court of California. April 15, 1895.)

COMMON-LAW MORTGAGE—VALIDITY AS AGAINST CREDITORS—CHANGE OF POSSESSION.

1. After removing a hop crop to the curer to be dried and baled, the owner mortgaged it to plaintiff, giving him authority to take possession of the crop at any time he felt insecure. When the hops were cured and baled, plaintiff satisfied the curer's lien thereon, and removed them to his warehouse, with the mortgagor's consent. *Held* that, though the mortgagor subsequently gave instructions regarding the hops, their delivery to plaintiff was "immediate," and followed by an "actual change of possession," within the meaning of Civ. Code, § 3440, providing that every transfer of or lien on personal property, other than a mortgage allowed by law, is conclusively presumed to be fraudulent as against creditors, unless accompanied by an "immediate delivery, and followed by an actual and continued change of possession."

2. A power of attorney to execute a chattel mortgage is the best evidence of the agency for that purpose.

Commissioners' decision. Department 1. Appeal from superior court, Mendocino county; R. McGarvey, Judge.

Action by J. S. Rohrbough against J. R. Johnson. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

T. L. Carothers, for appellant. J. H. Seawell, for respondent.

HAYNES, C. Action in claim and delivery for 50 bales of hops. Judgment for the plaintiff was entered upon the findings, and defendant appeals from the judgment, and from an order denying his motion for a new trial. Joel Eveland, a hop grower, removed and delivered his crop of 1893 to one Felix Purcell at his hop house, to be by him dried and baled. On September 11, 1893, Eveland executed to the plaintiff his promissory note, payable 80 days after date, for the sum of $1,200. which sum the plaintiff had advanced to Eveland to enable him to pay for picking the hops; and, to secure the payment thereof, Eveland also executed to the plaintiff an instrument purporting to be a chattel mortgage, in which the mortgaged property is described as "consisting of the whole of the said mortgagor's hop crop for the year 1893, and now being and lying in the hop house of Felix Purcell, situated in Round Valley township, Mendocino county, California." Said mortgage also provided that, if the mortgagee should thereafter deem himself insecure, he might take possession of said property, and sell the same in the manner provided by law, without foreclosure, and from the proceeds pay the whole amount due, as specified in the note and mortgage. This mortgage was recorded on the 13th. When the hops were dried and baled, plaintiff sent his teams to remove them, but Purcell refused to deliver them until his charges for curing and baling were paid. Plaintiff thereupon paid said charges, amounting to $180.25, whereupon Purcell, who had been informed by Eveland that he had mortgaged the hops to plaintiff, delivered them and they were thereupon placed upon plaintiff's wagons, and hauled to Ukiah, in the same county, where they arrived on October 2, 1893. On September 30, 1893, one Marks commenced an action in the superior court of Mendocino county against said Eveland to recover the sum of $879.53 and interest, upon a promissory note made by Eveland in 1890, and procured a writ of attachment to be issued and placed in the hands of J. R. Johnson, the defendant in this action, who was then the sheriff of said county. Upon the arrival of the hops at Ukiah, and while upon plaintiff's wagons upon the street, the defendant, as such sheriff, seized the hops under said writ, and afterwards sold them under the judgment procured by Marks in said action as the property of Eveland. Upon the refusal of the sheriff to surrender the hops to plaintiff upon demand duly made, this action was brought. Plaintiff had judgment for the return of the hops, or for $1,107.75, the value thereof, in case a delivery could not be had.

Appellant contends that plaintiff's mortgage was void, and conferred no right to the possession of the property, or to a lien thereon, because taken upon property not authorized to be mortgaged; citing section 2,955 of the Civil Code. It is conceded that a valid statutory mortgage could not be made upon the hops after they ceased to be a growing crop; but what is frequently called "a common-law chattel mortgage" may be taken upon any species of personal property, if it is accompanied by a delivery of the property to the mortgagee, and followed by such actual and continued change of possession as is required by section 3440 of the Civil Code; the difference being that, as to the property enumerated in section 2955, Civ. Code, the due execution, acknowledgment, and recording of the chattel mortgage dispenses with a change of possession, and permits the property to remain in the hands of the mortgagor. The expression "common-law mortgage" is not a happy one, and under the Code is inaccurate. At common law, a chattel mortgage amounted in effect to a conditional sale. By it the legal title to the goods passed to the mortgagee, subject to be divested upon performance of the condition. See note to Lucketts v. Townsend, 49 Am. Dec. 731, and cases there cited. The Civil Code (section 2,920) defines a mortgage to be a contract by which specific property is hypothecated for the performance of an act, "without the necessity of a change of possession," and cannot be properly applied to a security dependent upon possession by the creditor, which the Code denominates a "pledge." Section 2,924, Civ. Code, is as follows: "Every transfer of an interest in property, other than in trust, made only as a security for the performance of another act, is to be deemed a mortgage, except when in the case of personal property it is accompanied by an actual change of possession, in which case it is deemed a pledge." Whether the instrument be called a "mortgage" or a "pledge" does not, however, affect its efficacy as a security.

The question, therefore, is whether there was such delivery to and possession by the plaintiff as is required by section 3440 of the Civil Code, which, so far as pertinent here, is as follows: "Every transfer of personal property, other than a thing in action, * * * and every lien thereon, other than a mortgage, when allowed by law, * * * is conclusively presumed, if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred, to be fraudulent, and therefore void, against those who are his creditors while he remains in possession, and the successors in interest of such creditors, * * * and against purchasers or incumbrancers in good faith subsequent to the transfer." It has been repeatedly held that a sale of personal property, not accompanied by an immediate delivery and an actual and continued change of possession, is fraudulent and void as to any creditor who was such during any of the time the property remained in the seller's possession, and that such property may be seized by such creditor in the hands of the buyer in the same manner as though there had been no attempted transfer by the debtor. Watson v. Rodgers, 53 Cal. 401; Edwards v. Bank, 59 Cal. 148. This construction of said section is equally applicable to chattel mortgages, other than those authorized by statute; and the same rule must apply in determining what is an immediate delivery and actual and continued change of possession, viz. that these questions must be determined upon the facts of each particular case. Claudius v. Aguirre, 89 Cal. 503, 26 Pac. 1077; Byrnes v. Moore, 93 Cal. 394, 29 Pac. 70. At the time this mortgage was made, the hops were not in the possession of Eveland, but were in the possession of Purcell, a bailee, for the purpose of being cured and baled by Purcell, and his possession was actual and exclusive, for the purposes of the bailment, and he had a lien thereon, dependent also upon possession, for the value of his services in curing and baling them. Actual possession could not be delivered to the plaintiff by Eveland until the hops were dried and baled, and Purcell's charges were paid, without the latter's consent. For aught that appears in the record, the plaintiff took possession of the hops as soon as the bailee's work was accomplished, and certainly as soon as his lien was discharged, and such actual possession could not have been had without payment of his charges. The plaintiff sent his wagons for the hops, and Purcell refused to deliver them without payment, and thereupon plaintiff satisfied his lien, and immediately took them into his actual possession. Neither Eveland, the owner, nor the defendant, as sheriff, with his writ of attachment, could have obtained possession of the hops without first discharging the lien of the bailee.

The contention that the plaintiff did not rightfully obtain possession because the debt secured by the mortgage was not due is without merit. He was expressly authorized, under the terms of the mortgage, to take possession at any time he deemed himself insecure; and, as his security depended upon possession, no question as to the construction of that condition in the mortgage can arise. Purcell testified that Eveland informed him of the mortgage; hence no question is made as to his right to deliver the hops to the plaintiff, and the plaintiff, being thus compelled for his own security to discharge the prior lien of Purcell, became subrogated to his lien as against the attachment, and upon this ground also he was rightfully in possession of the hops at the time they were attached.

The evidence sustains the findings, and no question is made as to the sufficiency of the findings to support the judgment. The note and mortgage and the power of attorney from the plaintiff to White were properly admitted in evidence. White transacted the business for the plaintiff, and the power of attorney was the best evidence of his agency. Nor did the court err in sustaining plaintiff's objection to the questions put to Eveland by the defendant as to instructions sent by the witness to the warehouseman at Ukiah concerning the hops after plaintiff had taken possession. Such instructions, whatever they were, could not affect the plaintiff, who was rightfully in possession by his express authority.

The judgment and order appealed from should be affirmed.

We concur: BELCHER, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

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(5 Cal. Unrep. 19)

## HEIM et al. v. BUTIN. (No. 15,798.)[1]

(Supreme Court of California. April 4, 1895.)

ENFORCEMENT OF DEFICIENCY JUDGMENT — INJUNCTION TO RESTRAIN—BREACH OF AGREEMENT BY MORTGAGEE—CONSIDERATION.

1. Plaintiffs, having executed a note and mortgage to defendant, conveyed the mortgaged property to another, who assumed the payment of said note and mortgage, but, he having defaulted thereon, defendant agreed with plaintiffs to purchase the land at the foreclosure sale for the full amount of his claim, and not to take a personal judgment against plaintiffs, and the latter, relying on such promise, allowed default to be entered, and refrained from attending the sale. *Held*, that there was a sufficient consideration for such agreement.

2. Such agreement was not void as altering the terms of the note and mortgage.

3. Nor was it void as an agreement to prevent bidding at the sale.

4. The complaint in a suit to enjoin the enforcement of a deficiency judgment, obtained against plaintiffs in such foreclosure suit, alleged that plaintiffs, relying on defendant's promise, failed to appear in the suit, or to be present at the sale, or make any bid thereat, though they were able to purchase the property and protect themselves. *Held*, that the complaint showed that plaintiffs were damaged by their reliance on defendant's promise, they having a right to demand that the deficiency judgment be entered also against the owners of the property.

Commissioners' decision. Department 2. Appeal from superior court, Sonoma county; S. K. Dougherty, Judge.

Action by Ella M. Heim and another against James M. Butin to restrain the enforcement of a personal judgment. From a judgment of nonsuit, plaintiffs appeal. Reversed.

William H. Jordan and W. A. Richardson, for appellants. W. E. McConnell and J. A. Barham, for respondent.

BELCHER, C. The plaintiffs brought this action to obtain a perpetual injunction restraining the enforcement of a deficiency judgment entered against them in a suit to foreclose a mortgage. The facts stated in the complaint are in substance as follows: On or about December 30, 1887, the plaintiffs, Ella M. Heim and Julius F. H. Heim, her husband, executed to the defendant their promissory note, bearing interest at the rate of 6 per cent. per annum, payable monthly in advance, and, if not so paid, to become immediately due, at the option of the holder thereof. At the same time, to secure payment of the note, they executed to the defendant a mortgage upon certain real property in Sonoma county. Subsequently they conveyed the mortgaged property to other parties, upon the express condition that the grantees should assume the payment of the said note and mortgage. Thereafter, about September 1, 1891, the grantees having failed to pay the interest on the note, "and the said defendant herein having elected and declared said note to be due and payable, defendant herein, being requested by plaintiff Ella M. Heim to commence proceedings for the foreclosure of said mortgage, did agree with her that he would commence an action for such foreclosure, and, upon obtaining judgment in said cause and a decree of court directing the sale of said property to satisfy said judgment, he, this defendant, would at such sale purchase the same for the amount of such judgment obtained, including interest and costs at that time accrued; and he, the said defendant, did expressly agree with the said plaintiff that no personal judgment in said action should ever be entered or docketed against plaintiffs, or against either of them." On September 11, 1891, defendant commenced an action in the superior court of Sonoma county to foreclose his said mortgage; and such proceedings were had therein that on January 4, 1892, judgment, foreclosing the mortgage, and directing a sale of the mortgaged premises to satisfy the same, was duly given and made against the defendants therein (plaintiffs herein), for the sum of $4,702.25, and $250 attorney's fees. Thereafter, on February 29, 1892, the mortgaged property was sold by the sheriff of the county under and by virtue of said judgment. "That these plaintiffs relied upon said promise and agreement of the said defendant, and, so relying and believing that said defendant would keep and perform the same, these plaintiffs, and both of them, failed to appear or answer in said foreclosure suit though made parties thereto, and permitted their defaults to be entered therein; and thereafter, so relying and believing in said promise of defendant, they abstained from being present at said sale, or taking any step whatsoever to obtain a purchaser for said property, so that their interests in said judgment might be protected and exonerated; and these plaintiffs, and both of them, furthermore did, by reason of their reliance upon said promise of defendant, refrain from making or causing to be made any bid at said sale, although at that time they were fully able to purchase said property for the amount of said judgment, and thereby to protect themselves against said judgment." Notwithstanding his said promise, and in violation thereof, the defendant failed to purchase the property at said sale for the amount of said judgment, but instead thereof purchased the same for the sum of $4,200. From this sum were deducted the sheriff's commissions and expenses in making the sale, leaving $4,195.95, which was credited upon the judgment; and thereafter, on the same day, in violation of his said agreement, the defendant caused a personal judgment to be docketed in said cause against these plaintiffs, and each of them, for the sum of $918.43, which personal judgment has since remained and still is in full force and effect against them. Defendant has refused to cancel said judgment so far as these plaintiffs as concerned, and now threatens to take out an execution against them, and to satisfy the same by the sale of other property belonging to them, to their great and irreparable detriment and harm. No demurrer to the complaint was interposed. Defendant answered, denying that he made the promise or agreement set out in the complaint, admitting that he caused a deficiency judgment for $918.43 to be docketed in the said action on February 29, 1892, and that the judgment so docketed has been and still is in full force and effect against the plaintiffs, but denying that the same was docketed in violation of any such promise or agreement as is alleged in the complaint, or in violation of any promise or agreement of defendant with plaintiffs, or either of them, or with any one else. At the trial it was proved, without objection, that the plaintiff Ella M. Heim purchased the mortgaged property from the defendant for the sum of $5,500, and that the terms of the purchase were $600 cash, one note for $500, due on or before January 1, 1889, and one note for $4,400, due on or before January 1, 1893; both notes drawing interest at 6 per cent. per annum, payable monthly in advance, and secured by a mortgage on the property executed by her and her husband. The plaintiffs then sought to prove the agreement as alleged, and that they relied and acted upon it, and therefore did not appear in the foreclosure suit, the improvements placed upon the property during the time Mrs. Heim owned it, and its value at the time of the foreclosure, and that but for the agreement they or one of them would have been present at the sale, and bid in the property for the purpose of protecting themselves. This evidence was all objected to by defendant, upon the ground, among others, that the complaint did not state facts sufficient to constitute a cause of action, and the objections were sustained, the plaintiffs reserving exceptions. No further evidence was offered by the plaintiffs, and the cause was then submitted on their behalf. Thereupon counsel for defendant moved for a nonsuit, upon the ground that the complaint did not state facts sufficient to constitute a cause of action, and the plaintiffs had not proved anything that would entitle them to recover. The motion was granted, and from the judgment and an order denying their motion for a new trial the plaintiffs appeal.

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[1] Rehearing granted.

The question, then, is, did the complaint state a cause of action? If it did, the court erred in excluding the offered evidence and in granting the nonsuit. It is claimed for respondent that the complaint was insufficient, because the agreement set up was without any consideration and void. Section 1605 of the Civil Code provides: "Any benefit conferred, or agreed to be conferred, upon the promisor by any other person, to which the promisor is not lawfully entitled, or any prejudice suffered, or agreed to be suffered, by such person other than such as he is at the time of consent lawfully bound to suffer, as an inducement to the promisor, is a good consideration for a promise." Under this provision, if, as alleged, the plaintiffs, in reliance upon the defendant's agreement, allowed their defaults to be entered and refrained from being present and bidding at the sale, thus surrendering their legal rights, a benefit was conferred upon the defendant, and a prejudice suffered by them, which, in our opinion, constituted a good and sufficient consideration for his promise to purchase the property for the full amount of his judgment, and that no deficiency judgment should be entered against them. See Montgomery v. Gibbs, 40 Iowa, 652.

It is also claimed that the complaint was insufficient for the following reasons: (1) Because the effect of the agreement set out was to alter the terms of the note and mortgage, which, under section 1698 of the Civil Code, could only be done by a contract in writing, or by an executed oral agreement; (2) because the direct effect of the agreement was to prevent bidding at the execution sale, and it was therefore against public policy and void. We are unable to see how either of these points can be sustained. The agreement did not in any way alter the terms of the note or mortgage. It simply, as in Montgomery v. Gibbs, supra, obligated the defendant to limit his remedy to the property sold. Nor did it prevent bidding at the sale, but only required the defendant to bid for the property the full amount of his judgment.

It is further claimed that the complaint was defective because it contained no allegation that defendant made the agreement with intent to deceive or mislead the plaintiffs, or with any fraudulent intent whatever, but shows that the agreement was made before the foreclosure suit was commenced, and that plaintiffs had an opportunity to appear therein, and neglected to do so, and that they lost their rights, if any they had, under the agreement, by reason of their own negligence. We do not perceive that it can make any difference whether the agreement was made before or after the suit was commenced. It was evidently made in view of the suit, and its purpose was to save the plaintiffs from the trouble and expense of appearing in the case, and being present and bidding at the sale; and, being made, plaintiffs had a right to rely upon it, and to expect the defendant to carry it out in good faith, and were guilty of no negligence in doing so. If, however, the allegations are true, the defendant's failure to carry it out constituted an actionable fraud or wrong, which entitled the injured parties to relief.

Finally, it is claimed that the complaint was insufficient, because it does not appear therefrom that the plaintiffs had any defense to the foreclosure suit, or that they could have prevented the entry of the deficiency judgment, or that the land mortgaged was worth more than the sum for which defendant bid it in, or that plaintiffs could have procured any one to bid more, or that they would have bid more themselves if present at the sale, and hence that there is no showing that plaintiffs had been damaged. The complaint avers that the plaintiffs relied upon the promise and agreement of the defendant, and, so relying and believing that he would keep and perform the same, they "failed to appear or answer" in the foreclosure suit, and that thereafter, so relying and believing in said promise, "they abstained from being present at said sale, or taking any steps whatsoever to obtain a purchaser for said property," and, "furthermore, did, by reason of their reliance upon said promise of defendant, refrain from making or causing to be made any bid at said sale, although at the time they were fully able to purchase said property for the amount of said judgment, and thereby to protect themselves against said judgment." The fair import of this language, it seems to us, is that, but for the agreement of defendant, plaintiffs would have appeared and answered in the suit, and would have been present and bid for the property at the sale, or would have procured some one else to do so. The language, of course, is somewhat ambiguous and uncertain, but, as no demurrer was interposed, that ground of objection was waived. That the plaintiffs were damaged by their failure to appear and answer in the foreclosure suit, and to be present and have an opportunity to bid at the sale, is clearly shown, inferentially at least. After the mortgage was executed, they sold the property, and the grantees assumed the payment of the mortgage debt. As between themselves, the grantees thereupon became the primary debtors, while the mortgagors occupied the relation of sureties, responsible to the mortgagee alone. Wilts. Mortg. Forec. § 223. Both the purchasers and the mortgagors were proper parties to the action to foreclose, and the plaintiff therein was entitled to have the deficiency judgment entered against the former. Pellier v. Gillespie, 67 Cal. 582, 8 Pac. 185. It would seem, therefore, that the mortgagors would have been entitled, if present, to claim and insist, for their own protection, that such judgment should be entered against the purchasers as well as against themselves. And that the property was worth more than $4,200, the price bid by defendant, may be assumed from the fact that the plaintiffs were able and willing to purchase the same for the amount of the judgment. We conclude, therefore, that, in the absence of a special demurrer, the complaint was sufficient, and the objection that it did not state facts sufficient to constitute a cause of action should not have been sustained. The law applicable to the case is very clearly stated by Mr. Freeman in his work on Judgments (section 492, 4th Ed.), as follows: "It has frequently happened that one of the parties litigant has failed to present his claim or defense because he relied upon some agreement or understanding between himself and his adversary which, if observed, rendered such presentation unnecessary. And with more than occasional frequency, if we may judge from the reports, these agreements have been designed to lull a party into security and inactivity in order that some unconscionable advantage could be taken of him. In all such cases courts of equity, when asked to do so, have invariably restored the injured party to his rights under the agreement, and have wrested from his opponent all those fruits he had hoped to harvest and enjoy through fraud and duplicity. * * * Where A was sued upon a note and mortgage, and the plaintiff, for a valuable consideration, released him from personal liability, but took judgment in violation of his contract, and issued execution thereon, such execution was restrained on the ground 'it was against conscience for the mortgagee to retain his advantage;' " citing Hibbard v. Eastman, 47 N. H. 507. "It makes no difference that the agreement is void because made on Sunday, or was oral, when the rules of the court required all stipulations to be in writing. If it can be shown that it was successfully employed to prevent the defendant from making his defense, then the plaintiff will not be allowed to retain the advantage it has secured him;" citing Blakesley v. Johnson, 13 Wis. 530. And see Thompson v. Laughlin, 91 Cal. 313, 27 Pac. 752, a case somewhat analogous to this.

The judgment and order appealed from should be reversed, and the cause remanded for a new trial.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, and the cause remanded for a new trial.

(107 Cal. 67)

## HOWE v. JOHNSON. (No. 15,919.)

(Supreme Court of California. April 5, 1895.)

FRAUDULENT CONVEYANCE—DELIVERY OF POSSESSION — INTEREST OF JOINT TENANT — TROVER AGAINST SHERIFF — ANSWER — ALLEGATIONS OF FRAUD.

1. An alleged sale of personal property to a daughter of the vendor in payment for her services, no delivery of the property being made until two weeks after the sale, is conclusively presumed to be fraudulent as against creditors of the vendor.

2. When a joint tenant sells his interest in the property, and retains possession thereof, and there is no evidence that the other joint tenant has actual possession, no presumption of constructive possession by the purchaser arises which will take the place of the actual delivery of the property required by Civ. Code, § 3440.

3. In an action by one who had purchased certain personalty and the realty on which it was being used, against the sheriff, who afterwards sold the personalty under an execution issued on a judgment against the vendor, the evidence showed that a part of the property so sold by the sheriff was the produce of the realty after its purchase by the plaintiff. *Held*, that though the sale of the personalty was void as to creditors of the vendor, there being no immediate delivery thereof, plaintiff was entitled to recover for the produce of the realty after its purchase, upon proving that the purchase was in good faith and for a valuable consideration, and not otherwise.

4. The answer of a sheriff in an action against him to recover for property sold on an execution issued on a judgment against plaintiff's vendor need not allege that the sale to the plaintiff was fraudulent, when the complaint makes no claim of title based on such sale.

Commissioners' decision. Department 2. Appeal from superior court, Mendocino county; R. McGarvey, Judge.

Action by Elizabeth A. Howe against J. R. Johnson. Judgment for plaintiff, and defendant appeals. Reversed.

J. A. Cooper and J. M. Mannon, for appellant. T. L. Carothers and G. A. Sturtevant, for respondent.

VANCLIEF, C. Action of the nature of the common-law action of trover to recover damages for an alleged wrongful taking and conversion of personal property. At the time of the alleged taking, the defendant was sheriff of Mendocino county, and in his answer alleges that he was justified in taking the property, by virtue of an execution issued to him on a judgment against Montgomery Howe (plaintiff's father) in favor of Phoebe Blair, and denies that plaintiff was the owner of the property so taken, or entitled to the possession thereof. The cause was tried by the court, whose judgment was in favor of plaintiff for the sum of $1,512, with interest and costs. Defendant appeals from the judgment, and from an order denying his motion for a new trial.

The plaintiff claimed title to the property by an alleged sale thereof from her father, Montgomery Howe. Appellant makes the point that the sale was fraudulent and void as against the creditors of Montgomery Howe, because not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the property, and that the finding to the contrary by the court is not justified by the evidence. The property in question consists of one-third undivided part of certain farming utensils, farm produce, and live stock, situate at the time of the alleged sale to plaintiff on a farm in Mendocino county, known as the "Clay Ranch." On March 14, 1893, the ranch and all said personal property thereon were owned in equal parts by Montgomery Howe, Samuel Howe, and Mrs. Given. On that day, Montgomery Howe and Samuel Howe (brothers) conveyed by deed all their interests in the ranch, and verbally sold all their interests in said personal property, to the plaintiff. At the time of the sale the plaintiff was at her father's residence in Oakland, where she also resided, and the business of the sale on her part was transacted on the Clay ranch by her agent, Frank Teichman, to whom she was then engaged to marry. Teichman did not receive possession of either the ranch or the personal property at the time of the sale, though the Howe brothers were then in actual possession of both, and were working on the ranch and using the personal property. Immediately after the execution of the deed for the land, Teichman recorded it in Mendocino county, and returned to Oakland, whence he had been sent by plaintiff, and there delivered the deed to her. The only consideration for the deed for the land and the sale of the personal property was the personal services of plaintiff in keeping house for her father, as to which she testified as follows: "I made the contract with my father for wages when I was thirteen. The woman he had working left, and I told him I would do the work if he would pay me. During the first year he paid me sometimes three dollars, sometimes four dollars, not the full amount. I kept no memorandum of it. Could not tell how much he paid me. He bought my clothes and boarded me. I was to receive five dollars a month for a time. Occasionally he gave me as much as five dollars per month. This continued until I was eighteen. When

I was eighteen I was to get more.' No sum was stipulated, but a different contract was made. My father said: 'When I am able I will pay you.' At the time the ranch and personal property were conveyed to me, the value fixed was a little over five thousand dollars,—about five thousand five hundred dollars. There was an agreement made to pay me so much a year for the time that I had worked,—one thousand dollars a year. The ranch was valued at five thousand five hundred dollars. My uncle had been on the ranch in charge of the personal property since February, 1891, and my father since July, 1891, but father was there only a portion of the time. I was in Oakland when the deed was made. My father and uncle were both upon the ranch, in charge of the property." She testified further that, "besides the deed to the ranch and personal property, my father gave me a note for seven thousand five hundred dollars. That made thirteen thousand dollars,—a note for $7,500 and $5,500 worth of property. That was the way I accepted it at the time." And also testified as follows: "It was in the agreement when I took the ranch and personal property from my father and uncle that they should stay and help me out for a time. I did not understand farming. They agreed to stay on the place and help me out. That was the contract. My uncle, Samuel Howe, was to receive fifty dollars per month, and my father was to receive fifty dollars per month. They continued to work on the place, and I afterwards paid them their wages. They were both busily engaged on the ranch, and it was a part of the agreement with them that they should have such employment. Under this agreement, I purchased a two-thirds interest in this personal property and in the ranch. Mrs. Given owned the other undivided one-third interest." Between the day of the sale (March 14th) and April 1st, —that is, from 10 to 17 days after the sale, —plaintiff again sent Mr. Teichman to the ranch as her agent, with written instructions to take possession for her of the personal property and the ranch, which he assumed to do by remaining on the ranch directing the work, and doing a part of it, until about June 1st, when he went to Oakland, and brought plaintiff to the ranch; and thereafter, until the personal property was levied upon by the sheriff, he and plaintiff formally directed the work, kept the books, employed and paid the help, bought supplies, and sold whatever of the property that was sold. But during all that time the Howe brothers lived and worked on the ranch the same as before Teichman took possession. As to this Samuel Howe testified: "After Mr. Teichman came there, my brother and I worked on the ranch just the same as we did before, except that after Mr. Teichman came up we had a boss. Previous to that I was boss. After that I was the servant. * * * Sometimes my views were asked about running the place, but I had no authority." The testimony of plaintiff and Samuel Howe was fully corroborated by Montgomery Howe, but none of them could remember any definite agreement between the father and daughter as to what wages he was to pay her for her services, or how much he had paid her before the sale in question. No accounts were ever kept between them. He testified: "My wife died in 1876. Some time after my wife died, my housekeeper talked of going away. The plaintiff and my eldest daughter came into the office, and they said they would do the work and it should not cost any more than it did to hire housekeepers. I told them all right. * * * They were to receive pay, but how much we agreed to pay them I do not remember now. I suppose we intended to pay them what it was reasonably worth. They did the work ever since that time. My oldest daughter is now dead. She has been dead some six or seven years. After plaintiff became of age, I had a conversation with her. I do not remember how much I was to pay. I do not remember that we set any definite price. I cannot tell how long after she became eighteen years of age that her employment continued. * * * I think the services were reasonably worth from fifty to one hundred dollars per month. * * * When my wife died, plaintiff was eight or nine years old. My family consisted of three daughters and one son and a housekeeper. The plaintiff went to school until she was eighteen, and I wished her to go to school longer. I furnished her with clothes, and sent her to school, and she kept house and worked there. Ques. You say no particular arrangement was made? Ans. I do not recollect any set sum. Q. You do not recollect any particular time that you made any express bargains? A. They came to the office, and told me what they would do. They would talk to me. I would agree to it. Q. Did you pretend to keep any account of the money you gave them? A. No, sir. I think sometimes they told me for so long a time they had had so much money. Q. Did you make any different arrangements with this daughter to what you had with your older daughter? A. My recollection is that she came in and talked with me sometimes, but I do not recollect what it was. I was not very particular." The plaintiff testified that both her father and uncle agreed to pay her for housekeeping, though it does not appear that her uncle was a member of the family. But there is no evidence that her uncle so agreed until about the time of the sale in March, 1893. As to this he testified as follows: "About the month of March, 1893, myself and my brother made a sale of the personal property to the plaintiff, who is my niece and my brother's daughter. We made that sale for services that were rendered in keeping house for a goodly number of years. My brother and I were partners in business—in the railroading business—in Oakland. I think plaintiff's services commenced two or three years after her mother's death. At the time we made the agreement we let her have the ranch and the personal property, and we gave her notes at the same time for seven thousand five hundred dollars, in payment of the services she had rendered, and in full of those services; I think for about thirteen years' services. We sold her all our right, title, and interest in the Clay ranch, and the personal property on the ranch. We owned a two-thirds interest, and Mrs. Given owned the other one-third. When we made the deed, we delivered it to Mr. Teichman, the agent of plaintiff, at Hopland. That was at the time the sale of the personal property went into effect. Plaintiff asked me to continue on the ranch, and my answer was, 'I would stop for a time.' There was no agreement at that time about our wages, but there was afterwards. * * * I knew very well that after my brother's wife died that the children had to be paid from the very start. I mean the plaintiff and her older sister. I do not know that we have agreed with her as to the rate of wages. We have put her off, and have never paid her for her services. It was all the time implied that she was to receive pay. I cannot say when was the first time that we had a talk with plaintiff about settling with her. It must have been about the commencement of the year 1893. At the time the deed was made, my brother and I had talked over the matter, but I do not know whether we had talked with plaintiff about it or not. I cannot say when was the first time I talked with her about it. I think I had a talk with her before Mr. Teichman came up to take possession of the property, but I don't know." It thus appears by her uncle's estimate that plaintiff was allowed, in addition to her personal expenses, board and schooling, $1,000 a year from the time she was about 12 years of age; for she testified at the trial that she was then (February 15, 1894, 11 months after the sale) only 26 years of age. But she estimated the value of her services at only $30 per month after she was 18 years of age, and at only $5 per month before.

It clearly appears from the evidence that the alleged sale was not accompanied by an immediate delivery of the property, as required by section 3440 of the Civil Code. On this point there is no conflict of evidence. The plaintiff, her father, her uncle, and Mr. Teichman all testified that the sale of the personal property was made on March 14, 1893, at the same time the deed of the ranch was executed; and that the Howe brothers were then in actual possession of both the real and personal property; and, also, that there was no attempt to deliver to plaintiff the personal property until about two weeks after the sale. It follows that the sale is conclusively presumed to be fraudulent and void against Phoebe Blair, who is admitted to have been a creditor of Montgomery Howe at the time of the sale; and consequently the finding that plaintiff was the owner of the property by virtue of that sale is not justified by the evidence. Cahoon v. Marshall, 25 Cal. 201; Bell v. McClellan, 67 Cal. 283, 7 Pac. 699; Newell v. Desmond, 63 Cal. 243; Bunting v. Saltz, 84 Cal. 168, 24 Pac. 167; Etchepare v. Aguirre, 91 Cal. 288, 27 Pac. 668; Murphy v. Mulgrew, 102 Cal. 547, 36 Pac. 857.

The only attempted answer by respondent's counsel to this view of the case is that, at the time of the sale, Mrs. Given was a tenant in common of one-third of the property; that upon the sale of the other two-thirds to plaintiff Mrs. Given's possession became plaintiff's possession, by construction of law; and that such constructive possession of plaintiff satisfied the requirement of immediate delivery. As authority for this, counsel cites Freem. Coten. § 167, which cites, and seems to rest upon, Brown v. Graham, 24 Ill. 630, alone. But the Illinois case is not in point. The decision in that case is fully expressed in the syllabus, as follows: "The possession of one of several tenants in common of personal property which is incapable of division is constructive possession of all. And when a tenant in common, not in possession, sells his interest, the possession of another tenant in common becomes the constructive possession of the purchaser." And this was held in that case to satisfy the statute of frauds. Conceding, for all purposes of this appeal, that a constructive possession thus acquired would satisfy section 3440 of our Civil Code, which, in view of the decisions of this court in Newell v. Desmond and Bunting v. Saltz, supra, seems extremely doubtful, still the Illinois case is not applicable, for the reason that the Howe brothers were in actual possession at the time they sold to plaintiff, and there is no evidence that Mrs. Given was ever in actual possession. Brown v. O'Neal, 95 Cal. 262, 30 Pac. 538.

The evidence shows that a portion of the property in question was produce of the ranch during 1893, after the sale, and therefore not the identical property sold, the value of which is shown to be $627.61; and it is claimed that respondent is entitled to recover this sum, even though the sale of the personal property should be held void. If the conveyance of the ranch was not void against creditors on the ground of actual fraud, I think this point well taken. While the evidence tends to prove that the conveyance of the ranch was actually fraudulent, as having been made to delay or defeat creditors of the vendors, it cannot be held that there was not such a conflict of evidence on this issue as to justify the finding of the court. Should it be found on a new trial, however, that the conveyance of land was intended by the vendors to defraud their creditors, and that plaintiff did not purchase in good faith for a valuable consideration, and without notice of the intended fraud, then such conveyance should be held void as against all persons who were creditors of the vendors at the date of the conveyance; and in that case the produce of the land during 1893, under the circumstances of this case, should be held subject to the execution by virtue of which the defendant took it.

The answer contains no allegation of fraud, actual or constructive; nor was such allegation necessary; for, since there was no indication in the complaint that plaintiff claimed title by sale from her father and uncle, the defendant was not bound to anticipate that she would do so. Grum v. Barney, 55 Cal. 254. But, now that defendant has notice of the nature of plaintiff's alleged title, it may be questionable whether he should expressly plead the fraud on which he relies for his defense before the new trial.

I think the judgment and order should be reversed, and the cause remanded for a new trial, with leave to defendant to amend his answer if so advised.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are reversed, and the cause remanded for a new trial, with leave to defendant to amend his answer if so advised.

(107 Cal. 55)

## FIRST NAT. BANK OF BRIDGEPORT v. PERRIS IRRIGATION DIST. (CORONADO FOUNDRY & MACHINE CO. et al., Interveners. No. 19,501).[1]

(Supreme Court of California. April 5, 1895.)

MECHANIC'S LIEN — CLAIM BY MATERIAL-MAN—RIGHTS OF INNOCENT PURCHASER—COUNTERCLAIM BY OWNER—COSTS OF REPAIR.

1. Under Code Civ. Proc. § 1184 (as amended in 1887), providing that a mechanic or material-man may give written notice of his claim to the owner of the structure "at any time," and requiring him to retain, from the money "due or that may become due" such contractor, a sufficient sum to answer claimant's demand, the notice may be served at any time before the money is due, though the claim has been assigned, or even after it is due, if the amount is still owed to the original contractor; but an assignment for value, with notice to the owner, after the time for payment has arrived, without knowledge on the part of the assignee of any unpaid demand, will defeat the rights of material men, and make ineffectual any subsequent notice.

2. The fact that a contract to construct a pipe line for defendant was void, for want of filing, or otherwise, does not render defendant liable to a personal judgment in favor of a material-man.

3. The right of a material-man to serve notice of his demand on the owner, requiring him to retain a sufficient sum to pay it, as provided by Code Civ. Proc. § 1184, is not affected by failure to file notice of lien within 30 days, as provided by Code Civ. Proc. § 1187, nor by Code Civ. Proc. § 1190, declaring that no lien shall be binding longer than 90 days unless proceedings to enforce it be commenced within such time.

4. Under Civ. Code, § 1439, providing that, before a party to a contract can compel another to perform any act under it, he must fulfill all conditions precedent imposed upon himself, one who has agreed with a contractor to furnish "all the couplings to be used in the construction of a pipe line," at a fixed rate per pound, cannot enforce payment before all the material has been delivered, and hence his cause of action against the owner of the structure does not accrue till the last delivery.

5. One furnishing materials to a contractor for the construction of a pipe line cannot recover against the owner of the structure, as a charge on the contract price, for patterns used in the manufacture of couplings, or boxes in which the latter are shipped, they not being used in the structure, and their price not included in that of the couplings.

6. Where a contract to construct a pipe line, and to keep it in repair for one year after completion,—the contract price to be paid 35 days after its completion,—was assigned to plaintiff after the money became due, with notice thereof to the owner, the latter's right to counterclaim for subsequent expenditures made necessary by the contractor's failure to repair was lost as against the assignee.

7. Where a contract for the construction of a pipe line included an agreement to keep it in repair for one year after its completion, and the assignee of the contractor sues for the balance of the contract price, an averment in the answer, filed more than a year after the work was finished, that "it will be required to spend more than" such balance to keep the line in repair, is insufficient to sustain a judgment for a counterclaim.

Department 1. Appeal from superior court, San Diego county; George Puterbaugh, Judge.

Action by the First National Bank of Bridgeport, Ohio, against the Perris Irrigation District. The Coronado Foundry & Machine Company and another intervened. From a judgment for the intervener named, and for plaintiff, after allowing defendant's counterclaim, plaintiff appeals. Reversed.

Code Civ. Proc. § 339, subd. 1, provides that "an action upon a contract, obligation or liability, not founded upon an instrument of writing, * * *" shall be commenced within two years. Code Civ. Proc. § 1190, declares that no lien provided for in the chapter binds any building for a longer period than 90 days after the same has been filed, unless proceedings be commenced within that time to enforce the same, etc. Code Civ. Proc. § 1187, provides that one who claims a lien upon a structure for work or materials must, within 30 days after the completion of such structure, file with the county recorder a claim containing a statement of his demand, etc. Civ. Code, § 1439, provides that, before any party to an obligation can require another party to perform any act under it, he must fulfill all conditions precedent thereto imposed upon himself, etc.

Trippett, Boone & Neale, for appellant. Crowe & Anderson and Parrish & Mossholder, for respondents. C. B. Morris and W. R. Guy, for interveners

PER CURIAM. Plaintiff, a corporation, commenced this action July 22, 1893, to recover of defendant a sum of money alleged to be due the plaintiff under an assignment of a claim therefor to it made by the Aetna Iron & Steel Company, also a corporation, on May 16, 1893. The defendant is an irrigation district formed under the statute providing for the organization and government of such districts, approved March 7, 1887. One W. L. Ewing filed a complaint in intervention, but the findings and judgment were against him, and he has not appealed. The case comes here on the judgment roll alone.

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[1] Rehearing denied.

From the record it appears that on March 26, 1891, defendant made a contract with the Silver Gate Manufacturing Company, a corporation, whereby such company agreed to construct for defendant a line of wood pipe 6.5 miles in length, and to keep the same in repair, free from leakage, for the period of one year after the completion thereof. The price to be paid by defendant for such work was by the contract made payable 35 days after the completion of the pipe line. The construction of such pipe was completed by the Silver Gate Manufacturing Company, or by said Aetna Iron & Steel Company, acting for and in the stead of said manufacturing company, on the 9th day of January, 1893. Previously, on September 14, 1892, said manufacturing company, the original contractor, assigned its claims due, or to become due, on account of the contract, to the said Aetna Iron & Steel Company. On May 2, 1893, the defendant, by its board of directors, allowed and approved the account of the Aetna Iron & Steel Company, as assignee of the original contractor, for the balance due under the said contract, amounting to the sum of $11,692.05, of which amount $7,500 was paid, and the sum of $4,192.05 remains unpaid, and is the subject of the action. The demand of said Aetna Iron & Steel Company for such balance was assigned to plaintiff May 16, 1893, as stated above. The interest of the intervener, the Coronado Foundry & Machine Company, arose in this wise: Subsequently to March 26, 1891, the date of the contract, said intervener entered into an oral agreement with the contractor, the Silver Gate Manufacturing Company, whereby said intervener promised to furnish to the contractor all the iron couplings to be used in the construction of said pipe line, the quantity of such material so to be furnished being not otherwise specified, at the price of 4¼ cents per pound, which price the contractor agreed to pay. The court found that such agreement "also included the making by said intervener of all patterns for said couplings, and the furnishing of boxes in which to ship said couplings, said Silver Gate Manufacturing Company agreeing to pay the reasonable value of said patterns and boxes to said intervener." No time of payment was specified in said agreement. The intervener made such patterns to the value of $111.05, and boxes to the value of $99.05. Patterns, boxes, and couplings were made and supplied by the intervener to the contractor in divers quantities, and at divers times, from April 13, 1891, to November 9, 1891 (except a single item of patterns, amounting to $7.65, found to have been furnished February 19, 1891); the last item of couplings, $10.60 in amount, being supplied November 9, 1891. The couplings were actually used in the construction of the pipe line, but no patterns or boxes were so used. It seems that the patterns were used by the intervener in molding the couplings at its own works, and were necessary for that purpose. They were charged to the contractor, though it never had actual possession of them. The boxes were necessarily employed in the shipment of the couplings from the place of manufacture to the place of use. Payments were made to the intervener on account in the month of July, 1891, amounting to $300; and on October 26, 1893, after this action had been begun, said intervener served written notice on the defendant that it, the intervener, "furnished materials to the Silver Gate Manufacturing Company, to be used, and which actually were used, in the construction of the pipe line for the Perris Irrigation District, under the contract between the said Perris Irrigation District and the said Silver Gate Manufacturing Company; that said material was cast couplings, to be used in the construction of said pipe line, and that the value of the materials so furnished was $2,439.58;" also, that only $300 had been paid on account thereof, and that a balance of $2,139.58 remained due and unpaid; and required defendant to retain in its possession sufficient funds due under its contract with the Silver Gate Manufacturing Company to pay such balance. A few days later, November 4, 1893, said intervener filed its complaint in intervention herein. The plaintiff pleaded, among other defenses to intervener's action, that the same is barred (1) by the provisions of subdivision 1 of section 339 of the Code of Civil Procedure; (2) by the provisions of section 1190 of the same Code. Regarding the controversy between plaintiff and defendant, the court found that default was made in performance of that term of the contract between defendant and the Silver Gate Manufacturing Company by which the latter agreed to keep the pipe in repair for one year after the completion thereof, and that defendant necessarily expended for that purpose, during such period, from January 9, 1893, to January 9, 1894, the sum of $1,223.15. The only averment in the pleadings setting up a counterclaim for this sum is contained in the defendant's answer filed January 13, 1894, and its most material language is that defendant "will be required to expend more than the sum of $4,192.05, withheld by defendant herein, to keep said pipe line in repair for one year from its completion." The court gave judgment in favor of the intervener, the Coronado Foundry & Machine Company, for the amount of its demand,—$2,139.58,—and in favor of plaintiff for $829.32, besides interest from February 13, 1893;

the remainder of the fund in the hands of defendant—$1,223.15—being allowed to it in virtue of the counterclaim referred to. Plaintiff appeals.

1. Was the notice served on defendant by the intervener, October 26, 1893, in sufficient time to fix the right of the intervener in the fund yet remaining in the hands of defendant? Such notice was given more than eight months after the completion of the contract for the construction of the pipe; more than seven months after the balance due under said contract became payable, according to its terms; more than one year after the original contractor had assigned its rights to such balance; and more than three months after plaintiff, as a subsequent assignee thereof, had commenced this action to recover the same. Appellant maintains that, these circumstances considered, the notice was too late. The decision of this question turns upon the proper construction of the statute (section 1184, Code Civ. Proc.) as amended in 1887. What that construction should be is not discussed in the briefs filed on behalf of either the intervener or the defendant. Said section 1184 provides that: "Any of the persons mentioned in section 1183, except the contractor, may at any time give to the reputed owner a written notice that they have performed labor or furnished materials, or both, to the contractor, or other person acting by authority of the reputed owner, or that they have agreed to do so, stating in general terms the kind of labor and materials, and the name of the person to or for whom the same was done or furnished, or both, and the amount in value, as near as may be, of that already done or furnished, or both, and of the whole agreed to be done or furnished, or both. * * * Upon such notice being given, it shall be the duty of the person who contracted with the contractor to, and he shall, withhold from his contractor * * * sufficient money due, or that may become due, to such contractor or other person, to answer such claim." The intervener is a material-man, within the category of persons authorized to give such notice; and, by the wording of the section, those persons "may at any time give" the specified notice. It seems reasonable to say that no assignment made by the contractor of the amount to become afterwards due to him in the course of performance of the contract could, before the arrival of the time of payment, defeat the right of the material-man to give the notice in question and obtain the benefit thereof. If an assignment so made could have that effect, then the provisions of the statute in this regard could in most cases be evaded. The section requires the owner, on receipt of the notice, to withhold sufficient money "due, or that may become due," to answer the claim; and doubtless the notice may be effectually given, so long as the money is owed to the contractor himself, although the time when it should have been paid has passed. Board of Education v. Blake (Cal.) 38 Pac. 536. In this case the contractor assigned his claim, September 14, 1892, and before the completion of the work, to the Aetna Iron & Steel Company, and the defendant on May 2, 1893, audited and approved the claim of such assignee for the balance of the contract price then unpaid. The Aetna Company then had, at least, the rights of the original contractor. After the expiration of 35 days from the time of completing the contract, the Aetna Company was, therefore, by the terms of the contract, entitled to be paid the full amount of the contract price then remaining unpaid. As has been seen, a portion of this price was paid in May following, and on the 16th of that month the claim for the residue was assigned to plaintiff. Undoubtedly the plaintiff then had the right to receive the unpaid balance of the money; and, if payment had actually been made at any time after it was due and before the intervener served its notice of October 25, 1893, such payment would have been valid, and the intervener could not have pursued the fund in the hands of the plaintiff, or held the defendant liable in any way on account thereof. There is nothing in the record to show that plaintiff possessed any information that the intervener had or claimed even a contingent interest in such fund, or knew that anything was unpaid for work or materials used in the construction of the pipe. Why should the assertion by intervener of its latent equity, months after the assignment, toll plaintiff's right to the money, and make the act of payment unlawful, which had before been lawful? The law does not require that the assignee for value of a thing in action shall take it subject to the latent equities of third persons of which he has no notice; but only that the assignment shall be subject to the equities existing in favor of the debtor,—in this case the defendant. Code Civ. Proc. §§ 368, 440; Civ. Code, § 1459; Wright v. Levy, 12 Cal. 257. If the contractor, previous to the giving of the notice, has transferred to another, who takes the assignment for value, and without notice of the latent equities of the material-man, the amount then actually due and payable on the contract, there is then nothing either due or to become due to him, and there is no fund on which the notice can operate. It is true that the statute declares that the material-man or other person dealing with the contractor may give the notice "at any time"; but this expression must be construed in connection with the other provisions relating to the subject, and the general scheme of the Code chapter of which they form a part. That chapter contemplates throughout that the privileges it allows to those who furnish material or labor for the construction of buildings and other improvements shall be exercised with promptitude, and so as not to hamper either the owner or the contractor, or those who deal with them, in the free disposition of the property rights affected by or

arising from the contract, beyond such time as may be convenient for the assertion of those privileges. It cannot be supposed that the legislature, while requiring a portion of the contract price to be withheld from the contractor for the period of only 35 days after the completion of the contract, and making it incumbent on the material-man desirous of acquiring a lien to give public notice thereof by filing his verified claim therefor in the proper office within 30 days from the actual or presumed completion of the structure or other work, and to begin his action in the proper court for the enforcement of his claim within 90 days following the filing, yet designed that the same material-man may, without imparting notice in any manner to the public, retain a latent lien for an indefinite time after completion of the contract, and after payment is due thereunder on the compensation earned by the contractor, and that this secret equity "may at any time" be asserted, not only against the contractor, but also against those who have acquired his property interests therein by assignment or otherwise. We hold in this behalf (1) that the right of the intervener to give the notice of its demand, and thus to charge the contract price in the hands of the owner, was not affected by any assignment made by the contractor until after the time when the demand assigned became due, in this case upon the expiration of 35 days from the completion of the contract; (2) that the assignment made by the original contractor, the Silver Gate Manufacturing Company, to the Aetna Iron & Steel Company, before the completion of the work, vested the latter company, prior to the expiration of 35 days from the date of such completion, with no rights anywise different from or superior to those of the original contractor, nor even then if such assignment was made as part of a mere substitution of the Aetna Company for the contractor in the original contract,—a matter on which the findings are not clear; (3) but that the assignment by the Aetna Iron & Steel Company to the plaintiff of the contract price or the balance thereof, and notice to defendant of such assignment after the balance was due and payable under the terms of the contract, cut off all rights of the intervener in the fund so assigned, and any notice afterwards given by the intervener was futile, provided the plaintiff took such assignment for value and without notice of the unpaid demand of the intervener. We think such proviso just. If the plaintiff was a mere volunteer or trustee for the Aetna Company, or did not render value for the assignment, there is no reason why it should not stand precisely in the shoes of its assignor, subject to any right of the intervener, within the doctrine asserted in Bush v. Lathrop, 22 N. Y. 535. This qualification of the immunity of the assignee is commonly found in the authorities which, with the better reason, as it seems to us, affirm the right of the assignee, in good faith and for value, to take the subject of the assignment free from the latent equities of third persons (Redfearn v. Ferrier, 1 Dow, 50, which Lord Eldon declared to be "a most important case"; Livingston v. Dean, 2 Johns. Ch. 480; Mullison's Estate, 68 Pa. St. 212; Moore v. Holcombe, 3 Leigh, 597), and has, along with the rule it qualifies, been approved in this state (Wright v. Levy, 12 Cal. 262, 263). The argument of the intervener that it must be presumed, in support of the findings and judgment, that some notice other than that expressly found by the court, and prior to it in point of time, was served on the defendant, is without foundation. Railroad Co. v. Reynolds, 50 Cal. 90. So of its contention that, since there is no finding that the contract of defendant with the Silver Gate Manufacturing Company was filed with the county recorder, it is therefore to be treated as void; and, as subsidiary consequences, that the defendant became personally liable to it, the intervener, for the materials furnished (Code Civ. Proc. § 1183), and no notice of its claim was necessary. The court found that a contract was entered into for the construction of the pipe line, and that it was performed. It will not be presumed in such case, without proof, that the contract was void for want of filing, or for any other reason. Even if it were void, the consequence claimed—personal liability of the defendant in the sense that could uphold the judgment in favor of the intervener—would not follow. Lumber Co. v. Schmitt, 74 Cal. 625, 16 Pac. 516.

2. Our conclusion on the branch of the case above considered necessitates a reversal of the judgment in favor of the intervener; but, as there may be a new trial, some other points presented should be noticed. Appellant maintains that the intervener should have filed notice of its claim in the office of the county recorder, as in cases where a lien is claimed against a building or other structure under section 1187, Code Civ. Proc. But the remedy provided by section 1184 of the same Code, for intercepting the contract price in the hands of the owner, is not dependent upon proceedings to enforce a lien against the property affected by the contract. Bates v. Santa Barbara County, 90 Cal. 547, 27 Pac. 438. Counsel question the authority of that case, but we think it construes the statute correctly. For similar reasons the intervener's action was not barred by the provisions of section 1190, Code Civ. Proc. The contract of the intervener was entire; it agreed to furnish to the contractor "all the iron couplings to be used in the construction of said pipe line" at a fixed rate per pound (see 2 Pars. Cont. side p. 519, and cases cited); it could not have enforced payment in an action on the contract for any part of the couplings delivered until it had furnished all necessary for the use indicated, or had offered so to furnish the same, and the contractor had refused the offer (Civ. Code, § 1439); the last delivery of couplings was on November 9, 1891, and appears to

have been made in performance of the agreement of the intervener with the contractor. The complaint in intervention filed November 4, 1893, was therefore not barred by subdivision 1 of section 339, Code Civ. Proc. The court erred in allowing to the intervener the value of the patterns used in the manufacture of the couplings, and the value of the boxes in which such couplings were cased for shipment. Both the patterns and the boxes were made the subject of separate charges by the intervener, and not included in the price of the couplings; they remained the property of the contractor, and were not incorporated in the structure,—in these respects, and perhaps others, differing from the cartage considered lienable in Lumber Co. v. Newkirk, 80 Cal. 275, 22 Pac. 231, as being included in the value of the materials furnished. We regard the boxes and patterns here as too remote from the actual work of construction to permit their cost to be made a charge in this action against the contract price in the hands of the owner.

3. There is no pleading on the part of the defendant sufficient to sustain the judgment allowing a counterclaim in its favor for the expense of keeping the pipe in repair during the period of one year after completion. The averment that "it will be required to expend more than" a sum specified for that purpose, contained in the answer filed January 13, 1894,—after the period of one year in question had elapsed,—amounts to nothing; and we discover no other allegation by which the defect is supplied. It is found that the expenditures made by defendant for such repairs occurred between January 9, 1893, and January 9, 1894. Unless the damage thus arising from the failure of the contractor to keep the pipe in repair accrued at least as early as notice to the defendant of the assignment to plaintiff of the demand sued upon, then such damage could not be counterclaimed in this action at all,—assuming that the substance of the contract between defendant and the Silver Gate Manufacturing Company is correctly set forth in the findings before us,—for it appears that the agreement of the defendant to pay the contract price in 35 days after completion of the contract was in no manner dependent upon the contractor's engagement to keep the pipe in repair for one year after such completion. See Wallace v. Maples, 72 Cal. 356, 14 Pac. 19. And, upon notice to defendant of the transfer to plaintiff of the contractor's right to the money due for the work, defendant's right to counterclaim for subsequent repairs was lost as against the assignee. No right of recoupment or set-off for expense of future repairs existed in favor of defendant. Code Civ. Proc. §§ 368, 438, 440. It is not clear whether like effect would follow the assignment made by the original contractor to the Aetna Iron & Steel Company in 1892, and of which notice was had by defendant at least as early as May 2, 1893; for it may be surmised from some parts of the record that there was perhaps a mere novation of the Aetna Company for the Silver Gate Company in the contract; and, if so, of course, such assignment would not affect the right of set-off. If it becomes material, the nature of that assignment can be determined on another trial.

The judgment and order appealed from are reversed, and the cause remanded for a new trial, with leave to any of the parties to amend its pleadings, and it is so ordered.

107 Cal. 84

## STINCHFIELD v. GILLIS et al. (No. 18,315.)

(Supreme Court of California. April 5, 1895.)

SALE OF PORTION OF MINING CLAIM—DEED—PAROL EVIDENCE.

1. C., being the owner of a mining claim, took possession of an adjacent vein, and held the whole as one claim for many years, finally selling it to defendant under the name of the "C. Claim." Thereafter defendant conveyed to plaintiff a part of C. claim by metes and bounds, the part sold being designated as the "P. Claim," to distinguish it from that portion retained by defendant. *Held*, that the property was a single claim, and there being no reservation in the deed, and no evidence of mining customs introduced on the trial, defendant was estopped from denying plaintiff's title to all the gold found in any vein whose apex was within the surface lines of the ground conveyed; defendant's claim not being a "prior location," within Rev. St. U. S. § 2336, providing that all ore in the space of intersection of two veins shall belong to the prior location.

2. Where a deed designated certain monuments as the corners of the tract conveyed, in addition to giving the length of each side, the former description will prevail; and, in trespass, parol evidence is admissible to point out such monuments.

In bank. Appeal from superior court, Tuolumne county; G. W. Nicol, Judge.

Action by A. W. Stinchfield against James N. Gillis and others to recover the value of minerals alleged to have been taken from plaintiff's mining claim. From a judgment for plaintiff, defendants appeal. Affirmed.

F. W. Street and J. F. Rooney, for appellants. I. M. Kalloch and F. P. Otis, for respondent.

HARRISON, J. Upon the former appeal in this case (96 Cal. 33, 30 Pac. 839), it appeared that the Carrington mine was a single claim held by the defendant Gillis, of which he had sold a portion to the plaintiff, and it was held that, by virtue of his deed to the plaintiff, Gillis was estopped from questioning the right of his grantee to all of the gold found within the surface lines of the deed, irrespective of the depth below the surface at which it was found. After the case went down to the superior court for another trial the defendants amended their answers, presenting issues to the effect that the tract of ground which was sold to the plaintiff was known as the "Pine Tree Claim," and was distinct from that known as the "Carrington Claim," which was retained by Gillis, and had been located subsequent to the location of the Carrington claim; that upon these facts they were entitled to the gold found at the place of intersection of the Rice vein and the West vein, although that place of intersection was within the surface lines of the grant to the plaintiff. Upon the issues thus presented, the court found that for nearly 14 years prior to the sale to the plaintiff the mining ground held by the defendant Gillis, including that sold to the plaintiff as well as that retained by himself, had been held and claimed by him as a single mining claim, and was known and designated as the "Carrington Claim," and that during this time no Pine Tree mine or claim had existed; that, prior to the sale and conveyance to the plaintiff, Gillis had pointed out to him the boundaries of the Carrington claim, and told him that the ground so sold and conveyed was a part of that claim; that, before the execution of the deed, Gillis and the plaintiff went together upon the ground, and marked off and agreed upon the portion of the claim to be sold to the plaintiff, and established visible monuments at each of the four corners, and agreed upon the dividing line between the portion to be sold to the plaintiff and the portion to be retained by the defendant, and established and agreed upon permanent monuments marking said dividing line; that the ground was conveyed according to these monuments, and in the conveyance to the plaintiff was designated as the "Pine Tree Mine," for the purpose of distinguishing it from the remaining part of the Carrington claim retained by Gillis. In 1854 the Carrington claim was located for 1,000 feet in length and 100 feet on each side of the vein, and in 1859 or 1860 T. E. Carrington, then being in possession of the Carrington claim, posted notices on the Pine Tree vein, adjacent thereto on the east, claiming 300 feet along said vein. Carrington remained in possession of this property until some time in 1870, when he moved away from the county, leaving the whole of the mining ground in charge of one Stoker, and instructed him to do the assessment work thereon. Stoker took possession of the entire ground in which the Carrington and Pine Tree veins lay, and held it for Carrington, as one claim, until June, 1872; and during this time the entire ground was held and known as the "Carrington Claim," and all the assessment work that was done upon the ground was done as and for the Carrington claim. In June, 1872, Carrington sold to the defendant Gillis his interest in the mining ground, the deed of conveyance including claims on all sides of the Pine Tree mine, but not mentioning any claim or mining ground by that name; and, upon the execution of this deed, Stoker turned over to Gillis the possession of all the ground that he had been holding for Carrington, and Gillis remained in possession thereof until his conveyance to the plaintiff, in 1886. Upon these facts the court rendered judgment in favor of the plaintiff. The defendants have appealed.

We are of the opinion that the additional facts presented upon this appeal do not take the case out of the principles under which the decision of the former appeal was given. The mining ground held by Carrington, of which Gillis took possession under his deed of June, 1872, must be considered as a single claim, irrespective of the original locations of the different parts of the claim. Whatever distinction may have been at one time observed between the original location of the Carrington mine and that of the Pine Tree mine, it was disregarded by Carrington during a large portion of the time these claims were held by him; and after he left the county the entire mining ground, which included them both, was treated as one claim, not only while Stoker held them, but also during all the time that Gillis held them, until his conveyance to the plaintiff. That conveyance did not purport to be made in accordance with the lines or claim of any previous location, but was a conveyance of a tract of mining ground carved out of another tract, known as the "Carrington Claim," by metes and bounds agreed upon between the parties, and which they both treated as a part of the Carrington claim, but which, for the sake of convenience, was designated in the conveyance as the "Pine Tree Claim." Under these facts the conveyance from Gillis to the plaintiff must have the same effect as though the entire ground held by him previous to the conveyance was held by mere possession, or under a patent from the United States, or as if the two veins were a part of the same location. At the former appeal herein it was held that if the locator of a mining claim should convey a portion of his claim, without any reservation in his deed of conveyance, his grantee would be entitled to all the gold that might be found within the ground conveyed, in any vein whose apex was within the surface lines of his deed. So, if a locator should convey to A. the east half of his claim, and afterwards should convey the west half to B., each of his grantees would, in the same manner, be entitled to all of the gold found in any vein which was entirely within the surface lines of his conveyance; and, on the same principle, if the proprietor of a tract of mining ground which has been derived through several locations should dispose of the same in parcels, irrespective of the lines of such locations, the rights of his grantees would be measured by the terms of their deeds. In such cases section 2336 of the Revised Statutes of the United States has no application. That statute was not intended to limit or define the rights of a person in mere possession of a tract of mining ground, where there is more than one vein, or to prescribe the effect of a conveyance by the locator of a claim of a portion of his location containing one of such veins. The object of the statute was to supplement the provisions of section 2332, and to prescribe rules under which different locations by different proprietors should be held, and to determine the rights of such proprietors in case of intersecting veins. At the date of the passage of that act, May 10, 1872, the Carrington claim was, and had for many years been, held as a single claim, without any adverse claim thereto, and it continued so to be held until the conveyance by Gillis to the plaintiff, in 1886. The position of the proprietor of a mining claim, who conveys a portion thereof, and retains the remainder, is analogous to the position of the United States after it has issued its patent for a location. As the United States, as well as a subsequent locator, holds the unpatented claim subject to the prior rights of the patentee, as prescribed by section 2336, so the grantor of a portion of his claim, in the absence of any reservation in his deed, or proof of mining customs, holds the ungranted portion subordinate to the rights of his grantee in the ground conveyed. The effect of the deed from Gillis to the plaintiff was to estop him and those claiming under him from questioning the title of the plaintiff to all the gold that might be found in the West vein, within the surface lines of his deed. The gold in controversy was found within the surface lines of this deed, and it was also found within the limits of the two walls forming the West vein, although the place at which it was found is also within the lines of the walls which form the Rice vein. This latter circumstance does not, however, relieve Gillis from the estoppel of his deed, for, as the deed contains no reservation, and as there was no evidence at the trial of any mining customs, effect must be given to the deed according to its terms, by holding that the entire West vein within the surface lines, even though intersected by another, passed to the plaintiff. In thus holding we concede that, when mining ground is conveyed by deed without express limitation, the grantee takes subject to the characteristics of mining property given to it by prevailing customs and laws, and not with the absolute dominion which flows from a conveyance in fee of ordinary land. The mining land thus granted is still subject to all mining laws and customs which are applicable, but the provision of section 2336 that, when two veins intersect, "priority of title shall govern, and such prior location shall be entitled to all ore or mineral contained within the space of intersection," cannot possibly be applied to the case where A. conveys part of his mining claim to B., for in such a case there is no "prior location." Therefore in such a case the ordinary rules which govern grants of land must, of necessity, apply, and if the intersection takes place on part of the claim conveyed the grantee takes all the mineral within the space of intersection. Whether the plaintiff would have been entitled to follow the West vein into the ground retained by Gillis, and to claim the gold found therein, or whether Gillis would have been entitled to any of the gold that might be found in the Rice vein, within the ground conveyed to the plaintiff, are questions which are not involved in this appeal, and upon which we do not express any opinion. All that we hold is that inasmuch as the gold in question was within the ground conveyed by Gillis to the plaintiff, and in a vein whose apex was within the surface lines of that ground, it belonged to the plaintiff.

Certain rulings of the court upon the admission of evidence to show the boundaries of the lands described in the deed from Gillis to the plaintiff are assigned as error, but we are of the opinion that the rulings were correct. The description in the complaint follows that in the deed from Gillis to the plaintiff, and, in addition to giving the length of each side of the ground, designated certain monuments as the corners of the tract conveyed. If these monuments can be ascertained, they will prevail over the designated measurements, and the evidence offered was for the purpose of pointing out upon the surface of the earth the monuments which had been agreed upon in the sale, and which were named in the conveyance. For this purpose the court was authorized to receive parol evidence, in order to show the identity of the land so conveyed with that upon which the trespass had been committed. The judgment and order are affirmed.

We concur: McFARLAND, J.; VAN FLEET, J.

GAROUTTE, J. (concurring). While I do not think the decision in this case upon the former appeal is at all conclusive as to the questions raised by the present appeal, still I concur in the judgment, upon the ground that the facts do not bring the case within the provisions of section 2336 of the Revised Statutes. And when that statute does not apply, and there is no other law or mining custom applicable to the facts, I think the grantee of the surface ground must be held to take all the mineral at the point of intersection. Again, it is not clear to me that the gold at the point of intersection can be said to be located in the West vein, any more than it was located in the Rice vein.

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(107 Cal. 117)

## HELMS et al. v. DUNNE, Justice of the Peace, et al. (No. 15,725.)[1]

(Supreme Court of California. April 6, 1895.)

WRITS FROM JUSTICES' COURTS—ISSUANCE.

1. Under Code Civ. Proc. c. 5, art. 1, tit. 1, pt. 1, § 95, declaring that justices' courts shall be governed by the laws regulating proceedings before justices, "so far as such provisions were not altered or modified in this article," a summons, signed by the clerk of the justices' court, in accordance with section 91 of the same article, is valid, that provision modifying Code Civ. Proc. § 844, requiring process to be signed by the justice.

2. A summons from the justices' court, signed by W., "clerk of the said court," is valid, though "justices' clerk" is the proper designation.

3. Under Code Civ. Proc. c. 5, art. 1, tit. 1, pt. 1, § 91, providing that process shall be issued by the justices' clerk "upon the order of the presiding justice," the summons need not state that it was so issued, and, if such recital be made, a mistake therein as to the name of the presiding justice will not affect the jurisdiction of the court.

Department 1. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

A writ of review issued in an action by Fred Helms and another against F. H. Dunne, justice of the peace, and another, was dismissed, and plaintiffs appeal. Affirmed.

Geo. M. Hurlbut, for appellants. Aylett R. Cotton, for respondents.

GAROUTTE, J. This is an appeal from the judgment of the superior court for the city and county of San Francisco, entered in the above-entitled action, dismissing appellants' writ of review issued therein for the purpose of reviewing the proceedings of the justices' court in the city and county of San Francisco in a certain action then pending. It is claimed that the court failed to get jurisdiction of the person of the defendant in said action by reason of a fatally defective summons. That portion of the summons to which objection is made reads: "Given under my hand, this 31st day of May, 1893. By order of Charles A. Low, presiding justice of the peace for the city and county of San Francisco. E. W. Williams, Clerk of the Said Court."

1. It is contended that the summons should be signed by the justice of the peace, as provided by section 844 of the Code of Civil Procedure. We do not think that chapter 5, art. 1, tit. 1, pt. 1, of the Code of Civil Procedure is in any sense special legislation, and we have no doubt but that the sections of the Code found in that article are in full force and effect. Section 91 thereof provides that all process of every kind in actions, suits, or proceedings, "shall be issued by the said 'justices' clerk' upon the order of the presiding justice." Section 95 provides: "The justices' court and the justices of the peace of every such city and county shall be governed in their proceedings by the provisions of law regulating proceedings before justices of the peace, so far as such provisions were not altered or modified in this article." It is sufficient to say that said section 91 contains a modification of the rule declared in section 844 regarding the proper party to sign a summons in justices' courts in the city and county of San Francisco.

2. It is claimed that there is no such office as clerk of the justices' court, and that the summons is improperly signed and invalid for that reason. Section 86 of the Code of Civil Procedure provides that the board of supervisors shall appoint a "justices' clerk," and such undoubtedly is the technical name

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[1] Rehearing denied.

of the office, but we think the variance between the two terms so slight and unimportant as to affect no question of jurisdiction. The better practice would be for the officer to sign all process as "justices' clerk."

3. It appears that at the time the summons was issued Charles A. Low was not presiding justice of the peace for the city and county of San Francisco, but J. E. Barry was such presiding justice. At the hearing of this proceeding in the trial court a written order for issuance of the summons under the hand of said Barry, as such presiding justice, was offered in evidence, and upon any question of jurisdiction we think the law fully satisfied. While the summons may, upon its face, recite that it was issued at the order of the presiding justice, we find no statutory requirement to that effect, and hence such recital is not conclusive as to the fact. Especially is this true of that portion of the recital which states the name of the presiding justice, and a mistake as to a recital of the name of the particular person, who was at the time presiding justice, presents in no way any jurisdictional question. Only those recitals in the summons which the law requires to be recited there are evidence of their truth. As to the recitals of matters of mere surplusage, they prove nothing. In the present case the order was made by the presiding justice, and that was the material and controlling fact. The judgment is affirmed.

We concur: VAN FLEET, J.; HARRISON, J.

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107 Cal. 133

## COHEN v. WALLACE. (No. 4.)

(Supreme Court of California. April 6, 1895.)

Bill of Exceptions—Form—Settlement — Contents.

1. A trial judge is not justified in refusing to settle a bill of exceptions on the ground that it is a mere transcript of the reporter's notes, where it appears that the evidence in the proposed bill has been condensed to about one-fourth its original volume, and that a statement of some parts thereof by questions and answers is necessary in order for a proper understanding of the exceptions thereto.

2. Where the oral charge of the trial court, to which objection is taken, and the instructions asked for and refused, have been so authenticated as to become a part of the judgment roll, they need not appear in the bill of exceptions.

In bank.

Petition by Louis Cohen for a writ of mandate against William T. Wallace, judge of the superior court of San Francisco county, to compel the settlement of a bill of exceptions. Granted.

H. I. Kowalsky and T. J. Crowley, for petitioner. Wm. S. Barnes, Dist. Atty., for respondent.

VAN FLEET, J. Application for a writ of mandate to compel the settlement of a bill of exceptions. The petition sets forth that petitioner Louis Cohen, was tried and convicted in the superior court of the city and county of San Francisco before respondent, the Honorable William T. Wallace, a judge of said court, of the crime of perjury; that judgment was entered on the verdict on January 18, 1895, and that thereafter, on January 28th, and within the time allowed by law, petitioner, upon notice to the district attorney, delivered to the clerk of the court for said judge a proposed bill of exceptions in said case for settlement; that on the 30th day of January, two days after the delivery of said proposed bill to the clerk, the respondent, as such judge, made an order refusing to settle said bill, and directing that it be stricken from the files of said court. The prayer is that respondent may be required by the mandate of this court to settle said bill. In response to the alternative writ issued upon said petition, the district attorney appeared in behalf of respondent, and filed an answer, wherein it is admitted that respondent has refused to settle the proposed bill, but stating that such refusal was because of the fact that the bill as proposed appeared to respondent to be substantially but a transcript of the reporter's notes of the trial in all its fullness of question and answer, argument of counsel, and remarks of the court in detail; that, for this reason, respondent deemed the bill objectionable; and that he was justified in refusing to settle it. The answer, contrary to the requirement of the statute, is unverified; but, inasmuch as no specific objection to its sufficiency is urged on this ground, we may regard the omission as waived, treat it as raising an issue, and proceed to dispose of the matter upon its merits.

We do not think the action of the respondent can be sustained. An examination and comparison of the proposed bill presented in this case, in connection with the transcript of the evidence taken at the trial, satisfies us that the learned judge of the trial court was misled in assuming that the bill as presented by petitioner was a mere transcript of the reporter's notes. It cannot properly be said to be such, either in fact or in form. The testimony taken at the trial comprises, exclusive of the examination of talesmen upon their voir dire, some 200 typewritten pages of the reporter's transcript. The examination of talesmen covers about 28 or 30 pages more, making a transcript in all of about 230 pages. The proposed bill consists of 101 pages of typewritten matter, but of this the statement of the evidence, including the objections and exceptions reserved thereon, covers but 55 pages; showing that the evidence is condensed in the bill to only about one-fourth of its original volume. It is true that the evidence is to a considerable extent stated in the bill by question and answer, but this would seem to be largely necessary in order to point the very numerous objections and exceptions which appear to have been taken and reserved. For such purpose it is proper to so state it. It furthermore appears that some 15 pages of the statement of the evidence is taken up by the examination as a witness of the shorthand reporter with reference to testimony claimed to have been given by the defendant upon a former occasion. As to this portion of the evidence, it is necessary that it should appear by question and answer in detail. The same is essentially true as to the statement of the testimony given by the talesmen. It may be that there are instances in the bill where the evidence might with propriety be reduced to narrative form where it is not so stated; but, if so, this can be required upon the settlement of the bill, according as it may appear proper or necessary to the trial judge. While it is a rule, which should, so far as possible, be followed in making up a bill of exceptions in criminal as well as civil cases, to make as short and succinct a statement of the evidence as possible, either in narrative form, giving its substance, or by stating what the evidence tended to establish, yet there are frequent instances where neither of these methods would be wholly appropriate and adequate to express exactly what a witness has said. In such case it becomes necessary to state the evidence by question and answer, although not strictly required for the purpose of pointing an exception, but to lay before the court the exact statement of the witness. At best, written words are but a halting and imperfect substitute for words spoken in portraying the meaning or effect of language, and it will not do to say that in all cases and under all circumstances the evidence should never be stated by question and answer, except where it is desired to point an exception. No hard and fast rule should be laid down upon the subject, nor do we understand such to be the requirement of the statute. It must be left largely to the discretion and judgment of the trial judge, when settling the bill, to determine the proper method to be pursued in any given case. In this instance the manner in which the evidence is stated does not render the bill bad in form on that ground.

The rest of the bill, other than that portion devoted to the statement of the evidence, consists of other matters arising during the progress of the proceedings in the court below, to which objection and exception were taken; such, for instance, as a motion and the affidavits used thereon for a continuance, exceptions reserved to rulings made during the examination of talesmen, and to remarks of the district attorney in his opening statement, and argument to the jury, the charge of the court, and other matters. There are some things stated, perhaps, which might with propriety be left out of the bill; but the very purpose of the statute in requiring a settlement to be had is that such matter may be eliminated, and it is no reason for refusing to settle the bill. It is not necessary, for instance, to incorporate in the bill of exceptions the instructions asked by defendant and refused by the court, where, as here, they are properly indorsed by the judge, as they become a part of the judgment roll, and should not be repeated in the bill of exceptions. The same may be true of the oral charge of the court. If it has been authenticated by the judge in such manner as to become part of the judgment roll, it has no place in the bill of exceptions; but, if it has not been so authenticated, it then becomes proper to preserve it in the bill. See People v. January, 77 Cal. 179, 19 Pac. 258; People v. Gibson (Cal.) 39 Pac. 864. Taking the proposed bill in its entirety, we find nothing constituting such a departure from the requirements of the statute as justified the respondent in refusing to settle it. The case falls strictly within the rule declared in Sansome v. Myers, 80 Cal. 483, 22 Pac. 212. In that case the judge of the trial court had refused to settle the bill, upon the ground that he deemed it inaccurate and in many respects untrue, and that it contained but a partial statement of the facts and proceedings leading up to and connected with and upon which the rulings of the court were had that were complained of. This court said: "We do not regard these as sufficient grounds for refusing to settle a statement. If anything was omitted from the statement, or any matter was incorrectly stated, it was the duty of the district attorney to propose such amendments as would correct the omissions or errors. His failure to do his duty in this respect did not justify the respondent in arbitrarily refusing to act in the matter. As was said in the former decision in this case, it was not the duty of the judge to prepare a statement, but it was his duty to see that one was properly prepared, and then sign it. If the attorney for the petitioner had omitted anything material, the judge should have directed and required him to insert it; or, if matter was incorrectly stated, he should have required him to correct it, if the district attorney had neglected his duty by failing to propose the necessary amendments, which he seems to have done. If the petitioner had refused or neglected to so correct the proposed statement as directed, the judge would, no doubt, have been justified in refusing to settle the same, but not otherwise. This, the findings show, was not done. The respondent refused, in the first instance, to settle the statement, not to sign it. This, we think, he had no right to do. To so hold would place it in the power of the trial judge to deprive a litigant of his right of appeal by simply refusing to perform a plain duty."

The proposed bill in no sense comes within the objection stated in People v. Getty, 49 Cal. 581, relied upon by respondent as a warrant for his action in the premises. In that case it appeared that the bill of exceptions found in the record consisted simply of the reporter's notes of the trial, without any attempt at condensation or the elimination of immaterial matter in any particular; and in passing upon the case this court said: "In no conceivable case can it be necessary or proper that a bill of exceptions should be made up in that manner. It was never intended that the reporter's notes should constitute a bill of exceptions. The evidence relating to the points presented should be stated, as far as possible, in narrative form, or by a statement of its substance, or what it tended to prove, and the questions should be stated only when it is necessary to present the point of an objection thereto." And it was said that the judge of the court below would be justified in refusing to settle a bill of exceptions presented in that form. What is there said was not strictly pertinent to that case, nor necessary to its determination, since no question as to the right to have settled the bill there criticised was involved in the appeal. But it is nevertheless true that the expression in that case as to the proper practice with reference to bills of exceptions presented in such form has in subsequent cases received the authoritative approval of this court. In People v. Sprague, 53 Cal. 422, involving directly the right of the defendant to the settlement of certain bills of exceptions proposed by him, which had been refused, the court say: "The judge was fully justified in refusing to settle and certify the bills of exceptions (so called) filed on the 16th and 18th of September. The first was a mere skeleton, containing no statement of evidence or rulings; the second was in the form pronounced 'reprehensible' in People v. Getty, 49 Cal. 584." While this last case seems to have been determined largely upon another point,—that of a failure of defendant to give notice to the adverse party of the presentation of his bills,—the point covered by the language quoted was involved, and what was said upon it cannot therefore be ignored. And in the case of January v. Superior Court, 73 Cal. 537, 15 Pac. 108 (a proceeding like the present, to compel by mandate the settlement of a bill), it is said: "The bill, as originally presented, was a transcript of the reporter's notes of the evidence and proceedings, and the court was justified in refusing to settle it." In Sansome v. Myres, 77 Cal. 553, 19 Pac. 577, where, in a proceeding to require the settlement of a bill of exceptions, the respondent answered that the reason for his refusal was that the proposed bill contained but a mere "defective skeleton" of the testimony and evidence, and the answer was demurred to as not stating sufficient ground for such refusal, the demurrer was overruled by this court, and it was held that the answer, if sustained by the facts, was good.

From these cases it may be fairly taken as established that in instances where the proposed bill is either merely a copy of the reporter's transcript, without any effort to reduce to proper form for the purpose of presenting the questions involved, or where it is a mere skeleton, so bald of the essential requisites of the bill contemplated by the statute that it cannot in any true sense be regarded as such, it may be disregarded, and a settlement of it will not be required. This doctrine, however, is a harsh and rigid one, and, if inconsiderately applied, would be liable to great abuse, and frequently operate a virtual denial of justice to a defendant solely through the ignorance, incompetency, or indolence of counsel, for which he may be in no way responsible. For these reasons, we are not disposed to extend its application to cases not falling strictly within the class to which it has heretofore been held to apply. Even in such cases we are of the opinion that it would be better, as a general rule, if the judges of the trial court, disregarding as far as possible technical objections, should endeavor to settle the bill rather than refuse it. For this purpose, it is not necessary that the labor of making a proper bill of exceptions should be assumed by the judge. The party presenting the objectionable bill could be required by the judge to put it in proper shape, giving a reasonable time for such purpose. As suggested in Sansome v. Myers, 80 Cal. 486, 22 Pac. 212: "We must not be understood as intending to justify the too prevalent habit on the part of some attorneys of presenting an imperfect statement, thereby casting upon opposing counsel and the court the labor of piecing out and making complete a statement that should have been made perfect by the appealing party in the first instance. Such a course, whether it results from a design to gain an undue advantage or from indolence, should be severely condemned; and the party practicing it should be required by the judge to make and present a proper statement."

For these reasons, we are of opinion that the respondent should have proceeded to a settlement of the proposed bill, and that a peremptory writ should issue to that end. It is so ordered.

We concur: BEATTY, C. J.; HARRISON, J.; GAROUTTE, J.; McFARLAND, J.; HENSHAW, J.

TEMPLE, J., not having heard the argument, did not participate in the foregoing decision.

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107 Cal 141

WOODSIDE et al. v. HEWEL. (No. 18,432.)

(Supreme Court of California. April 13, 1895.)

DISMISSAL OF APPEAL—NOTICE.

1. Code, Civ. Proc. § 954, provides that, if appellant "fails" to furnish the requisite papers, the court may dismiss the appeal. Rule 14 provides, that defects in the transcript may be

corrected on suggestion of either party; and rule 15 provides that any exception to the transcript which could be cured on suggestion of diminution must be taken before hearing. *Held*, appellee is not entitled to a dismissal for failure of appellant to include, under the Code, in the transcript, the notice of appeal, where such objection is cured by the filing of a certified copy before the motion to dismiss is heard.

2. The including of an additional notice of appeal from the judgment in the notice of appeal from the order denying a new trial has no effect either as an original appeal or to impair the appeal already pending.

Department 1. Appeal from superior court, Stanislaus county; W. O. Minor, Judge.

Action by one Woodside and others against one Hewel, executor. There was a judgment for plaintiffs, and defendant appeals.

Heard on motion by appellant to dismiss appeal. Denied.

D. M. Delmas, L. W. Fulkerth, and W. H. Hatton, for appellant. J. H. Budd and L. J. Maddux, for respondents.

HARRISON, J. Motion to dismiss an appeal. February 20, 1894, the defendant filed and served his notice of appeal from the judgment herein that had been entered against him December 22, 1893. August 25, 1894, the superior court made an order denying the defendant's motion for a new trial, and on August 27th he took an appeal from that order. November 20, 1894, the appellant filed in this court a transcript on appeal, containing the judgment roll, statement on motion for new trial, order denying the same, and notice of appeal therefrom, which notice contained also a notice of appeal from the judgment. The transcript did not contain a copy of the notice of appeal from the judgment that had been filed February 20, 1894. February 16, 1895, the respondents gave notice of the present motion to dismiss the first appeal from the judgment, upon the ground that no transcript on said appeal had been filed; and also to dismiss the second appeal from the judgment, upon the ground that by reason of the first appeal there was at that time no judgment pending in the superior court, from which an appeal could be taken. The appellant, in response thereto, has suggested a diminution of the record, and has filed a certified copy of the first notice of appeal and of the undertaking given thereon.

Rule 5 of this court provides that, if the transcript, though not filed within the time prescribed, be on file at the time the notice to dismiss the appeal for failure to file it within the prescribed time is given, that fact shall be a sufficient answer to the motion. The judgment roll contained in the transcript that was filed by the appellant presented all the matters to be reviewed on the appeal from the judgment, but the notice of appeal was omitted from the transcript. Section 950, Code Civ. Proc., provides that "on an appeal from a final judgment the appellant must furnish the court with a copy of the notice of appeal, of the judgment roll, and of any bill of exceptions or statement in the case upon which the appellant relies"; and section 954 provides that "if the appellant fails to furnish the requisite papers the appeal may be dismissed." Rule 14 of this court provides that, upon the suggestion by either party of any error or defect in the transcript, the same may be corrected by producing and filing a certified copy of the omitted record. By rule 15 it is provided that any objection to the right of the appellant to be heard, or any exception to the insufficiency of the transcript which might be cured on the suggestion of a diminution of the record, must be taken and notified to the appellant prior to the hearing; and that the objection to the hearing of the appeal shall not prevail unless the appellant shall fail to file such additional record after having been so notified. The provision of section 954, Code Civ. Proc., above quoted, is to be construed in connection with this rule, and not as giving to the respondent the absolute right to a dismissal of the appeal upon the mere showing that the transcript as filed is defective, but as authorizing a dismissal of the appeal if the appellant "fails" to furnish the requisite papers after the diminution of the record has been suggested, as provided by this rule. The including of an additional notice of appeal from the judgment in the notice of appeal from the order denying a new trial had no effect, either as an original appeal or to impair the one then pending. The motion is denied.

We concur: GAROUTTE, J.; VAN FLEET, J.

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(112 Cal. 180)

## SIMSON v. FERGUSON. (No. 19,476.)[1]

(Supreme Court of California. April 15, 1895.)

FORECLOSURE OF MORTGAGE—PRIORITIES—DECREE.

Where a mortgage of land and the crop growing thereon was not executed as a mortgage of a growing crop is required to be executed by Civ. Code, § 2956, and the crop was subsequently mortgaged in good faith, in proceedings to foreclose the first mortgage the court should direct a separate sale of the crop, and the application of the proceeds thereof on the second mortgage.

Department 1. Appeal from superior court, Riverside county; J. S. Noyes, Judge.

Action by one Simson against one Ferguson and another to foreclose a mortgage. From a judgment for plaintiff, defendant Ferguson appeals. Reversed.

G. A. Skinner, for appellant. E. B. Stanton, for respondent.

PER CURIAM. The defendant Shaw executed to the plaintiff three promissory notes, bearing date October 1, 1891, and, as security for their payment, a mortgage upon certain lands in Riverside. The mortgaged premises are described in the complaint as "lots numbered 231 and 232 of the lands of the Southern California Colony Association," but the copy of the mortgage annexed to the complaint has, in addition to the above description, the following clause: "Together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging, and the rents, issues, and profits thereof." The defendant Ferguson is the holder of a second mortgage upon the same property, executed by Shaw, and is also the holder of a chattel mortgage executed to him by Shaw, June 17, 1893, upon the crop of oranges then growing, or to be produced during the season of 1893 and 1894, upon the trees upon said lots 231 and 232. The present action was brought July 19, 1893, by the plaintiff, to foreclose the mortgage to him. Judgment was rendered against the defendant Shaw in favor of the plaintiff and of the defendant Ferguson for the amounts claimed by each respectively, and directing that the "mortgaged premises mentioned in the plaintiff's complaint, hereinafter described," be sold, and the proceeds applied in paying to the plaintiff the amount found due to him, and that out of any surplus that might then remain the defendant Ferguson should be paid the amount found due to him. The property directed in the judgment to be sold is described as "the aforesaid lots numbered 231 and 232 of the Southern California Colony Association," "together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging, and the rents, issues, and profits thereof." Ferguson moved the court to amend the judgment by providing that the growing crop of oranges be sold separately, and their proceeds applied upon the judgment in his favor. This motion was denied, and Ferguson has appealed directly from the judgment. The respondent has not filed any brief in support of the judgment, nor did he appear at the argument of the cause, but the cause has been submitted upon the brief filed on behalf of the appellant, and upon an oral argument in his behalf.

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[1] Rehearing granted.

Without determining whether, as between the plaintiff and Shaw, the mortgage, in 1891, of the land, together with the "rents, issues, and profits thereof," would create a lien in favor of the plaintiff upon all the crops of oranges that might thereafter grow upon the land during the life of the mortgage (see Montgomery v. Merrill, 65 Cal. 432, 4 Pac. 414; Treat v. Dorman, 100 Cal. 623, 35 Pac. 86), it is sufficient, for the purposes of this case, to say that, as against a subsequent mortgagee in good faith, a mortgage upon a growing crop must be executed with the formalities prescribed in Civ. Code, § 2956, otherwise it is void as against him. As the mortgage to the plaintiff was not thus executed, the lien of Ferguson upon the crop of oranges was superior to the claim of the plaintiff, and the court should have directed that they be sold separately, and the proceeds applied upon the amount of the judgment in his favor. The judgment is reversed, and the court below is directed to modify the same, by directing a sale of the mortgaged property, in accordance with this opinion.

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107 Cal. 154

## PREWIT v. DYER. (No. 15,825.)

(Supreme Court of California. April 16, 1895.)

LIMITATIONS—SETTING ASIDE DECREE FOR FRAUD —DIVORCE.

1. Under Code Civ. Proc. § 338, subd. 4, providing that an action for relief on the ground of fraud must be brought within three years of the discovery of the fraud, the burden is on plaintiff in a suit to set aside a decree of divorce for fraud to prove that the discovery was within three years.

2. Plaintiff was married in 1877. In 1878 she separated from her husband by mutual agreement, and returned to her former home, in Pennsylvania, where she remained until 1886. While there she wrote to her husband with her address upon the envelopes, and the letters were never returned. In 1882 the husband applied for a divorce, and in the affidavit for publication swore that, to the best of his information, "defendant resided" in New York. In his testimony the husband swore that he did not know where his wife resided; that the last he heard of her she was in Pennsylvania. After the divorce, the husband took up his residence and lived till his death, in 1893, at Santa Cruz, where he was well known, and had lived with his wife in 1877–78. The subject of his divorce was a matter of common knowledge there. During this time one or more of plaintiff's sisters lived at Santa Cruz, with whom she corresponded. In 1888 plaintiff visited Santa Cruz, and remained there about three months, having gone there to effect a reconciliation, but concluded, from public report, that there was no use attempting it. She lived, while there, near her husband, but held no intercourse with him, although she saw him in the street once or twice. There was no positive evidence that plaintiff was ever directly informed of the divorce, and she swore she had no knowledge of it till 1892. *Held* to justify a finding that she knew in 1888 of his divorce.

Department 2. Appeal from superior court, Monterey county; J. H. Logan, Judge.

Action by Martha C. Prewit against Sarah A. Dyer, executrix of the estate of James L. Prewit, to set aside the judgment and decree of divorce obtained by defendant's testate on the ground of fraud. Defendant pleaded the statute of limitations. The case was tried by the court without a jury. From a judgment against plaintiff upon the issue of fraud and for defendant upon her plea, and from an order denying a new trial, plaintiff appeals. Affirmed.

Robert Friedrich, George P. Burke, Archibald Yell, and Charles M. Cassin, for appellant. Joseph H. Skirm and William T. Jeter, for appellee.

HENSHAW, J. Appeals from the judgment and from the order denying plaintiff a new trial. Plaintiff, the divorced wife of James L. Prewit, commenced this action after his death, asking the court to set aside the judgment and decree of divorce obtained by Prewit, upon the ground that the same were procured by fraud. Judgment in that case was rendered upon July 10, 1882. Plaintiff's action was commenced upon April 8, 1893, but she pleads that she was in ignorance of the divorce proceedings until December, 1892. Defendant, besides denying the material allegations of the complaint, pleads the statute of limitations. The court finds against plaintiff upon the issues of fraud, and for defendant upon her plea that plaintiff's cause of action is barred by the provisions of subdivision 4 of section 338 of the Code of Civil Procedure. If this finding is justified, it is determinative of plaintiff's right to maintain this action, and renders superfluous any examination and discussion of the evidence upon the charges of fraud. The finding of the bar of the statute is therefore first to be considered, and, herein, as to the facts: James L. Prewit and plaintiff intermarried in January, 1877, and thereafter lived at the Wilkins House in Santa Cruz, though the husband's ranch and home were in Monterey county. The wife separated from her husband in December, 1878. This separation she testifies was by mutual agreement, reduced to writing. She was to return to her former home, in Philadelphia, which she did after the lapse of a year, most of which she spent in Santa Cruz, the rest being passed in Sacramento. She remained in Philadelphia until 1886. While there she wrote some letters to her husband, with her address upon the envelopes. She never heard from her husband, but none of the letters were ever returned to her. Prewit's action was to obtain a divorce from his wife upon the ground of her desertion. It was verified and averred that the last known place of residence of his wife was the city of Philadelphia. In due course, service of summons was had by publication; and in the affidavit for such publication, made by Prewit three months after filing the complaint, he swears that, according to his best information, "defendant resides in the Fifth Avenue Hotel in the city of New York." At that time plaintiff had never been to that hotel, nor in New York. Upon June 26, 1882, Prewit, testifying in the matter of his divorce, swore that he did not know where his wife resided; that the last he heard of her she was living in Philadelphia. The divorce was obtained in the county of Monterey, but a short time after the date of it Prewit took up his residence in Santa Cruz, and there abode until his death, in January, 1893. Prewit was a man well known in Santa Cruz. He had lived there with his wife in 1877–78, and upon his return the fact that he had obtained a divorce from her was one of common knowledge, and the subject a matter of common conversation. Prewit himself discussed it openly. During this time one or more of the sisters of Mrs. Prewit were living in Santa Cruz. Alfred Fitch, son of one of these sisters, visited Mrs. Prewit in Chicago. This was in 1887. Fitch, at the time he saw his aunt, knew of the divorce. Mrs. Prewit testified that they discussed family matters, but nothing was said of the divorce. She corresponded with her three sisters in Santa Cruz. In 1888 Mrs. Prewit came again to Santa Cruz, and went to the home of a sister. She remained there from July until October. She came, she says, thinking she might have a reconciliation with her husband. "I changed my views from public opinion. I heard from public report the way he was living, and I concluded there was no need of my attempting it, and I went back to New York." She had, she testifies, quite a large circle of acquaintances in Santa Cruz. Of that circle was Mrs. Wilkins, the principal witness for Mr. Prewit in his divorce suit. Mrs. Wilkins visited Mrs. Prewit several times during this period, and was at the time living near by, in Mr. Prewit's house, he making his home in her family. Mrs. Prewit saw her husband once or twice upon the street in his buggy. She knew he was suffering from cancer of the eye. In fact, he was then mortally afflicted, and afterwards died of the disease. She never sought out her husband, nor had any manner of communication with him. From "public opinion," she concluded that efforts towards a reconciliation would be futile. The fact of the divorce was seemingly known to the relatives of Mrs. Prewit in Santa Cruz. It was certainly known to some, and was "mentioned in the families." Many witnesses of Santa Cruz testified to their knowledge and to the general knowledge of the community of the divorce; but there is no positive evidence that Mrs. Prewit was ever directly informed of the divorce. She swears she had no knowledge of it until she was informed by a letter from a sister, in 1892.

In this state of the evidence, was the court justified in rejecting her testimony, and finding that she had knowledge in 1888, and that, therefore, her cause of action is barred? Under the circumstances, it became necessary for plaintiff to aver, as she did, her discovery of the alleged fraud within three years of the time of the commencement of her action for relief. The burden of proof to support the averment was upon her. Her evidence upon this point was an assertion of her ignorance. To meet this, it was proper for defendant to prove facts and circumstances tending to discredit this assertion by showing its unlikelihood or improbability. This she attempted to do by proof of the facts above set forth. Any fact may be proved from which the fact in issue is presumed or is logically inferable. Code Civ. Proc. § 1870, subd. 16. Such facts frequently form the basis of argument against a party's contention.

A judge, no more than a jury, has the right arbitrarily to reject evidence, but, as a jury may be instructed that it is not bound to decide in conformity with the declarations of any number of witnesses which do not produce conviction, against a presumption or other evidence satisfying the mind, so should a judge be governed in his determinations by the same rule. Applying it to the facts of this case, a strong presumption is raised against the statement of Mrs. Prewit. She spent months in Santa Cruz, living but a short distance away from her husband, to become reconciled with whom she came to California; yet she held no intercourse with him. He was mortally afflicted; yet she did not offer to minister unto him. She lived in a community and among relatives who knew her husband had divorced her; yet no one told her of this all-important fact. She learned from a public rumor that it was useless to try to become reconciled with him; yet that same reckless gossip refrained from carrying to her ears news that she was a divorced wife. It is a natural presumption that what she did and did not do during these months was prompted by knowledge of the fact that she was no longer the wife of Prewit. To the mind of the trial judge, before whom the witnesses appeared, the presumption thus raised was more satisfactory than the declaration of plaintiff. It was his province to decide, and it cannot be said that his decision was error. The judgment and order are affirmed.

We concur: McFARLAND, J.; TEMPLE, J.

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(107 Cal. 151)

## PEOPLE v. FRIGERIO. (No. 21,193.)[1]

(Supreme Court of California. April 15, 1895.)

CRIMINAL PROSECUTION — WINNING AT PLAY BY FRAUD—SUFFICIENCY OF EVIDENCE — IMPROPER REMARKS OF COUNSEL — INSUFFICIENT OBJECTIONS.

1. A conviction under Pen. Code, § 332, directed against persons who obtain money fraudulently by the game of "three card monte, so called, or any other game, device, * * * or other means whatever," by the use of cards, is warranted by evidence that defendant and his accomplice pretended to play at a game of cards, wherein defendant, as an inducement to prosecutor to part with his money, was permitted to win repeatedly, and that the moment prosecutor's money was put up it was apparently lost by defendant to his accomplice.

2. The fact that the method used by defendant to swindle at cards was such as to render him guilty of larceny does not prevent him from being convicted of fraudulently obtaining money by tricks at cards.

3. Where the only objection to remarks of the prosecuting counsel in his arguments to the jury was couched in general terms, and apparently taken on the ground of misstatement of the evidence, defendant cannot for the first time on appeal object that the counsel erroneously called attention to defendant's personal appearance as a factor in evidence, though defendant had not testified as a witness.

Department 1. Appeal from superior court, Los Angeles county; B. N. Smith, Judge.

Paolo Frigerio was convicted of a crime, and appeals. Affirmed.

J. Marion Brooks, for appellant. Atty. Gen. Fitzgerald, for the People.

VAN FLEET, J. Appellant and one Josefa Balletto were jointly charged, under section 332 of the Penal Code, with a felony committed by obtaining the sum of $300 from one T. Marinovich, by trick and device, by the use of cards. Defendant was tried separately, and was convicted and sentenced to the state prison. He appeals from the judgment, and from an order denying him a new trial, and an order refusing to arrest the judgment. Several grounds of error are urged, but we do not regard any of them as possessing merit.

1. The information was in substantial compliance with the requirements of the Code, the offense being charged in the language of the statute, and the demurrer was not well taken. The orders of the court, therefore, overruling the demurrer, and denying the motion in arrest of judgment, were not erroneous.

2. It is contended that the evidence did not warrant a conviction. We deem it quite sufficient to make a case within the statute. The statute is directed against "every person who by the game of 'three-card monte,' so called, or any other game, device, * * * or other means whatever, by use of cards or other implements or instruments, or while betting on sides or hands of any such play or game, fraudulently obtains from another person money," etc. Without stating it in detail, the evidence discloses that the means employed in this instance was the old, familiar trick, by the defendant and his confederate, of pretending to play a game of cards, wherein the defendant, as an inducement to the prosecuting witness to part with his money, was permitted to repeatedly win; but the moment the money of the prosecutor was put up it was apparently lost by defendant to his confederate, who immediately disappeared with it. It is one of the most common of the many devices used in swindling by cards, and is strictly within the denunciation of the statute. The fact that the circumstances disclosed are such that the defendant might have been charged with and convicted of larceny does not make the offense any less one of the special class provided for in section 332, the circumstances being sufficient to bring the case within that section; nor does it render defendant less amenable to a prosecution under the latter section.

3. There was nothing in the language of the district attorney, used on the argument, to which exception was taken, not strictly pertinent to and warranted by the evidence, except that portion referring to the character and manner of the defendant. The defendant did not submit himself as a witness in the case, and it was therefore improper to comment upon or call attention to his personal appearance as a factor in the evidence.

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[1] Rehearing denied.

But this particular feature of the argument was not made the subject of special objection. The objection was couched in general terms, and apparently taken upon the ground contended for in the brief,—that defendant regarded the argument as involving a general misstatement of the evidence. The court's attention was in no way directed to any particular feature complained of, and where, as here, the argument was in large part a proper comment upon the evidence, it was the duty of the defendant to direct the court's particular attention to anything transgressing the people's privilege. Had this been done, the court would, no doubt, have corrected the impropriety. Under such circumstances, the defendant will not be permitted to take in this court, for the first time, any more specific objection to the language complained of than that urged in the court below.

4. The court did not err in refusing the instruction requested by the defendant, as the instruction was in no way pertinent to the evidence in the case.

The judgment and orders appealed from are affirmed.

We concur: HARRISON, J.; GAROUTTE, J.

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## PEOPLE v. BALLETTO. (No. 21,192.)[1]

(Supreme Court of California. April 15, 1895.)

Department 1. Appeal from superior court, Los Angeles county; B. N. Smith, Judge.

Josefa Balletto was convicted of fraudulently obtaining money by a trick at cards, and appeals. Affirmed.

J. Marion Brooks, for appellant. Atty. Gen. Fitzgerald, for respondent.

PER CURIAM. This case arises upon the same transaction as the case of People v. Frigerio (this day decided) 40 Pac. 107. The only ground urged for a reversal is that the evidence does not sustain the verdict. The evidence is in all substantial particulars the same as that involved in the case of People v. Frigerio, supra, and, upon the authority of that case, the judgment and orders appealed from are affirmed.

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(107 Cal. 130)

## JANES v. BULLARD. (No. 15,806.)[1]

(Supreme Court of California. April 6, 1895.)

JUDGMENT—AMENDMENT.

The error of the clerk in inserting in a decree the amount of the costs claimed by the plaintiff, before they had been ascertained or taxed, did not render it void, and was cured by the subsequent taxing by the court, and collection by the sheriff, of only the actual costs in the case.

In bank. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Action by T. I. Janes against J. A. Bullard. Judgment for plaintiff, under which an order was issued for the sale of real estate. From an order refusing to set aside such order of sale, defendant appeals. Affirmed.

Geo. D. Collins, for appellant. E. M. Morgan and G. W. Schell, for respondent.

VAN FLEET, J. This is an appeal from an order made after final judgment refusing to vacate and set aside an order of sale issued upon a decree of foreclosure, directing a sale of real property. In our judgment, the appeal is wholly without merit. Assuming, as contended by appellant, that the action of the clerk in inserting in the decree the amount of the costs as claimed by plaintiff, before the same had been taxed or ascertained, was erroneous, it was a mere clerical misprision, which did not affect the validity of the decree in other respects. Nor did it make invalid the order of sale issued thereon. The latter was, like the decree, erroneous, but not void, and the validity of the sale thereunder was not thereby affected. Newmark v. Chapman, 53 Cal. 557. Being merely erroneous, both the decree and order of sale were amendable in that regard; and the subsequent action of the court in taxing the costs was, in effect, such amendment, and a curing of the error. It was under the decree and order of sale as so modified that the property was sold, and only the amount of costs as taxed by the court was collected by the sheriff, so that appellant was in no way injuriously affected by the error complained of. The contention of appellant that the order of sale was prematurely issued, and therefore void, cannot be sustained. Code Civ. Proc. § 681; Bank v. Raynor, 61 Cal. 146. The order is affirmed, with $50 damages.

We concur: GAROUTTE, J.; HARRISON, J.; McFARLAND, J.; TEMPLE, J.

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(107 Cal. 120)

## GIRAUDI v. ELECTRIC IMP. CO. OF SAN JOSE. (No. 15,254.)[2]

(Supreme Court of California. April 6, 1895.)

ACTION AGAINST ELECTRIC LIGHT COMPANY—PERSONAL INJURIES—WIRES ON ROOF—CONTRIBUTORY NEGLIGENCE—ADMISSION OF EVIDENCE—HARMLESS ERROR.

1. Plaintiff was a dish washer in a restaurant, the wires to light which ran about sixty feet over the roof of the building at an average height of two feet. Plaintiff had seen the employés of defendant electric company placing the wires, and had been upon the roof in the daytime when the wires were in position. The night of the accident was stormy, and plaintiff, with his employer, went upon the roof, to secure the business signs of the latter. Plaintiff, not knowing or forgetting the location of the wires, came in contact with them. *Held*, that defendant was negligent in not raising the wires so high above the roof that those having occasion to go there would not come in contact with them.

2. The fact that plaintiff had been on the roof after the wires were placed did not show that he knew of their location, so as to render him negligent in coming in contact with them.

3. In such a case it would be a question for

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[1] Rehearing denied.

[2] Rehearing denied.

the jury whether plaintiff was negligent in touching the wires, even though he had previously observed their location.

4. One injured by an electric wire cannot be presumed, in the absence of evidence, to have had knowledge that moisture destroyed the insulation of such a wire.

5. Plaintiff, over the objection that the question called the witness to state whether the defendant was negligent or not, was allowed to ask certain questions of an expert electrician as to what matters should be taken into consideration in locating wires such as those in question, and whether it was proper or prudent management to put them so low over a metallic roof. The answer gave the facts in full, and explained what methods would have been safe. *Held*, that as the information could have been obtained by questions proper in form, and negligence had been fully proved by other evidence, defendant was not injured by the form of the question.

6. Persons using electricity must exercise the utmost care to prevent injury, and must protect those possessing less than ordinary knowledge of its character.

In bank. Appeal from superior court, Santa Clara county; John Reynolds, Judge.

Action by Giovanni Giraudi against the Electric Improvement Company of San Jose for damages for personal injuries. From a judgment on a verdict for plaintiff, and an order denying a motion for a new trial, defendant appeals. Affirmed.

Richards & Welch, for appellant. D. W. Harrington and Charles Clark, for respondent.

TEMPLE, J. This action is for damages for injuries received through an electric shock caused by the negligence of defendant. Plaintiff was employed as dish washer in an hotel and restaurant at San Jose, kept by one Lamolle. The house was lighted by incandescent lights, furnished by defendant. The wires passed over the house from the southeast corner, where they descended from the Hensley House to the apex of the roof. At the southeast corner it was 12 feet above the roof. At the ridge of the roof the wires were 18 inches high, and ran thence diagonally over the northern slope of the roof for 60 feet, at an average height of 2 feet, to a point on the north fire wall, where they descended on the outside of the wall to the transformer. Those wires were part of a circuit of 1,000 lights, and carried 1,000 volts, which was reduced at the transformer to 50. The wires were erected while plaintiff was employed at the Lamolle House. Plaintiff did not see the workmen place them over the roof, but saw where they came down the north wall. After the wires had been erected, plaintiff was on the roof for a few minutes, to assist in placing Lamolle's signs. One was at the southeast corner of the building, and one at the southwest corner. This was in the daytime, and was the only occasion on which plaintiff had been upon the roof before the accident. At that time the wires were dead, and plaintiff had no reason for taking note of them, and there is no evidence which tends to show that he did so. He got upon the roof then at the same point as upon the night of the accident, about three feet west of the place from which the wires passed down from the roof to the transformer. He reached the roof by stepladders temporarily placed there for the purpose. When the wires were erected, Lamolle was told by the workmen of defendant that they were harmless, and he was not consulted as to their location, nor was he asked what use, if any, was made of the roof. The accident occurred in the night of February 23, 1891. It was dark, stormy, and there was a heavy fall of rain. The signs seemed to be endangered, and Lamolle went upon the roof to secure them, and requested plaintiff to accompany him. Lamolle reached the roof first, having, as he thinks, a lantern, though plaintiff testified that he did not. They desired to reach the southeast corner of the building, to do which they must necessarily go over the wires, or, passing to the west over the roof, pass under them at the southeast corner. Plaintiff, not knowing or forgetting the location of the wires, came at once in contact with them. The first contact was with his leg. By the shock he was thrown down, and, when Lamolle ran to him, he found him grasping one wire with his hand. He was badly burned, both in his hand and leg. Plaintiff had judgment, and this appeal is from the judgment, and from an order refusing a new trial.

The first question is, is there evidence which tends to show negligence on the part of defendant which contributed proximately to the injury? I think there is. Indeed, this point is not much insisted upon on this appeal. The question is, simply, was there any evidence which it can be reasonably contended showed such neglect? If the question is open to debate, it must be left to the jury, even though there is no conflict in the evidence. The jury thought such negligence shown by a preponderance of evidence, and I think they correctly found. Defendant was using a dangerous force, and one not generally understood. It was required to use very great care to prevent injury to person or property. It would have been comparatively inexpensive to raise the wires so high above the roof that those having occasion to go there would not come in contact with them. Not to do so was sufficient proof of negligence to justify the verdict. If there was any excuse for not so locating the wires, it is on the claim that they were so covered that there was no danger in coming in contact with them. The accident itself proves that this was not sufficient, res ipsa loquitur. The point most insisted upon here is that plaintiff was guilty of contributory negligence; that he knew, or ought to have known, of the location of the wires, and should have taken care to avoid them. It is not a case where the doctrine of negligent ignorance can apply. Plaintiff owed defendant no duty, and no part of his employment required him to know, or gave him opportunity to know. Unless it can be held that he did in fact know, there was no evidence which even tended to show negligence on his part. He testified that he had never seen the wires before the accident, and did not know of their location. This probably means that he had no recollection of seeing them. There was no testimony as to where he went on the roof when he was there to assist in placing the signs, except that one was over the fire wall at the southeast corner, and the other at the southwest corner. He might have passed from one to the other without going near the wires. At all events, he had no occasion to take note of them. He had no interest in the matter, and no reason to suppose he would ever be upon the roof again. It would be a hard measure to hold one responsible for knowing everything he might observe if he would only take notice, when he had no interest in taking heed.

Can we say then, as matter of law, and against his positive testimony, that he had notice and did know? Even had he observed the wires during his short visit to the roof, it would be a question for the jury to say whether it was the want of ordinary care for him not to have it in mind on that occasion. It is said that, if one was aware of a fact which should have put him upon his guard, he cannot rebut the presumption of contributory negligence by showing that he momentarily forgot it. This is true as a general proposition, but, like all other rules upon this subject, it must have a reasonable construction. To forget is not negligence, unless it shows the want of ordinary care, and it is a question for the jury. Illustrations of this proposition are found in the cases of brakemen who are injured by obstructions over or near the track of the road. They have been allowed to recover, although it is shown that they knew of the obstruction, on the ground that they cannot be expected to retain at all times a complete outline of the track, and because, in the hurry of their work, they would not be likely to keep these things in mind; that is, to forget, under the circumstances, did not prove absence of ordinary care. See Dorsey v. Construction Co., 42 Wis. 583.

And, again, the wires over the roof were covered with insulating material, precisely as the wires in the house were. It is claimed that this was of the very best quality known, and that, if it had been perfect, it would ordinarily have rendered the wires harmless. If it was not in good condition, it was the fault of defendant, and plaintiff cannot be held to have had knowledge of its dilapidated condition. It is claimed that the fact that the wire was wet destroyed the insulation for the time. But we cannot presume that the effect of moisture is a fact generally known, and there was no evidence tending to show that plaintiff had such knowledge.

It is also suggested that plaintiff grasped the wire with such force that in its wet condition the insulation was destroyed. If so, this would not prove contributory negligence, but there is no proof of this except that, when he was found, he had hold of the wire. His testimony is that he first felt the shock in his leg, and was by such shock thrown down upon the wire. His case must here be judged by the testimony most favorable to him.

2. Plaintiff was allowed, over the objection of the defendant, to ask certain questions of an expert electrician as to what matters should be taken into consideration in locating electric wires carrying such currents as these in question, and whether it was proper or prudent management to put them so low over a metallic roof. The objection was that it was the province of the jury to determine such matters, and not a proper subject for expert testimony. The cases do undoubtedly hold that an expert cannot be asked whether a structure is a safe one, or whether certain methods are prudent, but all hold that facts may be elicited from the witness from which the conclusion inevitably follows. To illustrate, in Bemis v. Railroad Co., 58 Vt. 636, 3 Atl. 531, an expert was held not allowed to testify "that it was not prudent to use a certain hoisting apparatus with less than three men, on a stone of two tons heft." Yet the court said there might have been shown "the number of men required, danger in its use by a less number, its safety and adequacy when properly used," and added that then the jurors could as well decide for themselves. Of course, the point had been as effectively decided by the expert as though the first question had been answered. The difference is largely one as to the form of the question; and, while I do not mean to say that it is immaterial, or that such an error may never be cause for reversal, I do not think it should be so held here. The answer of the witness gave the facts in full, and explained what methods would have been safe. All this information might have been obtained by proper questions; and then it was not very material here. The negligence of defendant was fully proven by other evidence. In fact, the defense chiefly relied upon the plea of contributory negligence. I think we may safely conclude that the defendant was not injured by the form of the question.

3. Appellant also claims error in refusing two instructions asked by him, and in giving one at the request of plaintiff.

Instruction 4, which was refused, is as follows: "With reference to the use of the agencies of nature, such as fire, steam, gas, or electricity, the court instructs you that persons employing such agencies, and introducing them into cities in the form of commodities for the public use, while held to a considerable degree of care in the service of these dangerous elements, are not required to use such extraordinary care as, while it would render the element absolutely harmless under all conditions, would also render its supply impracticable. The public, who receive the benefits of convenience and comfort from the supply of the commodity, are presumed to know enough of the nature of the element to avoid the dangers which must arise out of its practical use. The duties of the person supplying the community [commodity?] and of the public using it are reciprocal. Each may depend upon the exercise by the other of such ordinary knowledge of the character of the community [commodity?] and such common prudence in its presence as the circumstances of the time and place require." I think this instruction was properly refused. The mere fact that some persons use a dangerous agency raises no presumption that the public know enough of its nature to avoid the danger which must arise from its use; and the public, aside from the consumers using the commodity, owe no duty to those introducing it; but, on the other hand, it is the duty of those making a profit from the use of so dangerous an element as electricity to use the utmost care to prevent injury to any class of people composing the public which exists in any considerable numbers. They must protect those possessing less than ordinary knowledge of the character of the commodity. If ordinary knowledge means that of the person of average intelligence, the rule contended for would leave one-half the community partially unprotected. It is true, when the question is as to the negligence of the defendant, he is entitled to be judged in view of the knowledge generally—that is, almost universally—possessed by the community. The instruction asked had reference only to the alleged contributory negligence of plaintiff. As to that it has been said: "As there are different classes in society, with widely different degrees of intelligence, the plaintiff was not required to exercise more care than is usual under similar circumstances among careful and prudent persons of the class to which he belongs." Shear. & R. Neg. § 87. In Mackay v. Railroad Co., 35 N. Y. 75, the court said: "You would never expect the same care and caution from the mass of ignorant laborers that is exercised by educated, grave philosophers. The mass of men would not expect it, and the law that requires it is absurd. He should be called upon for such care only as a man in his condition in life would ordinarily exert under the circumstances. Does not a juror know what that is as well as a judge? The ignorant and the unwary are entitled to the protection of the law, as well as the wise and educated. There is little justice in depriving a man of his life for not exercising more care than his capacity will allow him to exert." The same rule is applied to the case of children, lunatics, and the blind. Contributory negligence implies fault on the part of the person injured. Sometimes it is negligence to be ignorant. Such was not the case here.

The fifth instruction asked by defendant ought to have been entirely rejected. A portion was given. Of this the defendant cannot complain.

At the request of plaintiff, the court gave the following instruction: "What constitutes reasonable care must be judged by the circumstances of this case, of which you are the judge. If he is ignorant of the danger that might result from contact with these wires, a less degree of care was demanded of him than would have been required if he had been informed of such danger." This is also complained of by appellant. As applied to the facts of this case, I think it correct.

The judgment and order are affirmed.

We concur: BEATTY, C. J.; McFARLAND, J.; HARRISON, J.; GAROUTTE, J.; HENSHAW, J.; VAN FLEET, J.

(107 Cal. 107)

## KNOWLES et al. v. MURPHY et al. (No. 15,424.)[1]

(Supreme Court of California. April 6, 1895.)

ACTION AGAINST TENANT—DEFAULT IN RENT—RECOVERY OF POSSESSION—PLEADING—ESTOPPEL TO DENY LANDLORD'S TITLE—EVIDENCE.

1. Code Civ. Proc. § 1582, providing that "actions for the recovery of any property, real or personal, and all actions founded on contracts, may be maintained by executors in all cases in which they might have been maintained by their respective testators," authorizes the executor of a deceased landlord to sue the tenant in unlawful detainer.

2. In an action against a tenant to recover rent due or possession of the premises, a complaint alleging the terms of the lease, and tenant's failure to pay the rent which fell due prior to the date of demand, states a good cause of action, although it shows that the full amount claimed was not due at the time demand therefor was made.

3. When service of notice on a tenant to pay rent or surrender possession is distinctly alleged, the manner of such service need not be alleged.

4. When the complaint charged that defendant tenants "unlawfully hold over and continue in possession" of the leased premises, defendants' denial that they "continue to hold or occupy said premises, or any portion thereof, as tenants of" plaintiff's testator, was an admission that they were in possession of the premises, and a denial only of the tenancy.

5. One is bound by the terms of a lease made to him, which he has signed, but not acknowledged.

6. One who, in the absence of fraud or false representations, has executed to a creditor a deed to certain property, and retained possession under a lease from him,—the deed and lease providing that the premises should be reconveyed to the tenant upon his payment of the rent and the debt which the two instruments were given to secure, —is estopped to deny such landlord's title in an action brought to recover the rent.

7. In an action to recover from a tenant for rent of premises which he had conveyed to the landlord, and received back under a lease, the conditions of which permitted him to purchase the premises at a fixed price, it was not error to exclude evidence of the value of the premises, as being immaterial to the issue.

8. When a tenant's lease gave him the privilege of purchasing the leased premises at a fixed price, evidence of a tender made under such option was properly excluded in a suit against the tenant for rent.

9. When the defendant had admitted signing a lease, and the issue was whether such signing was voluntary, or had been induced by fraud, a charge reciting that the "execution" of the deed was admitted by the defendant was not misleading.

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[1] Rehearing denied.

10. A statement in a charge that the plaintiffs, in order to establish their case, had "offered in evidence the lease, and the payment of rent thereunder," was not equivalent to a declaration by the court that the defendants had paid rent under the lease, that being one of the issues before the jury.

Department 1. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Action by J. N. Knowles, executor, and Emma Lolor, executrix, of the will of C. P. Lolor, deceased, against Bridget Murphy and Martin J. Murphy. Judgment for plaintiffs, and defendants appeal. Affirmed.

Sullivan & Sullivan, for appellants. Wilson & McCutchen, for respondents.

HARRISON, J. Defendants entered into a lease with C. P. Lolor, bearing date August 3, 1885, by the terms of which he hired and demised to them a certain lot of land in San Francisco, for the term of six months, at the monthly rent of $31, payable in advance on the 3d day of each and every month during said term. The instrument contained a clause giving to the defendants the option of purchasing the demised premises at any time during the term, by paying the sum of $3,700, and all the rent accruing under the lease. The defendants had been in possession of the land, claiming to be owners thereof, for several years prior to this time, and had mortgaged it to Lolor to secure an indebtedness to him of $3,000. Lolor had commenced an action to foreclose the mortgage, and while that action was pending the defendants executed to Lolor a conveyance of the lands, and at the same time took from him the aforesaid lease. After its execution they paid all the rent which accrued, according to the terms of the lease, prior to April 3, 1891. Lolor died in December, 1890, and in March, 1891, the plaintiffs were appointed his executors. The defendants not having paid any rent after their appointment, the plaintiffs, on the 12th of February, 1892, served upon each of them a written demand for the payment of the rent, stating the amount then due, or that they deliver possession of the demised premises. This demand not being complied with, the present action was brought. Judgment was rendered in favor of the plaintiffs, and the defendants have appealed therefrom, and also from an order denying a new trial.

1. The plaintiffs were authorized to bring this action. "Actions for the recovery of any property, real or personal, or for the possession thereof, and all actions founded upon contracts, may be maintained by and against executors and administrators in all cases in which the same might have been maintained by or against their respective testators or intestates." Code Civ. Proc. § 1582. In Martel v. Meehan, 63 Cal. 47, it was held that the provisions of this section do not apply to an action brought under the provisions of section 1161, Code Civ. Proc., against an executor of one who, in his lifetime, had been a tenant of the plaintiff, for the reason that the section authorizes such action only when the tenant continues in possession, "in person or by subtenant," and that the executor is not such "person" or a subtenant, and that a judgment against an estate, in the nature of a penalty of three times the amount of the rent, should not be given unless expressly authorized by statute. These reasons do not exist in the case of an action by executors. The section expressly authorizes them to bring actions for the recovery of any property, in all cases in which the same might have been brought by their testator; and while they are engaged in the administration of the estate the executors are to be regarded as the "successor in estate of the landlord," for the purpose of giving the notice authorized by section 1161, and enforcing against a tenant who is guilty of an unlawful detainer the remedies authorized by that chapter.

2. The complaint sufficiently states a cause of action against the defendants. The terms of the lease were alleged, and also the period during which the defendants had been in default in the payment of the rent prior to the date of the demand. The rent was payable in advance, and the averment that the amount in default covered a period which extended beyond the date at which the demand was made, or beyond the date when the last installment accrued, was merely surplusage. It was alleged that the demand was made February 12, 1892, and within one year after the rent became due. It was not necessary to allege the manner in which the notice to pay rent or surrender possession was served. The fact of the service is distinctly alleged, and upon a general demurrer this allegation will be construed to include everything necessary to constitute a sufficient service.

3. The nonsuit was properly denied. Upon proof of the execution of the lease, and the default in the payment of the rent provided therein, with the admission in the answer that the defendants held possession of the demised premises, the plaintiffs were entitled to judgment. It was alleged in the complaint that "said defendants unlawfully hold over and continue in the possession of said premises," etc. The denial of the defendants that they "still continue to hold or occupy said premises, or any portion thereof, as tenants of C. P. Lolor," is an admission that they were in possession, but merely a denial of the tenancy. It was not necessary that the defendant Bridget Murphy should acknowledge the lease, in order to be bound by its terms.

4. The defendants alleged in their answer that the conveyance by them to Lolor on the same day that they executed the lease was merely by way of security for the payment of their indebtedness, and that the deed, although absolute in form, was only a mortgage, and was executed upon the agreement on the part of Lolor that upon payment of the sum of $3,700, and interest at the rate of $31 per month, he would re-

convey the premises to them; that they did not enter into possession of the premises under the lease; and that they were induced to sign the lease by reason of certain false and fraudulent representations by Lolor to the effect that the lease was intended only as additional security for a payment of said indebtedness. The court instructed the jury, very fully and explicitly, that, if they should find that the defendants were induced to accept the lease from Lolor through fraud or deception practiced upon them by Lolor, the lease did not create the relation of landlord and tenant, and that they must find for the defendants. The verdict in favor of the plaintiffs established that the lease was not entered into by the defendants by reason of any fraud or deception on the part of Lolor. It was immaterial, for the purposes of this action, whether the deed from the defendants to Lolor was absolute, or by way of mortgage. The question of title was not involved, and the defendants could not avoid the obligation assumed by them, by reason of the lease, by showing that Lolor did not have the title to the premises which he demised to them. Upon their failure to sustain the averments of fraud and false representations, the presumption arose that the lease is to be construed and to have effect according to its terms. Even if it had been admitted that the deed and the lease were both executed merely as security for the payment of the indebtedness, the defendants would still be subject to the obligations consequent upon their entering into the lease, one of which is the right of the lessor to a judgment for possession, in case of their default in payment of the rent. Their contention that, inasmuch as they were in possession of the premises at the time they entered into the lease, they are not estopped from disputing the title of the lessor, is inapplicable to the present case. In Tewksbury v. Magraff, 33 Cal. 237, and in Franklin v. Merida, 35 Cal. 566, it was held that in an action of ejectment, where the tenant did not enter into possession under the lease, but was in possession at the time of the lease, he was not estopped from disputing the title of the landlord. This rule, however, was held in Mason v. Wolff, 40 Cal. 246, to be inapplicable in actions of unlawful detainer, for the reason that in these actions the question of title is not involved, and cannot be raised. See, also, Felton v. Millard, 81 Cal. 540, 21 Pac. 533, and 22 Pac. 750. The expression in Davidson v. Ellmaker, 84 Cal. 21, 23 Pac. 1026, to the effect that in such action the tenant is not estopped from disputing the title of the plaintiff, is to be construed in connection with the claim set up therein that the tenant was induced to accept the lease by reason of the fraud of the lessor, which, as was said in Johnson v. Chely, 43 Cal. 305, destroyed the relation of landlord and tenant, and removed the estoppel. In the present case, however, the very circumstances under which the lease was executed preclude the defendants from invoking the rule laid down in Tewksbury v. Magraff, and estop them from questioning the title of their lessor; for, if the deed and lease were executed as a security for their indebtedness, their lessor would have the right to avail himself of all the remedies afforded by law for making that security effective, and to enforce against them the surrender of the possession, which, by virtue of their lease, follows their default in the payment of the rent. Under the same principles, the value of the property at the time the lease was executed was immaterial, and the court did not err in excluding evidence of such value.

5. Evidence that the defendant Bridget Murphy had tendered to Lolor the amount of the indebtedness in November, 1885, was immaterial in this action. If the tender was made by virtue of the option clause in the lease, it did not release the defendants from their obligation to pay the rent, unless they should in some manner have sought the enforcement of this agreement on the part of Lolor. So long as they retained the possession of the premises, they could not escape their obligations to pay the rent. The subsequent payment of rent by them was to be regarded as an abandonment of their exercise of this option. If this offer of payment was intended for the purpose of extinguishing their indebtedness to Lolor, it did not have that effect, unless they kept the tender good. Civ. Code, § 1500.

6. The issues upon the execution of the lease, and whether there was any fraud practiced by Lolor upon the defendants, were very fully and fairly presented to the jury by the court. The expression in the charge that the "execution" of the lease was admitted could not have misled the jury. The signing of the lease was admitted by the defendants in their answer, and their signatures to the instrument when it was offered in evidence were not disputed. The issue before the jury was whether this signing was voluntary, or had been induced by fraud. While the execution of an instrument includes more, in legal contemplation, than merely signing, these terms are often used interchangeably. In another portion of the charge the jury were told that the plaintiffs, to sustain their case, had offered in evidence this lease signed by the defendants, and the payment of rent thereunder. The contention of the appellants that in this statement the court declared that the defendants had paid rent under the lease, whereas this was one of the issues before the jury, is not sustained by an examination of the charge itself. In this part of its charge the court was merely stating to the jury the course that had been taken at the trial, and not the effect of the testimony that had been offered. The defendants did not dispute the fact that they had paid

money to Lolor by reason of the agreement between them and that they had taken receipts from him, in which this money was stated to have been paid as rent. Their denial in the answer that the money was paid under a lease was coupled with their denial that they had executed a lease; but when the lease was produced in evidence, and it was shown that the defendants had paid rent to the lessor, this payment, in the absence of other testimony, would be presumed to have been made under the lease. The judgment and order are affirmed.

We concur: GAROUTTE, J.; VAN FLEET, J.

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## PEOPLE v. GARCIA. (No. 21,154.)

(Supreme Court of California. April 17, 1895.)

CRIMINAL LAW—IMMATERIAL EVIDENCE.

The admission of hearsay evidence, in no way connecting the defendant with the offense charged, and in no way prejudicial to any of his rights, is harmless error.

Department 1. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

Defendant, Garcia, was convicted of robbery, and appeals from an order denying his motion for a new trial. Affirmed.

Alex. Campbell, for appellant. Atty. Gen. Fitzgerald, for the People.

PER CURIAM. The defendant, Garcia, alias Herrara, was convicted of robbery, and now appeals from the judgment and order denying his motion for a new trial. There is no merit whatever in his appeal. It is claimed that the court committed an error in admitting hearsay evidence before the jury. A complete and conclusive answer to appellant's contention in this regard is found in the fact that the evidence admitted in no way connected the defendant with the offense charged, and was in no way prejudicial to any of his rights. The record discloses that the evidence is sufficient to support the verdict and the judgment. For the foregoing reasons, the judgment and order are affirmed.

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107 Cal. 163

## McQUEEN v. MECHANICS' INSTITUTE. (No. 15,791.)

(Supreme Court of California. April 22, 1895.)

NEW TRIAL—CONFLICTING EVIDENCE—ERRONEOUS INSTRUCTIONS.

1. The fact that the jury, in an action to recover for injuries alleged to have been caused by the lack of sufficient light in the cellar in which plaintiff was working, were allowed to visit and examine such cellar, did not deprive the court of its jurisdiction to grant a new trial, where the jury rendered a verdict for plaintiff.

2. The giving of erroneous instructions is not grounds for setting aside an order granting a new trial.

Department 2. Appeal from superior court, city and county of San Francisco; John Hunt, Judge.

Action by Alfred W. McQueen against the Mechanics' Institute, a corporation. Judgment for plaintiff, and from an order granting a new trial he appeals. Affirmed.

Boone & Schlesinger, for appellant. E. J. McCutchen, for respondent.

PER CURIAM. This action was brought to recover damages for personal injuries received by plaintiff while in the employ of defendant. Plaintiff recovered a verdict, and the court granted a new trial. From this order plaintiff takes this appeal. Plaintiff's foot was crushed by the falling of a pile of boards which he and his fellow servants were storing in the cellar of the Mechanics' Pavilion. The boards were passed down through a hatchway, and put on a hand truck, and then taken to a place in the cellar, where plaintiff and a fellow laborer lifted them from the truck, and piled them. A pile which they had built up about five feet toppled over, and injured plaintiff. The work is not inherently dangerous, and no one was directing in what mode the planks should be piled, nor how high. Naturally, therefore, the presumption would be that the accident occurred through the carelessness of the workmen.

Plaintiff contends that the defendant was negligent, because there were cleats upon some of the boards, of which the workmen were not informed, which cleats caused the pile to be unsteady and liable to fall; also because the cellar was not sufficiently lighted. If the cellar was sufficiently lighted, plaintiff could have seen the cleats on the boards, and could also have seen if the pile was uneven or unsteady. The amount of light in the cellar was therefore a very material question. The trial court concluded that there was sufficient light in the cellar, and that the accident occurred through the negligence of plaintiff and his fellow servants, and it cannot be denied that there was evidence tending to support that view. But the jury was allowed to visit the cellar, and counsel contend that, therefore, they had evidence which is not and could not be in the statement on motion for a new trial. The purpose of allowing the jury to visit the premises was to enable them to understand the evidence introduced on the trial. Upon such evidence we must presume their verdict was based. The fact that the jury was allowed to visit the premises cannot deprive the court of its jurisdiction to grant a new trial. This it should do notwithstanding a conflict in the evidence, if fully convinced that the verdict was wrong.

The refusal of the court to grant a nonsuit is of no moment. Had there been no additional testimony, the court could change its ruling at any time during the trial. But there was further testimony in defense and in rebuttal.

If, as suggested by appellant, some of the instructions were erroneous, that fact might constitute an additional reason for granting a new trial, but it is no reason for setting aside an order awarding a new trial. The order is affirmed.

## BARNETT v. MULKINS et al. (No. 19,554.)

(Supreme Court of California. April 19, 1895.)

FORECLOSURE OF MORTGAGE—ATTORNEY'S FEES.

Where the mortgage secured the payment of principal and interest only, attorney's fees for which the note provided cannot be made a lien on the land. Clemens v. Luce, 35 Pac. 1032, 101 Cal. 432, followed.

Department 1. Appeal from superior court, San Diego county; George Peterbaugh, Judge.

Action by one Barnett against Mulkins and others to foreclose a mortgage. Judgment for plaintiff, and defendants appeal. Modified.

Wm. Darby, for appellants. V. E. Shaw, for respondent.

PER CURIAM. Upon the authority of Clemens v. Luce, 101 Cal. 432, 35 Pac. 1032, this cause is remanded, and the superior court is directed to modify the judgment by striking therefrom the amount included therein for attorney's fees, so far as the same is made a lien upon the land described in the complaint; and, as so modified, the judgment will stand affirmed.

107 Cal. 94

## PEOPLE ex rel. BOARDMAN v. TOWN OF LINDEN. (No. 18,335.)

(Supreme Court of California. April 5, 1895.)

MUNICIPAL CORPORATIONS — ORGANIZATION—PETITION—NOTICE OF ELECTION—BOUNDARIES.

1. Under Act 1889, p. 371, § 2, providing, on incorporation of municipalities, that the petition shall be presented to the board of supervisors after two weeks' notice, by publication, of the time when it will be presented, the petition is properly caused to be published by the petitioners before presentation to the board of supervisors.

2. Under Act 1889, p. 371, § 2, requiring, on incorporation of municipalities, the presentation to the board of supervisors of a petition signed by 50 qualified electors of the county, and resident within the territory to be incorporated, and providing that the affidavit of three qualified electors residing within the proposed limits shall be prima facie evidence of the requisite number of signatures, if the affidavit fails to show that the signatures of the petitioners are genuine, and there is no evidence introduced to prove their genuineness, the proceedings are fatally defective.

3. The board of supervisors, by adjourning the hearing of a petition for the incorporation of a municipality from day to day without fixing the hour for resuming the hearing, do not lose jurisdiction of the proceedings.

4. An order of the board of supervisors establishing the boundaries, and providing for the submission of the question of the incorporation, of certain territory, is not an ordinance, and therefore need not be published.

5. The board of supervisors, to whose discretion is committed the fixing of the manner of giving notice of an election for the incorporation of municipality, must themselves fix the manner or time of giving notice, and cannot delegate to the clerk such power.

6. An ambiguity in the order of the board of supervisors fixing the boundaries of a proposed municipality, consisting of a misdescription of a section corner, is not a fatal defect, where the courses and distances and other descriptions show the corner intended.

7. The filing of a certified copy of the order of the board of supervisors declaring a municipality duly incorporated is essential to the validity of the incorporation.

In bank. Appeal from superior court, San Joaquin county; Ansel Smith, Judge.

Quo warranto on the relation of S. H. Boardman against the town of Linden. There was a judgment for defendant, and relator appeals. Reversed.

Atty. Gen. Hart and Jas. A. Louttit, for appellant. W. M. Gibson and Kile & Plummer, for respondent.

BEATTY, C. J. By virtue of certain proceedings under the general law providing for the organization, incorporation, and government of municipal corporations (St. 1883, p. 93), the defendant is assuming and claiming to be a municipal corporation of the sixth class, and this action was brought for the purpose of determining its right to hold and enjoy the franchise and to exercise the powers of such a corporation. The plaintiff claimed that, by reason of the failure of the board of supervisors to comply with the statute, no organization was ever effected. The defendant claimed that there had been a substantial and sufficient compliance with the law on the part of the board and of all parties concerned. A trial was had in the superior court, and judgment given in favor of the defendant, affirming the validity of its incorporation. Plaintiffs appeal from the judgment, and from an order overruling their motion for a new trial. In support of their appeal they specify various particulars in which, as they claim, the proceedings looking to the incorporation of the defendant fell short of the statutory requirements. There seems to be no difference between counsel as to the proposition that a substantial compliance with the statute is sufficient, but it is contended that positive and important provisions of the law have, in this instance, been violated or ignored. Most, if not all, of the questions to be decided depend for their solution upon the proper construction of section 2 of the act above cited, as amended in 1889 (St. 1889, p. 371).

1. It is therein provided, among other things, that a petition describing the territory to be incorporated, and signed by at least 50 qualified electors of the county, resident within the limits of said territory, shall be presented to the board of supervisors after two weeks' notice, by publication, of the time when it will be presented. Appellant

claims that such petition must be presented to the board, in the first place, before publication of notice, and must be thereafter published, with the notice, affidavit, etc., by order and under the official sanction of the board, for the requisite time, before it is presented to the board for its further action. We think, however, that a proper construction of the statute warrants the course pursued by the petitioners in this instance, who themselves caused the publication of the petition, affidavit, and notice of the time when the petition was presented to the board.

2. It is provided in the same section that "the affidavit of three qualified electors residing within the proposed limits, filed with the petition, shall be prima facie evidence of the requisite number of signatures" to the petition. The affidavit filed with this petition was radically defective. It merely showed that the names attached to the petition were names of qualified electors resident within the limits of the proposed corporation. It did not show that their signatures were genuine, and there never was any evidence of the genuineness of such signatures offered before the board, or on the trial of this action before the court. The board never found or declared that such petition had been in fact signed by 50 qualified petitioners, and there was no evidence to sustain such a finding by the court. In this respect we think there was a failure, in a substantial particular, to comply with the statute. It is of the very essence of the proceeding, and absolutely essential to the jurisdiction of the board to make the order declaring the establishment of the incorporation, that a proper petition, signed by the requisite number of qualified petitioners, should be laid before them. This, of course, involves proof of the genuineness of the signatures attached to the petition, no less than the citizenship and residence of the persons whose names are attached. And the statute prescribes what that proof shall consist of,—at least in part,—viz. an affidavit of three qualified petitioners, filed with the petition. This affidavit, it is true, is only made, by the statute, prima facie evidence of the requisite number of signatures. But we do not construe this to mean, as counsel for respondent contends, that it may be entirely dispensed with, and other evidence substituted. It only means that the affidavit, if uncontradicted, is sufficient proof. If it is contradicted, no doubt it may be supported by additional testimony, but that such an affidavit should accompany the petition we think clear. And even if we were to concede, which we do only for the argument, that the absence of a proper affidavit might be supplied by other competent evidence of the genuineness of the signatures of a sufficient number of qualified petitioners, the case shows that in this instance there was no other evidence, and there was no finding or declaration of the fact.

3. There was no loss of jurisdiction by the board, if they had ever acquired jurisdiction, by the adjournments of the hearing from time to time, merely because, in the orders of adjournment, the hour of the day for resuming the hearing was not specified.

4. If the order of the board establishing boundaries, and providing for a submission of the question of incorporation to the people, had been otherwise valid, it was not invalidated by the failure to publish it as an ordinance. Such orders are not ordinances, governed, as to their enactment, by the provisions of the county government act, but are orders to be entered on the minutes of the board in accordance with the provisions of the statute regulating this particular proceeding.

5. The board of supervisors did not make any direction as to the manner or time of giving notice of the election in this case, but merely resolved that notice be given, leaving it to their clerk to determine what the notice should be. The clerk caused a notice to be posted for 15 days, in which was contained an ambiguous description of the boundaries of the proposed corporation. This was not a substantial compliance with the statute. The manner of giving notice, whether by publication in a newspaper, or by posting, and the length of time that the notice is to be published or posted, are matters committed to the discretion of the board, and cannot be delegated to the discretion of the clerk. In this case the proposed incorporation was of a territory eight miles long and six miles wide, embracing one small village and a wide extent of farming country. The notice of election was posted, under the direction of the clerk, in five places. This seems scarcely reasonable or sufficient, but whether or not it was sufficient to give actual notice to the voters, and to elicit a full vote, is immaterial. The board, and not their clerk, must determine what notice shall be given. As to the error in the description of boundaries, it was, to some extent, ambiguous, by reason of the call for the southwest corner of section 30, instead of the northwest corner, but the other calls show conclusively that the northwestern corner was meant. The beginning point in the description is the "southwest corner of township 2 north, range 8 east; running thence six miles to the southeast corner of township; thence north eight miles to north line of Douglas township; thence west six miles to southwest corner of section 30, township 3 north, range 8 east, being the northwest corner of Douglas township; thence south eight miles to the point of beginning." It was shown that the northwest corner of Douglas township was identical with the northwest corner of section 30; and the other calls, viz. a course west from the northeast corner to the northwest corner of the proposed incorporation, and a distance of eight miles from the northwest corner to the southwest corner, sufficiently demonstrated what corner of the section was meant.

6. No certified copy of the order of the board of supervisors declaring the defendant duly incorporated had been filed in the office when this action was commenced, or, so far as appears, when it was tried. The filing of such copy is, in our opinion, essential to the completion of the incorporation. Until it is filed there is no corporation. The last-mentioned defect in the proceedings is shown by the pleadings and findings, and is a ground for reversing the judgment on the appeal from the judgment. The other defects, viz. insufficiency of the affidavit as to signatures to petition, and failure of the board to exercise its discretion as to notice of the election, appear only from the statement on motion for new trial.

As the failure to file a certified copy of the order with the secretary of state may have been, or may still be, remedied, it is proper to remand the cause for further proceedings, with a view to which we have passed upon all the points likely to arise on another trial. The judgment and order appealed from are reversed, and the cause remanded.

We concur: McFARLAND, J.; VAN FLEET, J.; GAROUTTE, J.; HARRISON, J.

107 Cal. 160

## BOOB et al. v. HALL. (No. 19,550.)

(Supreme Court of California. April 19, 1895.)

APPEAL—NOTICE—FORECLOSURE OF CHATTEL MORTGAGE—ATTORNEY'S FEES.

1. It is not necessary, where one defendant appeals, to serve notice of appeal on other defendants, where by default they admit the averments of the complaint.

2. The complaint in foreclosure of a chattel mortgage described part of the property mortgaged as "ten shares of the L. W. Co., a corporation." *Held*, that the description was sufficient to identify the property intended to be mortgaged, as well as for purpose of sale under the judgment, where it appeared that no certificate of the stock had been issued.

3. In the absence of an agreement therefor, the court is not authorized to include counsel fees as part of the judgment in an action to foreclose a mortgage.

Department 1. Appeal from superior court, San Bernardino county; John L. Campbell, Judge.

Action by Paul Boob and others against Lavinia Hall and others to foreclose a mortgage. From a judgment decreeing foreclosure and sale, defendant Lavinia Hall appeals.

Goodcell & Leonard, for appellant. Geo. B. Cole, for respondents.

HARRISON, J. Action to foreclose a mortgage executed by the defendant Lavinia Hall. The other defendants were made parties to the action under the allegation that they have or claim some interest in the mortgaged premises, subject to the lien of the plaintiffs. The defendant Hall demurred to the complaint, and upon the overruling of her demurrer she failed to answer, and her default was thereupon entered. The defendants Mansfield made no appearance, and their default therefore was entered. Judgment was rendered in favor of the plaintiffs, directing a sale of the mortgaged property, foreclosing all the defendants of any right therein, and providing that, if the proceeds of the sale of the mortgaged property was insufficient to pay the amount found due to the plaintiffs, judgment for the deficiency should be docketed against the defendant Lavinia Hall. The defendant Lavinia Hall alone has appealed.

1. The notice of appeal was served upon the plaintiffs alone, and the respondents have moved to dismiss the appeal for failure to serve the notice upon her codefendants. As the averment in the complaint that the interest of the other defendants in the mortgaged property is subject to the lien of the plaintiffs was admitted by their default, and as the judgment merely forecloses their interest in the property, it is evident that they could not be affected by a reversal of the judgment, or by a modification of any of the terms thereof which affect the appellant and the respondents.

2. The demurrer to the complaint was properly overruled. The complaint described the mortgaged property, other than the land, in the same terms in which it had been described in the mortgage, viz.: "Together with one share of water in the South Fork ditch of the Santa Ana river, and ten shares of the capital stock of the Lugonia Water Company, a corporation." The appellant ought not to object to an uncertainty in description which she has herself made. It does not appear that the corporation had issued to the appellant a certificate for the shares of its capital stock; and, if not, the description in the complaint, as well as in the mortgage, was sufficient to identify the property which the appellant intended to mortgage, as well as for the purpose of a sale under the judgment. Such a description in an instrument of sale would transfer any title the vendor might have to shares of the capital stock in a corporation for which no certificate had been issued.

3. In the judgment rendered by the court there was allowed to the plaintiffs the sum of $400 for counsel fees in foreclosing the mortgage. The complaint contains no averment of any agreement on the part of the mortgagor to pay a counsel fee, nor does the copy of the mortgage annexed to the complaint contain any such stipulation. In the absence of an agreement therefor, the court was not authorized to include counsel fees as a part of the judgment. Sichel v. Carrillo, 42 Cal. 493; Clemens v. Luce, 101 Cal. 432, 35 Pac. 1032. Neither the prayer in the complaint for its allowance nor the averment of the amount which would be reasonable can supply the necessity of a direct averment that an attorney's fee had been agreed to be paid by the mortgagor. The

motion to dismiss the appeal is denied, and the cause is remanded to the superior court, with directions to modify the judgment by excluding therefrom the amount included therein for attorney's fees, and, when so modified, the judgment will stand affirmed.

We concur: VAN FLEET, J.; GAROUTTE, J.

(107 Cal. 175)

## REDEMEYER v. HENLEY et al. (No. 15,671.)

(Supreme Court of California. April 27, 1895.)

ACTION ON FIRM NOTE—PLEADING.

Where, in an action against a partnership on a note, the complaint named the individuals of the firm, asserted the existence of the partnership, and alleged the execution of the note in the firm name by one of the partners, it sufficiently alleged his authority to make the note.

Commissioners' decision. Department 1. Appeal from superior court, Mendocino county; R. McGarvey, Judge.

Action by A. F. Redemeyer against Whitcombe Henley and others, as partners, on a promissory note. Judgment was entered for plaintiff on default, and defendants appeal, on the ground that the complaint did not state a cause of action. Affirmed.

T. L. Carothers, for appellants. J. A. Cooper, for respondent.

**VANCLIEF, C.** Action on a promissory note made by the defendants to plaintiff, in which judgment was rendered in favor of plaintiff by default. The defendants have appealed from the judgment on the judgment roll, which contains no bill of exceptions; and the only point made by appellants is that the complaint does not state facts sufficient to constitute a cause of action. The following is a copy of those parts of the verified complaint which it is contended are deficient: "(1) That the defendants, Whitcombe Henley, Barclay Henley, and Thomas B. Henley, are now, and at all the times herein named have been, partners, doing business in the county of Mendocino, state of California, under the firm name and style of W. Henley & Bros. (2) That on the 15th day of April, 1893, the said defendants, Whitcombe Henley, Barclay Henley, and Thomas B. Henley, partners, doing business under the firm name of W. Henley & Bros., as aforesaid, by the said W. Henley, made and executed their certain promissory note in writing, of which the following is a copy, to wit: '$1,601.60. Ukiah, April 15, 1893. One day after date, without grace, we, or either of us, promise to pay to A. F. Redemeyer at Ukiah, or order, the sum of sixteen hundred one and 60-100 dollars, for value received, with interest thereon at the rate of ten per cent. per annum from date until paid. W. Henley & Bros., by W. Henley.' And then and there delivered the same to plaintiff, and plaintiff is now the lawful owner and holder thereof."

The substance of the objection to the complaint is that it does not show that W. Henley was authorized to make the note, because such authority is not expressly alleged nor implied in any of the express allegations. But I think it is implied in the express allegation that "said defendants, Whitcombe, Barclay, and Thomas B. Henley, partners, doing business under the firm name of W. Henley & Bros., as aforesaid, by the said W. Henley, made and executed" the note. This allegation is not true, unless W. Henley had authority from Barclay and Thomas B. to make the note; yet its truth is admitted by the default of the defendants. There is nothing on the face of the note inconsistent with the truth of this allegation, as contended by appellants. I think the judgment should be affirmed.

We concur: BELCHER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

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5 Cal. Unrep. 26

## WOODBRIDGE v. WORLD PUB. CO. et al.

(No. 15,923.)

(Supreme Court of California. April 27, 1895.)

REVIEW ON APPEAL.

A finding by the court on conflicting evidence will not be disturbed on appeal.

Department 1. Appeal from superior court, city and county of San Francisco; James M. Troutt, Judge.

Action by Alfred F. Woodbridge against the World Publishing Company and others for the subjection of property. From judgment for defendants, plaintiff appeals. Affirmed.

Wm. Grant and C. S. Cushing, for appellant. Bartholomew Noyes, for respondents.

PER CURIAM. This action is in the nature of a creditors' bill to subject property in the possession of the defendant California World Publishing Company to the payment of a judgment recovered by the plaintiff against the defendant World Publishing Company. The court below found the facts, and gave judgment against the plaintiff, from which, and from an order denying his motion for a new trial, he appeals. The notice of motion for a new trial stated that the motion would be made upon the grounds of the insufficiency of the evidence to justify the decision, and that it was against the law, and of errors in law occurring at the trial, and excepted to by the plaintiff.

It is earnestly contended that several of the findings were not justified by the evidence, but it would subserve no useful purpose to notice them in detail. It is claimed that every witness in the case, with one exception, was absolutely adverse to the plaintiff, and that he was not bound by the testimony of witnesses adverse to him; and it is said that, while there was some testimony tending to support the findings, still "the whole transaction shows, beyond a doubt, that the facts found cannot be the truth." There is testimony set out in the statement which, in our opinion, tends to support all of the findings. Whether that testimony was true or false was a question for solution by the trial court, and not on appeal. The case falls within the well-settled rule as to conflicting evidence, and the judgment cannot be disturbed upon the first ground urged.

It is also contended that the court failed to find upon several of the issues raised by the pleadings, and that some of the findings are inconsistent and contradictory. But we think the findings substantially cover all the material issues, and we discover no such inconsistency in them as would justify a reversal.

It does not appear from the record that any rulings of the court during the trial were excepted to by the plaintiff, nor are there any specifications attached to the statement showing errors of that kind. It follows that the judgment and order appealed from must be affirmed, and it is so ordered.

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107 Cal. 177

## McGOWAN et al. v. FORD, County Treasurer.

(Nos. 15,841, 15,842.)

(Supreme Court of California. April 27, 1895.)

COUNTY INDEBTEDNESS — MANDAMUS TO COMPEL PAYMENT—BURDEN OF PROOF — ALTERATION OF COURTHOUSE — VALIDITY OF CONTRACT — LIQUIDATED DAMAGES FOR DELAY.

1. County Government Act, § 25, subd. 9, requiring the board of supervisors to let contracts to erect, or rebuild and furnish, a courthouse, and other necessary public buildings, to the lowest bidder, after 60 days' notice, does not apply to a contract for repairs or alterations in the courthouse and improvements in the grounds surrounding it.

2. Where a contract for the alteration of a courthouse, and for the making of improvements and walks around it, provides for liquidated damages in case of delay in finishing the courthouse, such damages cannot be recovered under an allegation that the "work" is not finished at the time stipulated.

3. Under Const. art. 11, § 18, and the county government act (sections 5, 6, 36), providing that each year's revenues must pay each year's indebtedness, the board of supervisors, after issuing a warrant for payment of work completed within the fiscal year, cannot exchange therefor another warrant issued in the next fiscal year, payable out of the revenues of that year.

4. On an application for a writ of mandamus to compel the treasurer of a county to pay a warrant, when plaintiff alleges that the warrant was regularly issued, his ownership of it, the refusal of the treasurer to pay it, and the fact that there was money in the treasury out of which it could be paid, the burden is on defendant to show that he was justified in refusing payment.

Commissioners' decision. Department 1. Appeal from superior court, Mendocino county; R. McGarvey, Judge.

Application by Matthew McGowan and another for a writ of mandate to compel William Ford, treasurer of Mendocino county, to pay two warrants drawn on him by the county auditor. From a judgment making the writ peremptory as to both warrants, defendant appeals. Reversed as to warrant No. 1,746, and affirmed as to warrant No. 1,747.

J. E. Pemberton, for appellant. T. L. Carothers and J. A. Cooper, for respondents.

BELCHER, C. There are two appeals in this case, and two separate transcripts are presented, but the questions involved may properly be considered together. The respondents made application to the court below for a writ of mandate to compel the appellant, as treasurer of Mendocino county, to pay two warrants drawn on him by the county auditor. The material facts stated in the petition are as follows: On July 11, 1893, the county of Mendocino was justly indebted to respondents in the sum of $4,545.27 for work and labor done and performed by them under contract with said county in repairing the courthouse, county jail, and grounds and sidewalks surrounding the courthouse and public buildings on the courthouse square in Ukiah city. On said July 11, 1893, the board of supervisors of the county duly made an order accepting said work, and awarding to respondents the sum of $4,545.27 for the performance of the same, according to the terms and conditions of the contract; and by the order directed the auditor of the county to draw his warrant on the county treasurer for the said sum. On said July 11, 1893, the county auditor drew two warrants on appellant as county treasurer for the aggregate sum of $4,545.27,—the first warrant, numbered 1,746, for $2,970.27, and the second, numbered 1,747, for $1,575. The said warrants were delivered to the respondents, and by them presented to and registered by the treasurer on July 13, 1893, and were indorsed by him: "Not paid for want of funds." In December, 1893, there was money in the hands of the treasurer for the payment of said warrants, and respondents then presented them to appellant as such treasurer, and demanded payment thereof; but, notwithstanding there was money in the proper fund appropriated for their payment, he then refused, and ever since has refused, to pay the same, or any part thereof. On January 8, 1894, after the refusal to pay the warrants, respondents filed their petition for the writ of mandate, and the court granted an alternative writ, making it returnable on the 15th day of the same month. In due time appellant appeared and filed his answer to the petition. The answer admits that on the 18th day of July, 1892, respondents and the board of supervisors of said county entered into and executed what purported to be a contract, under the terms of which respondents agreed to make certain alterations in the courthouse of said county, to build and construct certain additions to said courthouse, lay certain walks around it, and make certain alleged improvements on the grounds thereof, for the agreed compensation of $7,990, but alleges that the said contract was not let to the lowest bidder, after a publication of notice to bidders and contractors that such a contract was to be let for 60 days prior to the time set for opening bids, as required by subdivision 9 of section 25 of the county government act of 1891, and was therefore not a valid contract. It is then alleged that respondents have been paid for the work done under the said contract the sum of $5,000, leaving due them, if the contract is valid and no deductions are to be made, only $2,990. It is also further alleged that by the terms of the contract the work was to be completed on or before the 1st day of November, 1892, and that respondents expressly agreed to "complete and deliver the said building, entire and perfect in all its parts," to the county on or before the day named, and that "for each and every day or portion thereof that the said building shall remain unfinished or uncompleted after the said 1st day of November, 1892," they would pay to the county the sum of $10, as liquidated damages; that the "said work" was not completed before April 5, 1893, and respondents had not paid the liquidated damages, or made any deductions or allowances on account thereof. The answer then proceeds to state that on April 6, 1893, respondents filed and presented to the board of supervisors two claims, one for $2,990, "balance on contract," and the other for $1,575, "balance due on extra work," and that the board on that day allowed the same for the sums named; that warrants therefor were drawn by the auditor and delivered to and accepted by respondents, and thereafter presented to and duly registered by the treasurer, and indorsed, "Not paid for want of funds;" that about a month later,—it having been discovered by respondents and the members of the board of supervisors that the board had incurred liabilities against the county during the fiscal year ending June 30, 1893, in excess of the income and revenue provided for that year,—for the purpose of evading the provisions of section 18 of article 11 of the constitution, and the statutes passed in conformity thereto, it was agreed by and between the respondents and the members of the board that under the pretense that the work called for by said contract was not completed, the said warrants should be recalled and revoked, and the time for finishing said work should be extended so as to end in the fiscal year beginning July 1, 1893, and the warrants for the payment of the same be drawn in that year, and apparently payable out of the revenue of that year; that thereafter, respondents consenting thereto, the board of supervisors made and caused to be entered on its minutes the following order: "It duly appearing to this board that on the 6th day of April, 1893, warrants were issued to" respondents "for work done in putting in cement walks, steps, and improving the courthouse under contract" made by respondents with the county of Mendocino; "and it further appearing that said warrants were inadvertently issued before the said work was completed, or the amount thereof due, and that the said contract is not completed according to the plans and specifications therefor; and it further appearing that the said" respondents "are still the owners and holders of the said warrants, and that the same are yet unpaid: It is therefore ordered that the said warrants be, and the same are hereby, canceled, and they are recalled and declared void and of no effect; this order not to impair the right of said" respondents "to receive their pay through proper warrants when the said work is completed and accepted and the amount due; and the time to complete said contract in accordance with the plans and specifications is hereby extended to and including the 5th day of July, 1893." The answer further states that thereupon respondents voluntarily surrendered said warrants, and consented to their being canceled and destroyed, but thereafter performed no more work on said courthouse, walks, or grounds, and that nevertheless the warrants mentioned in the petition were afterwards ordered to be issued by said board in pursuance of said agreement; and "that there are no funds whatever in the treasury of said county belonging to the revenue of the fiscal year ending June 30, 1893, from which the warrants mentioned in plaintiffs' application and the writ herein can be paid; but that all the money now in the fund on which said warrants are drawn, or which has been therein at any time since said warrants were drawn, has been derived solely from the taxes, income, and revenue of said county for the fiscal year ending June 30, 1894."

The respondents demurred to the answer, but subsequently withdrew their demurrer, and moved the court for judgment on the pleadings, and after argument by counsel the motion was submitted and taken under advisement. Thereafter the court filed a written opinion, holding that respondents were entitled to the relief demanded as to warrant No. 1,746 for $2,970.27, but not as to warrant No. 1,747; and judgment was thereupon entered, making the writ peremptory as to the first-named warrant. Afterwards the case came on regularly for trial by the court, without a jury, as to warrant No. 1,747 for $1,575; and both parties declined to offer any evidence, claiming that the burden of proof was upon the other side. After argument and due consideration, the court made and filed its decision, holding that the undenied allegations of the petition made a prima facie case for respondents, and that, in the absence of any evidence in support of the affirmative allegations of the answer, respondents were entitled to judgment; and judgment was thereupon entered, making the writ peremptory as to the last-named warrant. From these judgments the appeals are prosecuted.

1. Appellant contends that the board of supervisors had no jurisdiction or power to enter into the said contract with respondents, because notice by publication to bidders was given for only 11 days, and not 60, as required by subdivision 9, § 25, of the county government act of 1891; and hence the contract was ultra vires and void. The section referred to provides that boards of supervisors, in their respective counties, have jurisdiction and power "to cause to be erected, or rebuilt and furnished, a courthouse, jail, hospital, and such other public buildings as may be necessary: provided * * * all such buildings must be erected by contract, let to the lowest responsible bidder, after notice by publication in a newspaper of general circulation published in such county, for at least sixty days," etc. The contract in question was not for the erection of any building, but for making repairs or alterations in the courthouse, and for laying walks and making improvements upon the grounds surrounding the courthouse. Obviously, therefore, the statute invoked and the cases cited have no application to such a contract, and do not render it void.

2. The point is made, but not much urged, that the county was entitled under the contract to liquidated damages, because the "work" was not completed within the time fixed therefor. The averments of the answer are that respondents expressly agreed to complete and deliver the building to the county on or before November 1, 1892, and that for each day the building should remain unfinished or incomplete after that day they would pay to the county $10 as liquidated damages. There is no averment that the building was not completed and delivered within the time agreed upon, but only that the work was not completed before April 5, 1893. But the "work" included as well the walks and improvements on the ground, and it may well be assumed, therefore, that the building was completed in time, and only the walks and improvements on the ground remained unfinished, thus giving to the county no right to claim any sum as liquidated damages.

3. Appellant further contends that the indebtedness to respondents was incurred during the fiscal year ending June 30, 1893, and could only be paid out of the revenues provided for that year, and that all such revenues had been drawn and expended before the allowances in question were made and the warrants therefor issued. Section 18 of article 11 of the constitution provides that no county shall incur any indebtedness or liability, in any manner or for any purpose,

exceeding in any year the income and revenue provided for it for such year, without the assent of two-thirds of the qualified electors thereof, and any indebtedness or liability incurred contrary to this provision shall be void. This language of the constitution is repeated in section 5 of the county government act, and in section 6 of the act it is provided that "all contracts, authorizations, allowances, payments, and liabilities to pay, made or attempted to be made in violation of this act shall be absolutely void, and shall never be the foundation or basis of a claim against the treasury of such county." Section 36 of the same act also declares that "the board shall have no power to make allowances against any fund which, with all allowances previously made, and salaries and liabilities fixed by law payable therefrom, shall exceed the auditor's estimate of revenue for the year. * * * Any allowance made contrary to the provisions of this section shall be null and void, and the auditor shall not draw his warrant therefor, nor the treasurer pay the same." In Gas Co. v. Brickwedel, 62 Cal. 641, the court said it was clear that the framers of the constitution, in making the provision above referred to, meant "that each year's income and revenue must pay each year's indebtedness and liability, and that no indebtedness or liability incurred in any one year shall be paid out of the income and revenue of any future year." The question, then, is, when was the indebtedness involved in this case incurred? Was it in a fiscal year ending in 1893, or in that ending in 1894? The question, so far as it relates to the indebtedness for the payment of which judgment was granted on the pleadings, must be solved by a consideration of appellant's answer, for when respondents moved for judgment on the pleadings they in effect admitted that all the averments of the answer were true. Ward v. Flood, 48 Cal. 46; Fleming v. Wells, 65 Cal. 339, 4 Pac. 197; People v. Johnson, 95 Cal. 474, 31 Pac. 611. The answer clearly states that respondents fully completed the work to be done under their contract before the 6th day of April, 1893, and on that day presented to the board of supervisors a claim for the balance due on the contract, and the same was allowed, and a warrant therefor drawn and delivered to them. It further states that in May following, by agreement between respondents and the members of the board of supervisors, and for the purpose of evading the provisions of the constitution and statute and making the money payable out of the revenue of the succeeding fiscal year, that warrant was surrendered and canceled, and the warrant dated July 11, 1893, was issued and accepted by respondents as a substitute therefor; and that when the last-named warrant was drawn all the money in the treasury out of which it could be paid, or which had been therein at any time since it was drawn, was derived solely from the income and revenue of the county for the fiscal year ending June 30, 1894. If these statements are true,—and for the purposes of this decision they must be accepted as such, —it is obvious that the indebtedness was incurred as early at least as April 6, 1893, when the first warrant was issued, and could only be paid out of the revenue provided for that fiscal year. It is also obvious that the orders of the board, made for the purpose of carrying the indebtedness over and making it payable out of the revenue of the next fiscal year, were unauthorized and without effect. See Schwartz v. Wilson, 75 Cal. 502, 17 Pac. 449, where a similar question was considered. We conclude, therefore, that the court below erred in granting the judgment on the pleadings.

4. Appellant contends that the second judgment appealed from—that making the alternative writ peremptory as to warrant No. 1,747 for $1,575—was erroneous, and should be reversed, because the claim presented and allowed, as shown by his answer, was for extra work, and was not properly itemized, as required by the statute. The only question is, on which side was the burden of proof? It is earnestly urged that the averments of the answer show that the board of supervisors never had jurisdiction to audit and allow the claim, and that it devolved upon respondents to show by affirmative proof that it had such jurisdiction. It is averred in the petition, and not denied, that the board allowed the claim and ordered a warrant drawn therefor, and that a warrant was regularly drawn by the auditor and delivered to respondents. The presumption is that official duty is regularly performed (Code Civ. Proc. § 1963, subd. 15), and it seems to us that, when respondents presented their warrant to appellant for payment, there being money in the proper fund for the purpose, they were apparently entitled to have it promptly paid without question; and, when they were compelled to go into court to compel payment, they made a prima facie case by setting out the regular issuance of the warrant, their ownership of it, the refusal of the treasurer to pay it, and the fact that there was money in the treasury out of which it could be paid. We conclude, therefore, that the burden was upon the appellant to show that he was justified in refusing payment. We advise that the judgment as to warrant No. 1,746, involved in appeal No. 15,841, be reversed, and the cause remanded, and that the judgment as to warrant No. 1,747, involved in appeal No. 15,842, be affirmed.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment as to warrant No. 1,746, involved in appeal No. 15,841, is reversed and the cause remanded, and the judgment as to warrant No. 1,747, involved in appeal No. 15,842, is affirmed.

107 Cal. 166

### CITY OF EUREKA v. FAY et al. (No. 15,719.)

(Supreme Court of California. April 27, 1895.)

DEDICATION OF HIGHWAY—EVIDENCE—PARTIES.

1. In an action by a city to recover possession of land alleged to have been dedicated as a street, it appeared that a strip on each side of the tract had been sold by R., defendants' grantor, and the grantee had subsequently platted the whole tract, including therein the middle strip held by R., had a map of the tract made, and dedicated a portion of the land to the city as a street, which was never opened. R. protested against the platting of the land, and would not permit a record to be made of the map thereof. Subsequent to the conveyance to defendants, the city passed an ordinance accepting all lands dedicated to it by the owners thereof. R., in conveying lots on the tract, referred to the map for their description. *Held*, not to sustain a finding that there was a dedication by R., nor does the reference by him to the map constitute an estoppel.

2. Where it appeared that part of the demanded premises was in the tract conveyed by R. to the maker of the plat and map, and after the death of the grantee was conveyed by the administrator of his estate to another, as described in the map, and subsequently, in selling some of them, such other designated them by the numbers thereon, and that in one sale prior to the passage of the ordinance accepting land dedicated to the city he referred to the lot as bounded on the street in question, the acts of both constituted a dedication of that part, and the administrator's deed is competent evidence of the fact.

3. Neither the heirs of the dedicator nor the grantee of his administrator are necessary parties in an action to recover possession.

Commissioners' decision. Department 1. Appeal from superior court, Humboldt county; G. W. Hunter, Judge.

Action by the city of Eureka against Lura A. Fay and George M. Fay to recover possession of land alleged to have been dedicated to the plaintiff. Verdict for plaintiff. From judgment entered thereon, and an order denying their motion for a new trial, defendants appeal. Judgment affirmed in part, and reversed in part, and order reversed.

J. D. H. Chamberlain, for appellants. J. N. Gillett, for respondent.

VANCLIEF, C. The plaintiff, a municipal corporation, brought this action to recover possession of a strip of land alleged to be a portion of Sixth street, in said city. The cause was tried by a jury, whose verdict was in favor of plaintiff, and judgment was rendered thereon. The defendants have appealed from the judgment and from an order denying their motion for a new trial. The plaintiff claims title to the demanded premises by dedication, partly from Charles Raymond, and partly from Richard Duff, while defendants claim the whole premises by conveyance from Charles Raymond, and the principal and controlling questions relate to the sufficiency of the alleged dedications.

1. In October, 1864, Raymond owned a lot of land adjoining the town of Eureka containing about 12 acres, and on the 20th day of that month conveyed to Charles Duff two distinct parcels thereof, and retaining a strip between these parcels of 180 feet in width; and on January 30, 1872, Charles Duff conveyed these two parcels to Richard Duff. Some time in 1873, while the two parcels and Raymond's strip were inclosed as one tract, Richard Duff procured the whole to be surveyed and divided into blocks and lots as an addition to the city of Eureka, and a map thereof to be made by R. F. Herrick, who, as a witness for plaintiff, testified as follows: "By occupation I am a surveyor. (Map introduced in evidence shown witness, and he is asked if he ever saw it before.) A. Yes; I made that map in 1873. I made it at the instance of Richard Duff. It covers the Duff tract,—a tract of land that Richard Duff owned at that time. It also covered land which was owned by Charles Raymond. I made a survey of the ground. I drove stakes for the most of it, locating the blocks, but I don't know whether I drove stakes for the lots or not; but I did drive stakes for the corners of the blocks. I think I drove stakes for the block marked on this map as bounded on the north by Sixth street, on the east by A street, on the south by Seventh street, and on the west by California street. This California street, running through the center, represents a street in Clark's addition that joins on. The streets marked out on this map are continuations of streets in the city of Eureka. I made my survey to conform to those streets. They are simply continuations or elongations of those streets." Upon his cross-examination he said: "The lands lying between these two red lines marked upon the map were the lands of Charles Raymond. Raymond held those lands between those two red lines in one body. I could not well make a map of the Duff and Raymond tract for Richard Duff without including that land. Charles Raymond did not have anything to do with the survey of the land or the making of the map. He was around there part of the time I was surveying it. I think he saw me setting stakes there upon corners of the blocks. He lived right there upon the premises at that time. He knew I was surveying the land for Richard Duff. The Duff and Raymond tracts, at the time the survey was made, were all fenced in one body, and so remained for several years afterwards." The map shows but few whole lots on Raymond's land. In "block 2," composed of eight lots, there are five fractional lots on his land which are either triangular or quintangular. The evidence, without conflict, shows that Raymond frequently protested against the map, saying he would not be bound by it; and that he prevented the recording of the map, and it never was recorded. The evidence also shows that Raymond's land, through which Sixth street was extended by the survey, has always been inclosed by fences, and the bill of exceptions

contains the following: "It is admitted that the plaintiff never opened the alleged street in controversy, or worked it, nor have the said premises ever been open to public use, nor has the plaintiff ever accepted the said alleged dedication, or offer to dedicate, otherwise than by ordinance No. 88." This ordinance was passed April 7, 1885, and is as follows:

"Section 1. All streets and alleys within the corporate limits of the city of Eureka which have been dedicated by the owners thereof to the use of the public are hereby accepted and declared to be public streets of the city of Eureka."

The only ground upon which it is claimed by respondent that Raymond ever dedicated, or offered to dedicate, any part of Sixth street through his land, is that in two conveyances of portions of his land he referred to said map for a description of the lots conveyed; but neither of the lots so described adjoined Sixth street, nor was Sixth street referred to or mentioned in either of the descriptions. The conveyance principally relied upon is that of Raymond to W. C. Espie, dated March 23, 1885, and recorded April 8, 1885, one day after the passage of ordinance No. 88, in which the land conveyed is described as "lots five and six in block two, according to the map or plat of that certain addition to the city of Eureka known as the 'Duff & Raymond Tract.'" The scrivener who wrote this deed testified that the description was dictated by Raymond, who pointed out the lots on a tracing of the map then in the possession of Mr. Randall, who then claimed the Duff interest in the tract, and in whose employ the scrivener was at the time he wrote the deed. On cross-examination the scrivener (Mr. Murray) further testified as follows: "In this interview, when you drew this deed for Espie, or at any other interviews, and when you were having business relating to this map or plat, did Mr. Raymond say he would not be bound by this plat? Repudiate that plat? A. Yes, sir; he did. Q. Did he, in any of these interviews, refuse to permit this plat to be filed? A. He did. Q. At that time this plat was in Mr. Randall's hands? A. Yes, sir; and Mr. Randall was selling lots out of his portion of the Duff and Raymond tract. Q. Was or was not Mr. Raymond's protest the reason why this map was not filed? A. It was. I have heard this protest against this map from Mr. Raymond several times, but I cannot specify the dates. Mr. Raymond was living on the tract at the time. He knew that the map was designated as the Duff & Raymond map, and he pointed out to me on that map the lots that he wanted to transfer." The other conveyance by Raymond was to Thomas Blakewell, dated in June, 1882, in which the lot was described as follows: "Beginning at the northwest corner of Seventh and A streets, in the city of Eureka; running thence north, along the west side of A street, sixty (60) feet; thence west, parallel with Seventh street, one hundred and ten (110) feet to an alley; thence south, along the east side of said alley, sixty (60) feet to Seventh street; thence east, along the north side of Seventh street, one hundred and ten (110) feet to the place of beginning; being lot number four (4), in block two (2)."

The deed from Raymond to the defendant Lura A. Fay, under which defendants claim, was executed June 24, 1887, more than two years after the passage of the ordinance of acceptance (No. 88); and surely this deed evinces no intention to dedicate any part of Sixth street, but the contrary, since it purports to convey that part of the street in question. And, even if it could be construed to be an offer to dedicate, there is no evidence of acceptance by the city or the public. It is therefore clear that the evidence does not justify the verdict to the effect that Raymond ever dedicated or offered to dedicate to the public any part of Sixth street. The reference to the Duff map by Raymond for the mere purpose of describing lots sold by him, while expressly repudiating it for all other purposes and preventing the recordation thereof, has no substantial tendency to prove that he intended to dedicate to the public any part of a street defined on such map not adjacent to the lots sold nor referred to in the description thereof. Cerf v. Pfleging, 94 Cal. 131, 29 Pac. 417; People v. Reed, 81 Cal. 70, 22 Pac. 474; Phillips v. Day, 82 Cal. 30, 22 Pac. 976. None of the cases cited by respondent go to the extent necessary to sustain this as sufficient evidence of intention to dedicate any part of Sixth street. This case is clearly distinguishable from that class of cases in which the grantor of lots has been estopped, in favor of his grantee, from claiming as his private property the streets or parks by which he expressly bounded such lots. The record shows no ground of estoppel in this case; for it does not appear that the city council had even constructive notice of the Duff map, at the date of its general ordinance of acceptance of all offers to dedicate streets, etc., nor that it passed said ordinance in reliance upon any representation, by word or act, of Raymond. That ordinance had no reference nor application to the land in question, unless, before its passage, Raymond had offered to dedicate that land to the public. So that the controversy is reduced to the question whether Raymond had offered to dedicate the demanded premises before the passage of ordinance No. 88, and, surely, the evidence was insufficient to prove that he had.

2. As to the alleged dedication of a distinct part of the demanded premises by Richard Duff, it is to be remarked that about two-fifths of said premises lie northeast of and adjoin the northeasterly side of Raymond's strip of land, and within the boundaries of the northeast parcel conveyed, as

aforesaid, by Raymond to Charles Duff, and by the latter to Richard Duff, and which was owned by Richard Duff at the time he caused the survey and map to be made by Herrick. And, although the deed from Raymond to the defendant Lura A. Fay purports to convey the whole of the demanded premises, there is no evidence tending to prove a deraignment of title to that part thereof which is shown to have been owned by Richard Duff at the time he made the survey and map from Richard Duff to either of the defendants. On the contrary, it appears that the administrator of the estate of Richard Duff conveyed it to Randall by the following description: "All those lots, blocks, and parts of lots lying in the Duff & Raymond addition to the town, now city, of Eureka, in Humboldt county, state of California, numbered and described by reference to the plat thereof made by R. F. Herrick, as follows: All of lots number one (1), two (2), three (3), four (4), and seven (7), in block one (1), and that portion of lots number five (5) and six (6), in block one (1), and lots one (1) and two (2), in block two (2), lying northwest from the red line on said plat marking the northwest boundary of that portion of said addition belonging to Charles Raymond; also that portion of lots number four (4), five (5), six (6), and seven (7), in block two (2), and lot one (1), in block five (5), lying southerly of the red line on said plat, marking the southerly boundary of that portion of said addition belonging to said Raymond." The defendants objected to this deed on the grounds that an administrator has no power to dedicate the land of his intestate; that defendants are not bound by the acts of Duff's administrator; and that neither Randall nor the heirs of Richard Duff are parties to the action. Conceding that the administrator had no power to dedicate, I think the deed was competent and relevant to show that Duff's title had passed directly to Randall before the commencement of this action, thus laying the foundation for evidence either that Randall had dedicated, or that he had acquiesced in the dedicatory acts of his grantor, and completed them, in case the dedication had not been completed in the lifetime of the latter; and, for these purposes, the introduction of the administrator's deed was followed by evidence tending to prove that Randall had, at least, acquiesced in all the dedicatory acts of Duff. He had accepted a conveyance of the lots merely, as described on the map made by Duff. He sold many of those lots, designating them by the numbers on said map, and describing them as bounded by the streets as laid out on the map; and in two instances referred to Sixth street, and in one case described the lot sold as bounded on one side by Sixth street. The map was in his possession, and, according to the testimony of his clerk (Mr. Murray) above quoted, he was selling lots from his portion of the tract in March, 1885, before the passage of the ordinance of acceptance. Nor was it a valid objection to the administrator's deed that Randall and the heirs of Richard Duff were not parties to the action. The plaintiff was not required to make all persons through whom it deraigned its title parties defendant. If either Richard Duff or Randall dedicated that part of the land in question situate northeast of the red lines on the map, plaintiff's chain of title thereto, from the highest source, was unbroken and complete, and shows that Raymond and wife, the grantors of the defendant Lura A. Fay, had no title thereto at the date (June 24, 1887) of their deed to her, and there is no evidence that they ever acquired any title thereto afterwards. I think, however, that the evidence was sufficient to justify the jury in finding an offer to dedicate by Richard Duff, and an acceptance thereof by the city during his lifetime, especially as against the defendants, who appear to have no title. I perceive no reason to doubt that Richard Duff intended to dedicate, and intended his acts as an offer to dedicate. He would have recorded his map but for the opposition of Raymond. As to that part of the demanded premises situate between the two red lines on the map, I think the order and judgment should be reversed, and a new trial granted; but as to that part of said premises lying northeast of said red lines, and not between them, I think the order and judgment should be affirmed.

We concur: BELCHER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the order and judgment are reversed, and a new trial granted as to all that part of the demanded premises described as situate between the two red lines on the map; but, as to the remainder of said premises lying northeasterly from said red lines, the order and judgment are affirmed.

107 Cal. 187

## SINNOTT v. COLOMBET, City Treasurer.

(No. 15,721.)

(Supreme Court of California. April 29, 1895.)

POWERS OF CITY — ESTABLISHMENT OF KINDERGARTEN SCHOOLS—TEACHERS' CERTIFICATES—PAYMENT OF SALARIES.

1. Under Pol. Code, § 1576, as amended by St. 1893, p. 245, making a city a school district which shall be governed by the city board of education, or under a city charter giving the city board of education control over public schools in the city, and power "to determine the course of study and mode of instruction to be pursued in the city schools," in connection with Pol. Code, §§ 1665, 1666, as amended by St. 1893, p. 254, making instruction compulsory in certain branches "in the several grades in which each may be required," and providing that other studies than those specified in the above section may be authorized by the city board of education, and section 1617, subd. 9, and section 1662, as amended by St. 1893, pp. 249, 253, allowing the admission of children to kindergarten classes in cities which have made the kindergarten a part of the public primary schools, the board of education of a city may adopt the kindergarten as a special branch of the primary school system.

2. A certificate entitling one to teach "any

kindergarten class of the public schools," issued by a county board of education under Pol. Code, § 1771, allowing a county board of education to grant certificates entitling the holders to teach such special branches as may be required by city boards of education, qualifies the holder to teach kindergarten classes in a city of the county which has adopted the kindergarten as a special branch of its primary school system.

3. The salary of a teacher of kindergarten classes is payable out of a fund raised for the support of primary schools, although the tax to raise the fund was levied before the kindergarten system was adopted by the city.

4. Pol. Code, § 1771, authorizing the county board of education to grant certificates entitling the holder to teach such special branches as may be required by city boards of education, is not in conflict with Const. art. 9, § 6, providing that the public-school system shall include primary and grammar schools, and such other schools as may be established by the legislature or by municipal or district authority, and giving the county superintendents control of the examination of teachers and the granting of teachers' certificates.

Commissioners' decision. Department 1. Appeal from superior court, Santa Clara county; W. G. Lorigan, Judge.

Action of mandamus by Kathryn Sinnott against J. F. Colombet, treasurer of the city of San José, to compel defendant to pay plaintiff money due on a warrant for services rendered by her as teacher. From a judgment awarding a peremptory writ, defendant appeals. Affirmed.

Morehouse, Tuttle & Richards, for appellant. Wilcox & Patton and H. A. Mason, for respondent.

BRITT, C. Appeal by defendant from a judgment awarding a peremptory writ of mandate requiring him, as treasurer of the city of San José, to pay a warrant drawn on him by the board of education of the school district constituted by, and in turn comprising, said city, in favor of plaintiff for services rendered by her as teacher in a certain kindergarten school of the district. From the agreed statement of facts on which the case was submitted in the court below, the following matters, among others, appear: Said board of education is chosen under the provisions of the charter of the city of San José (St. 1873–74, p. 395), as required by section 1616 of the Political Code. The power to employ teachers in the district is vested in such board exclusively. Since November 25, 1893, plaintiff has been the holder of a special certificate issued to her by the county board of education of Santa Clara county, by the terms of which plaintiff is "entitled to teach any kindergarten class of the public schools" in said county. She has no other teacher's certificate. On December 8, 1893, said city board of education adopted the following order: "Resolved, that the kindergarten system be, and the same is hereby, adopted as a special study to be taught in the public schools of the school district of the city of San José, in the county of Santa Clara, and that classes be organized wherein such special study shall be solely taught. Be it further resolved, that no teacher be employed to teach such classes, and to teach such special study, unless such teacher shall be provided with a special certificate, issued by the proper authority, authorizing the holder thereof to teach the kindergarten system as a special study in the public schools of said school district, and to teach kindergarten classes in said schools; and that no other certificate be required." Thereupon said city board of education caused kindergarten classes to be organized wherein such special study is solely taught in separate school buildings devoted to that purpose. About December 11, 1893, plaintiff was employed by said city board as teacher in one of the kindergarten schools so established, for a term commencing on that date, and to end June 30, 1894, and performed the duties pertaining to such employment from the commencement thereof to January 5, 1894, and earned during that time, at the agreed rate of compensation, the sum of $67.50. For this sum said board drew its warrant in plaintiff's favor on defendant, as treasurer of the city, against the fund in his hands known as the "Grammar and Primary School Fund," which warrant, upon presentation, he refused to pay; hence this proceeding. Said fund consists of all moneys levied and collected by the city of San José for school purposes within its limits other than for the maintenance of high schools. Defendant, as treasurer, holds money belonging to such fund, several thousands of dollars in amount, which was collected by the municipal authorities as a tax upon the property within the city for the purposes of said fund. At the time of the levy of such tax those authorities (the common council, we assume) "failed, refused, and neglected to levy any separate tax for kindergarten schools, as such, in the city." Appellant maintains, as we understand his argument, that the board of education had no power to adopt the resolution of December 8, 1893; that, if it had such power, still the kindergarten classes form no part of the grammar and primary school system of the district, and hence moneys raised for the support of the grammar and primary schools cannot be used to pay for instruction of the kindergarten classes; and, if it be held that the kindergarten is part of the primary schools, yet the judgment is wrong, because plaintiff had no certificate authorizing her to teach in those schools.

The case does not disclose the character of instruction had in view by the terms of the resolution, further than the same may be inferred from the word "kindergarten"; but we think we may take judicial cognizance of its significance, as the supreme court of Colorado has apparently done. In re Kindergarten Schools, 18 Colo. 234, 32 Pac. 422. Thus informed, we find that the term "kindergarten" (meaning literally "a garden of children") was devised by Friedrich W. A. Froebel, German philosopher and educator, to apply to a system which he elaborated for the instruction of children of very tender years. "Children's garden" ought to be taken in its allegorical sense. The child is a plant, the school is a garden, and Froebel calls teachers "gardeners of children." Compayré, History of Pedagogy, § 537, Payne's translation. "He saw that the child's inborn desire for activity manifests itself in play, and that children love to play together. His system, therefore, guides this inclination into organized movement, and invests the games (unknown to the child) with an ethical and educational value, teaching, besides physical exercises, the habits of discipline, self-control, harmonious action and purpose, together with some definite lesson of fact." Sonnenschein's Cyclopaedia of Education, p. 169. The law governing the board warranted its action in adopting such a system into the methods of the schools under its supervision, whether we look to the same as written in the city charter or in the Political Code, and it need not be determined which controls, if either is exclusive of the other, as seems to be held by the appellant. The city forms a school district governed by the city board of education. Pol. Code, § 1576, amended St. 1893, p. 245. It is declared by the charter that the board of education shall have power "to make, establish, and enforce all necessary and proper rules and regulations, not contrary to law, for the government and management of the public schools within the said city, and for carrying into effect laws relating to education, * * * and to determine the course of study and mode of instruction to be pursued in said schools." St. 1873–74, p. 415. By section 1665 of the Political Code, amended in 1893, instruction in certain branches of study is made compulsory "in the several grades in which each may be required"; and section 1666, also then amended, reads: "Other studies may be authorized by the board of education of any county, city, or city and county; but no such studies shall be pursued to the neglect or exclusion of the studies in the preceding section specified." St. 1893, p. 254. Section 1617, subd. 9, and section 1662 (amended in 1893), of the same Code, are controlling in the city of San José as elsewhere. They provide for the admission of children to kindergarten classes "in cities and towns in which the kindergarten has been adopted, or may hereafter be adopted, as part of the public primary schools" (St. 1893, pp. 249, 253, 254); thus recognizing that the proper governing body may adopt the kindergarten as an integral part of the primary schools.

Since the "kindergarten system" has for its object the purposes above briefly indicated, and as those purposes seem appropriate for pursuit in the primary schools, and as the law evidently contemplates that such system, when adopted, shall be regarded "as part of the public primary schools," we consider that the kindergarten classes mentioned in the resolution of the board of education became, when organized, classes in the primary schools of the district. The mere fact that such classes were instructed in separate buildings, and that the special study mentioned in the resolution was "solely taught" in those classes, does not render such course obnoxious to the restrictive clause of section 1666, Pol. Code, as supposed by counsel for appellant. It may well be that the branches, some or all of them, specified in the preceding section 1665, are not, and should not be, required in the grade to which the kindergarten classes properly belong, and, if so, are not compulsory under that section; besides, non constat but that the children in the kindergarten who have sufficient capacity may receive in other classes and other buildings instruction in such of the studies named in section 1665 as their minds are prepared to comprehend.

But it does not follow, because the provision made by the board for the kindergarten system incorporates such system into the primary schools of the district, that, therefore, the plaintiff must have a certificate authorizing her to teach the whole primary school course before she could be eligible to employment as a teacher in the kindergarten. Under section 1771, Pol. Code, the county board of education has authority to grant certificates, valid for six years, which entitle the holder to teach such special branches as may be required by city boards of education. In this instance the plaintiff held a certificate entitling her to teach kindergarten classes, and the city board has required instruction appropriate to such classes as a "special branch." We see no conflict between the portion of said section 1771 referred to and sections 6 and 7[1] of article 9 of the constitution of the state. The certificate of fitness to teach any kindergarten class in the case before us is a certificate of fitness to teach a special branch of study in the primary schools; she was employed to teach that branch, and none other, and could not have been lawfully required to give instruction in any other; and no provision of law is brought to our attention which requires the plaintiff to hold a certificate of qualification to teach any subject which she was not legally bound to teach if pupils should offer themselves for instruction therein. The fund in the hands of appellant, and against which the warrant in plaintiff's favor was drawn, is subject to the disposition of the board of education for the payment of the proper expenses, including teachers' salaries, of the grammar and primary schools of the city; and since as we hold the kindergarten is, in virtue of the order of the board, incorporated as a substantive part of the primary schools, the fund was lawfully drawn upon to pay the compensation due the plaintiff for teaching the kindergarten classes (see sections 61-64 of the city charter; St. 1873-74, p. 417), and it is immaterial that the kindergarten classes or system had no existence in those schools at the time the tax to raise the fund in question was levied. The judgment should be affirmed.

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[1] Const. art. 9, § 6, provides that the public-school system shall include primary and grammar schools, and such other schools as may be established by the legislature, or by municipal or district authority, and restricts the use of the state school fund to the support of primary and grammar schools; and section 7 gives the county superintendent and county boards of education control of the examination of teachers, and the granting of teachers' certificates, within their respective jurisdictions.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed

(6 Cal. Unrep. 27)

HAINES v. STILWELL. (No. 15,828.)

(Supreme Court of California. April 30, 1895.)

MODIFICATION OF CONTRACT — FINDINGS—APPEAL —OBJECTIONS WAIVED—INTEREST.

1. After defendant had agreed to repay to plaintiff all moneys received under a contract in consideration of its annulment, a proposition by him to pay a certain amount was accepted by the latter, if he would agree in writing to do so, and defendant promised to send the agreement, but never did so. *Held*, that the new agreement was never perfected so as to change the defendant's liability under the agreement for the rescission of the contract.

2. Where counts for money loaned, money had and received, and on a special contract, which is especially set out, are joined, and the complaint shows that they are all on the same cause of action, the failure to find the issues under the first and second counts is not reversible error, the issues under the third count being found, as the latter include the former.

3. The fact that defendant's promise, in the action on a contract, is alleged in the complaint, merely by way of recital, is not ground for reversing a judgment for plaintiff, where the complaint is attacked for the first time on appeal, and where defendant specially denied the promise.

4. Defendant, after having agreed, in consideration of the rescission of a contract, to repay plaintiff all moneys received thereunder, refused to do so. *Held*, that he was liable for interest on the money received from the date of the later agreement.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; Charles W. Slack, Judge.

Action by Byron W. Haines against Henry C. Stilwell. There was a judgment for plaintiff, and defendant appeals. Affirmed.

Pierson & Mitchell, for appellant. J. W. Dorsey and Haven & Haven, for respondent.

HAYNES, C. This action was brought by Haines to recover from Stilwell $6,293.65, with interest. The cause of action was single, but was stated in different forms in the complaint: First, for money loaned; second, for money had and received; and the third count set out a contract in writing made March 30, 1891, whereby defendant agreed to sell and plaintiff agreed to buy one-half of the capital stock of the Stoney Creek Improvement Company, a corporation, defendant then being the owner of all the stock of said corporation. Certain payments were made thereon by plaintiff, the particulars of which need not be stated in this connection. The stock was not to be delivered until fully paid for, and none of it was delivered. On or about August 12, 1891, the parties thereto, under date of April 15, 1891, indorsed upon said contract the following: "We do hereby mutually agree that this contract is and shall be null and void,"—and signed their names thereto; and it was alleged that defendant promised and agreed to repay to the plaintiff all moneys he had paid or advanced under said contract. The issues raised by defendant's answer were tried by the court without a jury, and findings and judgment were for the plaintiff for $4,793.65, with interest thereon from August 12, 1891. Defendant's motion for a new trial was denied, and this appeal is from the judgment and the order denying a new trial. Appellant specifies findings 1, 3, 5, 6, and 8 as not justified by the evidence.

1. The court found that plaintiff paid under the contract $4,793.65, and appellant contends that the evidence is insufficient to sustain a finding for more than $2,789.15. A careful examination of the evidence reveals no ground upon which this finding should be disturbed. The principal point of difficulty in the mind of appellant seems to be based upon the "Nager Mill" sale, as to which the plaintiff claimed that defendant guarantied he would sell it for a specified sum, which was larger than defendant received for it. But the court clearly found against plaintiff's contention that defendant guarantied to sell the mill for $8,000, and must have found that defendant sold it for $6,500,—$2,200 in cash and $4,300 in notes, —and credited plaintiff and charged defendant said cash as received under said contract (the notes having been delivered to plaintiff), and this is in exact accord with defendant's testimony as to that transaction.

2. The third finding is to the effect that at the time of the rescission of the contract the defendant promised and agreed to repay to the plaintiff all the moneys he had advanced or paid to the defendant under the contract. There was direct testimony given by the plaintiff sufficient to sustain this finding, and, while there was a conflict of evidence, such conflict principally related to how and when and to what extent the plaintiff should be reimbursed. There seems to have been a proposition made by defendant, after the cancellation of the contract, to pay plaintiff $3,000 when the property should be sold, and that plaintiff was willing to accept such proposition provided the defendant would agree in writing to do so; that defendant said he would send such agreement to the plaintiff, but never did it; and defendant contends that, as the plaintiff did not allege such agreement or promise in his complaint, he cannot recover upon it in this

action. But the plaintiff's recovery is not based upon such promise, but upon the original promise made at the time the contract was rescinded. Of course it was in the power of the parties to change the agreement, but such new agreement was never perfected, the condition imposed by the plaintiff not having been complied with.

3. The fifth finding negatives the claim of the defendant that plaintiff agreed that he should retain to his own use the moneys plaintiff had paid to him, and the sixth is to the effect that plaintiff at no time waived his right to claim a repayment from the defendant. The first and third findings above noticed being sustained by sufficient evidence, it follows that the fifth and sixth must be also sustained.

4. The eighth finding is that the plaintiff never received any benefit from defendant under the original contract. As to this, appellant says the plaintiff received a benefit, in that he was admitted into the ownership of a half interest in said corporation, and received therewith all its benefits and emoluments. I think the court did not understand the word "benefits" to mean the barren honor of being a stockholder in a corporation burdened with debts and mortgages, and the evidence shows that plaintiff received no income, profits, or other tangible benefit.

5. Appellant further specifies that the issues under the first and second counts were not found upon by the court. These counts were upon the same cause of action as the third, and it so appeared upon the face of the complaint. As they rested upon the same facts, the facts found include them. Were it otherwise, it would not avail the appellant, as his answers to those counts consisted only of conclusions of law, and therefore admitted the facts alleged in them.

6. Appellant further contends that the third count of the complaint does not state facts sufficient to constitute a cause of action. His point is that the promise and agreement to repay the money he had received from the plaintiff is not alleged except by way of recital, as a consideration merely for the cancellation. The count mentioned is clearly open to criticism; but no demurrer was interposed upon the ground that the allegations were uncertain, and the case was tried as though the facts were properly alleged, and without any objection to evidence given under the imperfect averment. That it is too late to raise the question in the appellate court, under such circumstances, see Horton v. Dominguez, 68 Cal. 642, 10 Pac. 186; Kirsch v. Kirsch, 83 Cal. 633, 23 Pac. 1083; Ortega v. Cordero, 88 Cal. 221, 26 Pac. 80. Not only so, but defendant in his answer expressly denied "that he agreed to restore or repay to the plaintiff all or any of the moneys theretofore paid by the plaintiff to defendant under the terms of said contract." If the defendant had not understood the complaint to allege that he had so agreed, the denial would not have been made, and the denial, therefore, admits the existence of the allegation, and aids or cures its defects.

7. It is further contended that the findings do not support the judgment. The only point made is that the court found that the plaintiff had paid under said contract $4,793.65, while the judgment is for $5,657.63, the difference between these sums being the interest on the sum first stated from August 12, 1891. The court, however, having found that from the date last stated the defendant had in his hands $4,793.65 belonging to the plaintiff, as a conclusion of law rightly found that he was entitled to interest thereon, and ordered judgment accordingly. The judgment and order appealed from should be affirmed.

We concur: VANCLIEF, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

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107 Cal. 210

## BIGGINS v. RAISCH et al. (No. 15,771.)

(Supreme Court of California. April 30, 1895.)

EXECUTOR'S BOND — LIABILITY OF SURETIES—RELEASE BY LACHES OF HEIRS—JUDGMENT AGAINST EXECUTOR—EFFECT.

1. The sureties on an executor's bond conditioned on the executor faithfully executing the duties of his trust according to law are not released, on the ground of laches, by the mere failure of the heirs to compel the executor to file an account.

2. A judgment against an executor's estate in an action for an accounting is binding on the sureties on the executor's bond, who were made parties to the action, but were discharged, having demurred to the complaint for misjoinder.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; Eugene R. Garber, Judge.

Action by Thomas J. Biggins, administrator, against Gottfried Raisch and another. There was a judgment for plaintiff, and defendants appeal. Affirmed.

Eugene N. Deuprey and D. H. Whittemore, for appellants. Hepburn Wilkins, for respondent.

VANCLIEF, C. Thomas Biggins died testate in the county of Marin, September 8, 1879. On October 6, 1879, the will was proved, and Patrick Mallon was appointed executor thereof, and executed a bond for the faithful performance of his duties in the sum of $25,000, with the defendants and Patrick Burns as sureties thereon. Patrick Burns died before the commencement of this action. The executor, Patrick Mallon, died testate on January 26, 1890, without having closed the administration of the estate, and without having rendered any account thereof to the probate court. On February 17, 1890, letters of administration with the will annexed were issued to the plaintiff, who, six months thereafter, brought an action in the superior court of the city and county of San Francisco against Ellen Mallon, executrix of the will of Patrick Mallon, and the defendants herein, for an accounting in the matter of Patrick Mallon's administration of the estate of Thomas Biggins. The defendants herein were joined as defendants in that action on the ground that they were sureties on the bond of Patrick Mallon; but, their demurrer to the complaint on the ground that they were improperly joined as defendants having been sustained by the court, the action proceeded against the executrix of Patrick Mallon alone. On the trial of that action the court stated the account of Patrick Mallon, as executor of the estate of Thomas Biggins, deceased, charging him and his estate with a balance of $13,281.58, and thereupon ordered and adjudged that his executrix, the defendant in that action, pay to the plaintiff therein, in due course of administration, the said sum of $13,281.58, with costs. Said executrix having failed and refused to pay said sum on demand, and the estate of Patrick Mallon being insolvent, this action was brought to recover said sum, with interest, from the defendants as sureties on said bond. The obligations of the sureties are expressed in the bonds as follows: "And we, said sureties, are severally held and bound with said Patrick Mallon, are held and bound unto the state of California as follows: Gottfried Raisch in the sum of ten thousand dollars, Patrick Burns in the sum of twelve thousand dollars, John Mallon in the sum of five thousand dollars; for the payment of which sums we, and each of us, respectively, bind ourselves, our heirs, executors, and administrators, jointly and severally, as aforesaid, firmly by these presents. Sealed with our seals, and dated this 11th October, A. D. 1879. The condition of this obligation is such that if the said Patrick Mallon, as such executor, shall faithfully execute the duties of the trust according to law, then this obligation to be void; else to remain in full force and virtue." The court found upon all the issues in favor of the plaintiff herein, and rendered a several judgment against defendant Raisch for the sum of $9,831.09, and against defendant Mallon for the sum of $5,000. Both defendants have appealed from the judgment and from an order denying their motion for a new trial, but, the appeal of Raisch having been dismissed, only that of Mallon remains to be considered.

It is not claimed that the findings do not support the judgment, nor that the evidence does not justify the findings. But it is contended by appellant that the action is barred by the laches of the heirs of Thomas Biggins, namely, Honora, Thomas J., and Michael, whose respective ages, at the time Patrick Mallon died, were as follows: Honora, 23 years; Thomas J., 22 years; and Michael, 20 years,—in that they failed to compel the executor to render his accounts to the probate court as required by law. Surely no laches can be attributed to them after the death of Patrick Mallon, since Thomas J. was appointed administrator, and commenced said action against the executrix of the will of Patrick Mallon within 8½ months after his death, this being only a reasonable time within which to procure the appointment of the administrator, examine the condition of the estate, and commence the action. And before the death of the executor the heirs did nothing that could have discharged or affected the obligation of the sureties on his bond. While it is true that they might have compelled the executor to account to the probate court long before he died, yet merely passive delay and forbearance on their part could not discharge the sureties, nor affect their obligation (Humphreys v. Crane, 5 Cal. 173; Brandt, Sur. § 342, and cases there cited); for the condition of their obligation was that their principal should perform all the duties of executor, including that of rendering to the probate court from time to time such accounts of his administration as required by law; so that his failure to render such accounts was a dereliction of duty for which his sureties are responsible. If the sureties could not have initiated proceedings to compel the executors to account to the probate court, yet they might have taken proceedings under sections 1403 and 1404 of the Code of Civil Procedure at any time during the administration to procure their release from future responsibility; and, having failed to do so, they are responsible for all derelictions of their principal during his administration of the estate.

It is further contended by appellant that the judgment against the executrix of the will of Patrick Mallon is not conclusive against the sureties on his bond, since they were not parties to that action. But it was held otherwise in the case of Chaquette v. Ortet, 60 Cal. 594, a case similar to this in all respects. See, also, Brandt, Sur. § 580, and authorities there cited.

Other points made by appellant either have no foundation in the record or lack sufficient plausibility to require special consideration. I think the judgment and order should be affirmed.

We concur: BELCHER, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

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107 Cal. 193

## CENTRAL LUMBER & MILL CO. v. CENTER et al. (No. 15,678.)

(Supreme Court of California. April 30, 1895.)

BOND ON APPEAL—VALIDITY—STAY OF EXECUTION.

1. Where a bond on appeal has no validity as a statutory bond, a motion for judgment thereon should be denied, even if it is supported by a consideration, and is good as a common-law bond.

2. On appeal from a judgment foreclosing a mechanic's lien and ordering a sale of the property, defendant gave an undertaking to stay execution in double the amount of the judgment under Code Civ. Proc. § 942, which provides for appeals from judgments directing payment of money, and not under section 945, providing for appeals from judgments directing sale of real property. It did not appear that the property upon which the lien was adjudged was not available, or that, in the absence of the undertaking, plaintiff could have levied execution as upon a mere personal judgment against defendant. *Held*, that the undertaking did not stay execution upon the judgment, and was therefore void.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; D. J. Murphy, Judge.

Action by Central Lumber & Mill Company against John Center and others to foreclose a mechanic's lien. From a judgment against the sureties on an undertaking on appeal, defendant Nathan Cohen appeals. Reversed.

Marcus Rosenthal, for appellant. H. A. Powell, for respondent.

HAYNES, C. The Central Lumber & Mill Company brought an action against John Center et al. to foreclose a lien upon the leasehold interest of said Davis in a certain lot, for materials furnished by the plaintiff to said Davis as owner. The action was dismissed as to all the defendants except Joseph Davis. The judgment, so far as material to the questions involved, was that the plaintiff "have and recover judgment against defendant Joseph Davis in the sum of $198.47, with interest, * * * and for the sum of $5.00 cost of filing the notice of lien herein, and $25 counsel fees herein, making in all the sum of $245.80, together with plaintiff's costs and disbursements herein, amounting to the sum of $30.25; and said sums are a lien upon the building upon the land hereinafter described, and the interest of Joseph Davis in said land"; and, after stating said interest and describing the property, directed that it be sold by the sheriff, according to law and the practice of the court. Davis appealed from that judgment, and, in addition to the ordinary $300 undertaking for the prosecution of the appeal and the payment of costs and damages, as required by section 941, Code Civ. Proc., gave an undertaking to stay execution in double the amount of the judgment, under section 942, Id., which provides for appeals from judgments or orders directing the payment of money. Said appeal was dismissed, and, after the remittitur went down, the superior court allowed respondent's counsel a fee of $50 for services in the supreme court, under section 1195, Code Civ. Proc., relating to the enforcement of mechanics' liens; and upon motion entered judgment against the sureties in said undertakings on appeal, and from that judgment Nathan Cohen, one of said sureties, appeals.

Appellant contends: That the court erred in granting the plaintiff's motion for judgment against the sureties. That, as to the first undertaking, no costs or damages were awarded the plaintiff upon the dismissal of the appeal, and, as to the undertaking to stay execution, that it was unauthorized by the statute and ineffectual to stay the execution of the judgment, and was therefore without consideration. That it should have been given under section 945, Code Civ. Proc., which provides: "If the judgment or order appealed from direct the sale or delivery of possession of real property the same cannot be stayed, unless a written undertaking be executed * * * to the effect that during the possession of such property by the appellant he will not commit, or suffer to be committed, any waste thereon, and that if the judgment be affirmed or the appeal dismissed he will pay the value of the use and occupation from the time of the appeal until the delivery of the possession thereof, pursuant to the judgment or order, not exceeding a sum to be fixed by the judge of the court, * * * and which must be specified in the undertaking. When the judgment is for the sale of mortgaged premises, and the payment of a deficiency arising upon the sale, the undertaking must also provide for the payment of such deficiency." Where a bond on appeal has no validity as a statutory bond, a motion for judgment thereon should be denied, even if it could be shown to be supported by a consideration, and to be good as a common-law bond. Powers v. Chabot, 93 Cal. 266, 28 Pac. 1070; McCallion v. Society, 98 Cal. 442, 33 Pac. 329. The question, therefore, is whether the bond here given was sufficient to stay the execution of the judgment. If it was, the motion for judgment thereon was rightly granted. If not, the judgment must be reversed. It is contended by respondent that there was a personal judgment in the original action against Davis, and that his appeal was taken from that judgment; and counsel refers to the notice of appeal, in which it is said that he appeals from a judgment against him, rendered on a day named, for certain sums of money, stating the different items, amounting in all to the sum of $306, "and from the whole thereof." The judgment, however, declared a lien for all the moneys mentioned upon certain property therein described, and ordered a sale of that specific property; and the notice of appeal embraced this part of the judgment as well as that fixing the extent of his liability. It is quite true that Davis, having bought the materials from plaintiff as owner, was personally liable for the full amount, whether the property was sufficient to pay it or not; and it is also true that section 1197, Code Civ. Proc., provides that: "Nothing contained in this chapter shall be construed to impair or affect the right of any person to whom any debt may be due for work done or materials furnished to maintain a personal action to recover such debt against the person liable therefor." But where the action is to foreclose the lien, the defendant being also personally liable, the whole amount due is ascertained, "and whenever in the sale of the property there is a deficiency of proceeds, judgment may be docketed for the deficiency in like manner and with like effect as in actions for the foreclosure of mortgages" (Code Civ. Proc. § 1194); while the personal action provided for is a simple action upon the contract against the person who purchased the materials, whether contractor or owner, and has no reference to the lien given by the statute. And in such action the plaintiff, even though he filed a lien, cannot include the cost of filing, nor can he recover attorney's fees; those items being incident to a foreclosure of the lien, and not to the personal action. Bates v. Santa Barbara Co., 90 Cal. 543, 548, 27 Pac. 438. The Code provisions relating to the foreclosure of mechanics' liens provide no mode of enforcing the judgment other than by a sale of the property and docketing a deficiency judgment against the defendant who may be liable therefor; and in Phillips on Mechanics' Liens (section 458) it is said: "The execution to be issued for the enforcement of the lien is generally provided for by express enactment. * * * Unless otherwise provided, the execution is always special against the particular property incumbered with the lien." I conclude, therefore, that an execution as upon a mere personal judgment could not have been issued and levied upon the property of the defendant had the undertaking in question not been given, unless by direction of the court upon a showing that the property upon which the lien was adjudged was no longer available, and that the bond given did not operate to stay the enforcement of the lien upon the property described in the judgment. That a bond conditioned as required by section 945, Code Civ. Proc., concerning appeals from judgments or orders directing the sale or delivery of real property, is proper, where the appeal is from a judgment foreclosing a mechanic's lien, was held in Corcoran v. Desmond, 71 Cal. 100, 102, 11 Pac. 815.

It is said by respondent, in its brief, that at the time the judgment was entered in the original action the leasehold interest of Davis had expired, and was worthless, and that his only concern was to stay execution for the payment of the money. The judgment recites that the lease was for the period of five years from April 1, 1889. The judgment is dated September 2, 1891, and the undertaking on appeal was filed November 12, 1891, and there is nothing in the record tending to show that the lease was forfeited, or that from any cause the interest of Davis had ceased or become valueless. The other surety does not appeal. The judgment appealed from, so far as it affects appellant, Cohen, should be reversed.

We concur: VANCLIEF, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is reversed so far as it affects appellant, Cohen.

107 Cal. 206

## E. E. THOMAS FRUIT CO. v. START et al.
(No. 15,840.)

(Supreme Court of California. April 30, 1895.)

CONTRACT—PERFORMANCE—BREACH—EVIDENCE.

1. Where nothing was said as to the manner in which a contract was to be performed, it will be presumed, under Civ. Code, §§ 1983, 1984, that it was to be done in a proper and skillful manner.

2. Where plaintiff cured certain fruit for defendants, who disposed of it at values usually obtained for good fruit, that fact will not affect plaintiff's liability to defendants for damages to the fruit in defectively curing it.

3. Where plaintiff cured certain fruit for defendants, which defendants claimed was thereby damaged, boxes of the fruit, though not fair samples thereof, are admissible in evidence to show its condition, under Code Civ. Proc. §§ 1827, 1954, providing for the admission of "objects cognizable by the senses," and an "item in the sum of evidence."

Commissioners' decision. Department 2. Appeal from superior court, Santa Clara county; John Reynolds, Judge.

Action by E. E. Thomas Fruit Company against George H. Start and another for services rendered. From a judgment for defendants, plaintiff appeals. Affirmed.

S. G. Tompkins, for appellant. Crandall & Biddel, for respondents.

BRITT, C. Plaintiff, a corporation, brought this action to recover of defendants the sum of $603.90, claimed to be due from them as the compensation they had promised to pay plaintiff for drying a quantity of prunes (something over 86 tons), at the agreed rate of seven dollars per ton. Regarding its own undertaking, plaintiff, in its complaint, alleged merely that it agreed to dry the prunes for defendants, without specifying the degree of care or skill it should employ for that purpose. Defendants, in their answer, averred that plaintiff contracted to dry and cure the prunes "in a first-class manner," but failed to do so, and so negligently performed its contract that its services were of no value. As a counterclaim, defendants further alleged in effect that, by reason of the negligence and want of skill of plaintiff in the performance of its contract, the prunes were injured, and defendants thereby sustained damage in the sum of $1,525, for which they prayed judgment. The court found, among other things, that by the contract between the parties plaintiff agreed to dry the prunes in a proper and skillful manner; that the sum due for plaintiff's services at the contract rate was $603.90; that the prunes were injured by the careless and unskillful manner in which plaintiff performed its engagement, to the damage of defendants in the sum of $675. Judgment was given in favor of defendants and against plaintiff for the difference between the two sums last mentioned, amounting to $71.10, and their costs. Plaintiff appeals from the judgment and an order denying a motion for new trial.

From the statement of the case used on

such motion it seems to have been virtually conceded at the trial that the prunes as cured were of inferior quality for fruit of that class. Plaintiff maintained that such inferiority occurred on account of the overripe or other unfit condition of the green fruit when received by it from defendants; while defendants contended that it was produced by plaintiff's unskilled or negligent treatment of the fruit. On the question thus made the testimony of some 50 witnesses was introduced. There was proof that defendants, after taking out about four tons of the most inferior dried fruit, had mixed the remainder with other fruit, and, as so mixed, sold a large quantity at regular prices, without objection from the buyers on account of its condition. During the trial, defendants offered in evidence four boxes of the prunes dried by plaintiff for defendants as samples thereof. The offer was objected to on the ground that they were not shown to be fair samples, but, on the contrary, were shown to be prepared for the occasion. Some witnesses testified in a general way that they were fair samples of the whole, and there was more detailed evidence to contrary effect. The court overruled the objection, plaintiff excepting.

Appellant, in its argument here, apparently questions the finding that plaintiff agreed to dry the prunes in a proper and skillful manner, as not justified by the evidence; but an obligation to that effect is implied from the terms of the contract itself as alleged in the complaint. Civ. Code, §§ 1983, 1984.

It is also argued that the evidence does not sustain the finding of plaintiff's failure to exercise care and skill in drying the fruit; but, after perusal of the same as exhibited in the transcript, we think that it is not only conflicting, but that it preponderates in favor of the conclusion of the trial court. The circumstance that defendants sold at usual prices a large part of the fruit cured by plaintiff, and so incurred no loss as to the portion sold, does not affect the correctness of that conclusion. Proof of the circumstance referred to may have been relevant evidence and proper for consideration upon the question whether the value of the prunes was really lessened, and to what extent; but the dexterity—to employ a euphemism—of defendants in disposing of the product (thus possibly incurring liability in their turn to the purchasers) does not exempt plaintiff from its own responsibility to defendants. See Hunt v. Van Deusen, 42 Hun, 392; Muller v. Eno, 14 N. Y. 598; Brown v. Bigelow, 10 Allen, 244.

The court did not err in admitting in evidence the boxes of prunes offered by defendants. Being a finished and separable part of the manufactured product, the character of which was in question, they were "objects cognizable by the senses," and made "an item in the sum of the evidence" (Code Civ. Proc. §§ 1827, 1954), whether they were fair samples or not. If the proof showed that they were not such, that was a circumstance affecting the weight of the evidence, not its admissibility. The court might have inspected the whole quantity of fruit cured, if accessible, and such view could enlighten the question on trial; and so it had the right to inspect any part of it.

Appellant makes no other points for reversal. The judgment and order appealed from should be affirmed.

We concur: SEARLS, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

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107 Cal. 229

### RAUER v. LOWE et al. (No. 15,651.)

(Supreme Court of California. May 3, 1895.)

PUBLIC IMPROVEMENTS—VALIDITY OF ASSESSMENT—ENGINEER'S CERTIFICATE—RECORD—CONTRACT FOR WORK—VALIDITY.

1. A certificate as to the completion of street work, signed by a mere clerk, under a general direction of the city engineer to make out such certificates, is not sufficient, under St. 1891, p. 205, requiring such a certificate by the city engineer in order to make the amounts assessed a lien on the lands.

2. Under St. 1891, p. 205, requiring the assessment, warrant, diagram, and engineer's certificate to be recorded in the office of the superintendent of streets in order to render an assessment for street improvements a lien on the land, the engineer's certificate must be recorded as a part of the assessment record, and not in a separate book.

3. A contract for the construction of a sewer is not void because it guaranties the street superintendent and his sureties immunity from liability, as this clause could not affect persons injured by the acts of the superintendent.

4. Act March 18, 1885, providing that the superintendent of streets shall fix the time for the commencement of the work, which shall not be more than 15 days from the date of the contract, is satisfied by a provision in the contract that the work shall be commenced within 14 days from the date of the contract.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; James M. Troutt, Judge.

Action by J. J. Rauer against Susanna Lowe and another to recover an assessment for street improvements. From a judgment for plaintiff, and an order denying a motion for a new trial, defendants appeal. Reversed.

Horace W. Philbrook, for appellants. J. C. Bates, for respondent.

HAYNES, C. This action was brought by Rauer to recover an assessment for work performed in the construction of a sewer, and certain street work connected therewith, under a contract with the superintendent of streets, in the city and county of San Francisco. Written findings were filed and judgment entered for the plaintiff; and the appeal is from said judgment, and an order denying defendants' motion for a new trial.

The plaintiff called as a witness John G. Fitzgerald, who testified that he was a deputy superintendent of streets. The witness then produced several certificates, purporting to be the certificates of the city engineer, as to the performance of the work. These certificates were signed, "C. S. Tilton, City Engineer, H. D. G." In connection therewith the witness also produced the assessment, warrant, and diagram, and testified in relation thereto that he produced them from the office of the superintendent of streets; that they were duly recorded in volume 112, at page 28, of Assessment Records; that the affidavit therein contained was also recorded at said page in said book, but that the said certificates of the city engineer were not recorded in said book, or referred to therein, or in any book of assessment records, but were recorded in a small book, kept by the superintendent of streets in his office; that there was not any index or reference showing where they were recorded; that said small book was not kept with the assessment records, and that the latter did not in any manner refer to the record of the certificates or the place where they were recorded. The said certificates of the city engineer, together with the assessment, warrant, and diagram, were then offered in evidence by the plaintiff, and were received over the objection of defendants. Of the numerous grounds of objection stated in the record two only need be noticed: (1) That said certificates are not shown to be the certificates of the city engineer; and (2) that the assessment, warrant, and diagram, together with the certificates of the city engineer, were not recorded in the office of the superintendent of streets.

1. As already stated, these certificates were signed, "C. S. Tilton, City Engineer, H. D. G." The addition of the letters "H. D. G.," if they did not absolutely indicate that the certificates were not signed by the city engineer in person, were sufficient to call for an explanation before receiving them in evidence. There is no addition to his title, known to the law, that could be represented by them; and, if they are taken to indicate that the signature was written by a person other than the officer named, the certificates did not disclose the authority of such person to append the signature. The defendants, however, afterwards called as a witness H. D. Gates, who testified that throughout the year 1892 he was employed by the city engineer as an ordinary employé, but never was his deputy; that Mr. Tilton did not make the examinations himself, but certain employés made the examinations of the work, and left in the office notes thereof, and that he, the witness, prepared the certificates from said notes, and signed the name of the city engineer thereto, adding his own initials to indicate that he had written that officer's name; that when he was first employed, in the beginning of the year 1891, he was instructed by Mr. Tilton to make out the certificates, and sign his name to them, and that Mr. Tilton had nothing to do with them except through him as his employé. Pol. Code, § 4112, provides: "Every county and township officer, except county judge, supervisor, and justice of the peace, may appoint as many deputies as may be necessary for the faithful and prompt discharge of the duties of his office." Section 865, Pol. Code, provides: "In all cases, not otherwise provided for, each deputy possesses the powers and may perform the duties attached by law to the office of his principal." The general rule is that an officer has no authority to appoint a deputy unless it is specially conferred, especially where the duties of the office involve trust, skill, and confidence. State v. City of Buffalo, 2 Hill, 434. It would seem to follow that, if a deputy cannot be appointed unless authority to make the appointment has been conferred by law, a mere clerk or employé could not be empowered by an officer to perform official acts; and that the making of a certificate which is essential under the statute to create a lien upon real estate is an official act is beyond question. That such certificates may be made by a deputy is not questioned; and as the city and county surveyor, or city engineer, has ample power to appoint deputies, necessity cannot be urged in justification of the performance of any official duty by a clerk. Deputies must be appointed in writing, filed with the county clerk, and by section 910, Pol. Code, must make and file an oath in the manner required of their principals. The making of these certificates seems to be the final acts of the city engineer in reference to the work. It is the evidence of the completion of the work under the contract and according to the plans and specifications prepared by him, and is then required to be recorded in another office by another and different officer. There is nothing to call the attention of the city engineer to these certificates after they are signed; and, if they may be prepared and signed by a clerk under a general direction, such as is here shown, the official duty of determining from the notes of the field deputies whether the work is completed according to the plans, specifications, and contract is delegated to an irresponsible clerk, and may be made and handed to the superintendent of streets wholly without the knowledge of the city engineer. These certificates so made and signed are invalid, and insufficient as the basis of a lien upon property chargeable with the expense of the work; and therefore the evidence does not sustain the finding that the assessment is a lien upon defendants' lot.

Appellants also contend that the certificates are insufficient upon their face. It is not necessary to decide that question, but it should at least be said that they are unsatisfactory as evidence of the proper completion of the work.

2. The second ground of objection to the introduction in evidence of said papers, viz. that they were not properly recorded, should be noticed. Section 9 of the act of 1885, as amended in 1891 (St. 1891, p. 205), after prescribing the form of the warrant, provides as follows: "Said warrant, assessment and diagram, together with the certificate of the city engineer, shall be recorded in the office of said superintendent of streets. When so recorded, the several amounts assessed shall be a lien upon the lands, lots, or portions of lots assessed, respectively, for the period of two years from the date of said recording, unless sooner discharged; and from and after the date of said recording of any warrant, assessment, diagram and certificate, all persons mentioned in section 11 of this act shall be deemed to have notice of the contents of the record thereof. * * *" In Buckman v. Cuneo, 103 Cal. 62, 36 Pac. 1025, it was said: "By the act approved March 18, 1885, it was only necessary to create a lien, such as is sought to be enforced in this action, to record the warrant, assessment, and diagram. But by the act of March 14, 1889, the recording of the engineer's certificate was made an additional and necessary prerequisite to the creation of a lien thereunder. Nor does the creation of such a lien depend upon whether the owner of the lot had notice of any of these proceedings, but upon the recording of the warrant, assessment, diagram, and engineer's certificate; and, if they were recorded as provided by the terms of the statute, then a valid lien was created upon the defendant's lot, otherwise not." In that case the recorded certificate showed upon its face that the work was completed, except as to a certain part, which the certificate stated was shown by the diagram on the back thereof. It was held that the diagram thus referred to was a material part of the certificate, and should have been recorded with the certificate, and because it was not no lien was created. In the case at bar the testimony shows that the assessment, warrant, and diagram were duly recorded in a book kept for that purpose, and designated "Assessment Records," while the engineer's certificates were recorded in a small book kept in the same office, but not with the assessment records, nor was it in any way referred to in the assessment record, so as to make it even constructively a part of that record. The statute requires four things to be recorded in order to constitute the one thing called a lien, viz. the assessment, warrant, diagram, and engineer's certificate; and these are intended to constitute one record, and should be found together. Before the amendment of the statute in 1889, these certificates formed no part of the assessment record; and, as they were then intended only for the information of the superintendent of streets, the custom of placing them in a separate record was proper, though not required by the statute. That fact, however, emphasizes the intention of the statute that they should be recorded in the assessment record of which they are an essential part.

Appellants further contend that the contract under which the sewer was constructed is void, because it "guarantied the street superintendent and his sureties and bondsmen immunity from liability." I think this provision can have no such effect. If the defendants are injured by any acts of the superintendent of streets for which that officer is liable personally, or upon his official bond, they are not affected by this clause of a contract to which they were not parties. That they may have such action against the superintendent of streets, see Goodsell v. Ashworth, 96 Cal. 397, 31 Pac. 261. This precise question was decided against appellants' contention in Byrne v. Luning, 38 Pac. 454. The case of Brown v. Jenks, 98 Cal. 10, 32 Pac. 701, cited by appellant, is not in point.

It is further contended that the contract did not fix the time for the commencement of the work, and for that reason the contract is void; citing Libbey v. Elsworth, 97 Cal. 316, 32 Pac. 228. The provision in the contract now under consideration is, "The work to be commenced within fourteen days from the date of the contract." In Fletcher v. Prather, 102 Cal. 413, 36 Pac. 658, the same words were used to fix the time of commencing the work, and it was held sufficient; and in White v. Harris, 103 Cal. 528, 37 Pac. 502, the same provision, substituting the word "fifteen" for "fourteen," was again considered, and it was said: "The word 'time,' as here used, was not intended to mean a particular day to be fixed by the superintendent of streets for the commencement of the work, but that the time fixed by him for that purpose should not be more than fifteen days from the date of the contract." This question must therefore be considered settled. The judgment and order appealed from should be reversed.

We concur: VANCLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed.

107 Cal. 49

## STEEN v. HENDY. (No. 15,644.)

(Supreme Court of California. May 4, 1895.)

REVERSAL—REMAND.

An unqualified judgment of reversal remands the cause for a new trial without an express direction to that effect.

Motion for modification of judgment. Denied.

For former opinion, see 40 Pac. 21.

PER CURIAM. Respondent asks us to so modify the judgment herein as to give express direction that the cause be remanded for a new trial. Such modification is unnecessary, since the effect of the unqualified reversal is to remand the cause for a new trial. Stearns v. Aguirre, 7 Cal. 443; Argenti v. San Francisco, 30 Cal. 459; Ryan v. Tomlinson, 39 Cal. 639.

## RANDALL v. DUFF et al. (No. 15,758.)

(Supreme Court of California. May 14, 1895.)

JURISDICTION OF SUPREME COURT.

Under Const. art. 6, § 4, giving the supreme court jurisdiction in cases at law only where the demand, exclusive of interest, amounts to $300, the court has no authority to review an order made after final judgment, taxing a bill of costs of less than that amount.

Department 2. Appeal from superior court, Humboldt county; G. W. Hunter, Judge.

Action by A. W. Randall against Julia R. Duff and others to quiet title. Const. art. 6, § 4, grants the supreme court jurisdiction in cases at law only where the demand, exclusive of interest, amounts to $300. Defendants appeal from an order made after final judgment, taxing costs which were less than $300. Dismissed.

S. M. Buck and W. C. Belcher, for appellants. W. L. Duff, H. S. Foote, and L. D. McKissick, for respondent.

PER CURIAM. Respondent's motion to dismiss the appeal in this case is granted, and the appeal dismissed, on the ground that the court has no jurisdiction thereof, on the authority of Fairbanks v. Lampkin, 99 Cal. 429, 34 Pac. 101.

107 Cal. 243

## BUENA VISTA FRUIT & VINEYARD CO. v. TUOHY et al. (No. 18,350.)

(Supreme Court of California. May 13, 1895.)

EQUITY—RESCISSION OF CONTRACT—FRAUD.

The complaint alleged that defendants, by fraudulent practices, induced plaintiff to purchase property from them for twice what it was worth; that part payment thereof had been made, and notes and mortgages given for the residue. *Held* insufficient to maintain an action for the cancellation of the notes and mortgages, where the property received was worth more than the part payment made, without offering to put the vendors in statu quo.

Commissioners' decision. In bank. Appeal from superior court, Tulare county; W. W. Cross, Judge.

Action by the Buena Vista Fruit & Vineyard Company against John Tuohy and others to set aside a judgment, and to cancel certain notes and mortgages. From a judgment for defendants, plaintiff appeals. Affirmed.

Morehouse & Tuttle and J. A. Percy, Jr., for appellant. Daggett & Adams and C. L. Russell, for respondents.

SEARLS, C. This action is brought by the corporation plaintiff to have a judgment of foreclosure against its property and a deficiency judgment entered after a sale in foreclosure set aside, and to have the mortgages and notes upon which the foreclosure proceedings were had set aside, annulled, and canceled, and that the defendants, and each of them, be enjoined and restrained from conveying, disposing of, or incumbering the land and premises mortgaged. Defendants demurred to the complaint by two separate demurrers, one on behalf of Tuohy, and the other by all the other defendants. These demurrers were sustained by the court, and, plaintiff declining or failing to amend after notice and leave so to do, final judgment was entered in favor of defendants. Plaintiff appeals from the judgment.

The complaint, with the exhibits thereto attached and made a part thereof, covers over 50 pages of the printed transcript. To epitomize it within brief limits, and at the same time illustrate it fairly, is quite difficult. The following synopsis will illustrate its more salient features: On the 13th day of May, 1891, John Tuohy, one of the defendants, was the owner of 720 acres of land situate in the county of Tulare, state of California; also of certain water rights, stock in water companies, etc., and certain personal property, consisting of six mules, etc., their harness, five wagons, and a quantity of farming tools. On said last-mentioned day said Tuohy entered into an agreement in writing with E. J. Cox, E. De Witt, and P. F. Wood, the other defendants herein, as parties of the second part, by the terms of which he agreed to sell to them and they agreed to buy all of the property aforesaid on September 1, 1896, with interest at the rate of 8 per cent. per annum, payable semiannually in advance, from and after September 1, 1891. The parties of the second part were to take possession of the property at once, to prepare the land for planting trees and vines, to plant 200 acres to trees and vines during the season of 1892, to care therefor, and to plant the residue to other crops. They further agreed to incorporate a stock company to plant the land to fruit and vines, to advertise the same, and use due diligence to sell the same; and, if they carried out the agreement, Tuohy was to convey all of the property by good and sufficient deed, etc., on the 1st of September, 1891; and, if the second parties failed to perform, they were to return the property to Tuohy on September 1, 1891, until which time they were to have the option to buy, but, if they failed, they were to pay all expenses up to said last-mentioned date. On the same day, Cox, De Witt, and Wood, the parties of the second part in the foregoing agreement, entered into another agreement, as parties of the first part, with the persons whose names are thereto subscribed, each separately, and not one for the other, which recited that whereas it is proposed to form a corporation, etc., to be entitled the Buena Vista Fruit & Vineyard Company, with a capital stock of $144,000, divided into 720 shares of $200 each, for the purpose of purchasing 720 acres of land (then follows a description of the land and property as in the first agreement), at the price of $100 per acre, and to plant and set out thereon fruit trees and vines of first-class marketable varieties. The agreement then proceeds as follows: "Now, therefore, this agreement witnesses that the said parties of the first part hereby agree to sell to the said parties of the second part, and the said parties of the second part hereby agree to purchase from the said parties of the first part, the above-mentioned lands, water rights, and personal property, and all improvements that shall be made thereto up to the 1st of September next, at the price of $100 per acre; the title to said lands to be shown to be good and valid at law, by an abstract to be furnished to said parties of the second part, to be paid as follows: $10,000 cash out of the first payment upon subscription to the stock as hereinafter mentioned, and the balance on the 1st of September, 1896, with interest thereon in the meantime from said 1st of September next, until paid, at the rate of 8 per cent. per annum; said interest to be paid by even and equal half-yearly payments in advance. And it is agreed that on the 1st day of September next, upon said payment of $10,000 and interest, a deed shall be made to said corporation of said lands and premises, and a mortgage thereof by said corporation for the balance of the purchase money and interest. The said parties of the second part do hereby severally covenant and agree. each for himself, to and with the parties of the first part, that they will each severally take the number of shares of the capital stock of said corporation set opposite their respective signatures hereto, and pay at the time of their signature hereto, to E J. Cox, cashier of the Tulare County Bank, as treasurer and trustee, $20 per share upon the actual number of shares so respectively subscribed for by each of them, the said parties of the second part; and on the 1st of December next, and quarterly thereafter for the term of three years next ensuing, the sum of $5 per share for said shares, making in all $80 per share; such payments to be made quarterly as aforesaid. Said E. J. Cox, as such treasurer and trustee, shall and he is hereby authorized and directed to apply said money so to be received by him as follows: First in payment of said cash payment on said lands and interest, and the balance as the board of directors of said corporation shall direct in the improvement of said lands, as follows, viz.: The planting, in the season of 1891–92, in a good and workmanlike manner, of about 200 acres of said lands to grapes, and including the Chinese contract of about 100 acres of fruit trees, and the balance to grain, etc.; and thereafter, unless the directors appoint another treasurer, said money shall be paid by said treasurer, for the planting in the season of 1892–93 of so much of said land as the directors shall determine, and thereafter as said directors shall direct. The parties of the first part to pay all the taxes against said land for the term of five years. This agreement is made conditional and dependent upon the subscription, on or before the 1st of September next, of at least 600 shares of said capital stock; and, should that number not be subscribed by that date, then the said treasurer shall repay to said subscribers all such deposits or cash payments he may have received to the respective persons who shall have paid the same." The agreement was signed by defendants Cox, De Witt, and Wood, and by some 47 persons as parties of the second part, with the number of shares taken by each set opposite his name, aggregating 674 shares. Each of the defendants herein, including Tuohy, subscribed for 25 shares. To this agreement is appended (1) a list of eight names of those who subscribed for an aggregate of 85 shares, with a statement, signed by Cox, De Witt, and Wood, to the effect that said eight parties have been relieved from taking their stock, and are "relieved from payment, their stock never having issued"; (2) an assignment of the agreement with the claims accruing therefrom to the Buena Vista Fruit & Vineyard Company, which it is recited has been organized by the undersigned. This assignment is signed by said Cox, De Witt, and Wood, and is acknowledged before a notary public January 14, 1892. Neither of the above documents mentioned in 1 and 2 is dated.

The corporation was organized according to the complaint on or about the 6th day of June, 1891, for the purposes, with the capital stock and number of shares, etc., as specified in the agreement set out and quoted herein, but with other and further objects than those specified in said agreement. John Tuohy, D. W. Madden, E. De Witt, P. F. Wood, N. A. Hummel, J. F. Boller, and R. B. Bohannon were named as the directors of said corporation; and John Tuohy was elected president; D. W. Madden, vice president; and R. B. Bohannon, secretary. On the 16th day of September, 1891, the corporation plaintiff, pursuant to resolution of its board of directors, and for the purpose of completing the purchase of the property hereinbefore mentioned, and paying the purchase price thereof over and above the cash payment of $10,000, made its two several promissory notes, payable to defendant Tuohy,—one for $36,000, and the other for $26,000,—payable September 1, 1896, with interest at 8 per cent. per annum, payable semiannually in advance, etc., and, to secure the payment of said notes, executed to said Tuohy two several mortgages upon the real estate hereinbefore mentioned. The mortgages provided that, if default should be made in the payment of interest when due, the whole sum, principal and interest, should become due at the option of the mortgagee. The $26,000 mortgage was subject and the lien thereof subordinate to that of the $36,000 mortgage. Default having been made in the payment of interest on the $36,000 note, an action was brought to foreclose the mortgage on or about June 13, 1892. An answer was filed admitting the making of the note and mortgage by the corporation; and thereafter, and, on the 8th day of February, 1893, a decree of foreclosure was entered, under which, on or about April 1, 1893, the land was sold, John Tuohy becoming the purchaser, for $32,300, leaving a deficiency of $8,369.80, for which judgment was entered in favor of Tuohy, and against the corporation plaintiff herein. Tuohy, as president, and Bohannon, as secretary, executed, for and in the name of the corporation, the foregoing notes and mortgages. In January, 1893, a set of directors was elected, not including the defendants herein or any of them; and thereafter, and on the 20th day of September, 1893, this action was instituted. The property referred to was conveyed to the corporation plaintiff by Tuohy on the 16th day of September, 1891, the date of the execution of the mortgages, which conveyance, together with the mortgages, was duly recorded. The foregoing contains a chronological statement of the more important transactions involved in the case, irrespective of the fraud charged.

The more important allegations of frauds are: (1) The defendants herein, on or about June 6, 1891, agreed among themselves that with Bohannon, Boller, Madden, and Hummel they would organize a corporation to which the property should be sold; that Cox, Wood, and De Witt should act as promoters of said proposed corporation, represent to the public that they were the owners of the property to be sold, that the value thereof was $72,000, for which sum they would convey it to the corporation about to be formed; that defendant Tuohy should receive $36,000 thereof from the corporation, and that the residue of the purchase money should be received by the other defendants as a commission for acting as promoters; that this agreement was kept secret among the defendants, who held out to the world that Cox, Wood, and De Witt were owners of the property, and, to cheat and defraud the subscribers to said corporation, prepared and circulated the agreement (Exhibit B) which represented them as the owners, and that the value of the property was $72,000, and could not be bought for a less sum; that they well knew they were not the owners, and that their representations were false, and that the property was only worth $36,000; that the subscribers and stockholders knew nothing of their agreement to purchase at $36,000 from Tuohy until about November, 1892; that said defendants Wood and De Witt circulated the agreement for signatures, and that subscribers to the extent of 85 shares were fraudulent and false, and were obtained only for the purpose of causing the bona fide subscribers to believe they were genuine, and to induce others to subscribe, and, believing them to be genuine, others were induced to sign; that in fact 600 shares had not been subscribed for in good faith on the 1st of September, 1891, all of which defendants well knew, but, with intent to cheat and defraud the subscribers out of the sum of $10,000 paid in upon subscriptions, they represented that 674 shares had been subscribed, when in fact only 589 had been subscribed; that defendants paid nothing on the 25 shares subscribed by each of them, and that only $9,780 was paid in, which defendants appropriated to their own use; that they withheld all knowledge that Cox, Wood, and De Witt were to receive a commission of $36,000 from the subscribers, etc. (2) That, with a design to cheat and defraud the bona fide subscribers out of the sum of $36,000, defendants and a few others, on or about June 6, 1891, without the knowledge of the bona fide subscribers, met and organized the corporation, although it was understood and agreed by and between the parties to agreement B that the corporation should not be formed until September 1, 1891; that the object of sooner forming the corporation was to defraud the subscribers out of $36,000, and to enable themselves to be elected directors, that they might control and manage the corporation for their own purposes. The complaint then proceeds to charge that, with a view to defraud the subscribers out of the $36,000 aforesaid, the directors called a special meeting of the board, at which none of the subscribers were present, resolved to consummate the purchase of the lands and water rights, accept the deed thereof, and to execute the notes and mortgages for the purchase price, less $10,000, paid in cash, etc.; that most of the subscribers were nonresidents of Tulare county, and were not at Tulare city, the principal place of business of the corporation, and, believing the conduct of the corporation to be fair and honest, took stock in the corporation, and paid therefor as provided in agreement B. There are various other allegations of fraud going to support the main charge, to the effect that the value of the property was but $36,000, $10,000 of which has been paid, and that the defendants are seeking to defraud the bona fide stockholders out of the residue of the purchase money, and that the second note and mortgage are in fact held for the benefit of defendants Cox, Wood, and De Witt.

The first suggestion which presents itself to the mind upon a perusal of the complaint is that the plaintiff is seeking equity without doing equity. In other words, it has received a conveyance of property admitted to be of the value of $36,000, upon account of which it has paid $10,000, and given its notes and mortgages as security for the payment thereof, for the residue of the purchase price. It now seeks by this action to have these notes and mortgages set aside and annulled, without canceling the conveyance to it of the property, and without paying or offering to pay the value of the property which it has received. Manifestly, this cannot be permitted in a court of equity. Practically, it is an attempt to rescind so much of the contract as militates against the interest of the plaintiff, while claiming the benefit of that portion of it in its favor. As a precedent for such claim, we are referred to the case of Water Co. v. Flash, 97 Cal. 610, 32 Pac. 600. An examination of that case will show that it does not support the contention here. The germ of that case was that the defendants, promoters of a corporation, had by their agents falsely and fraudulently represented that 4,500 acres of land had been contracted for at $25 per acre, whereas in fact it had been contracted for at $5.05 per acre. The land was conveyed to the corporation at $25 per acre. The corporation or its stockholders had already paid a sum to the defendants in excess of the purchase price of $5.05 per acre, and had given its notes, secured by a mortgage, for the residue of the purchase price at $25 per acre, amounting to $75,000. The action was brought to cancel and annul a decree of foreclosure of the mortgage and the notes and mortgages, etc. Under these circumstances, the defendants having been paid more than was justly due them, it was held that a rescission of the sale by plaintiff was not necessary; and, as no injustice had been done to defendants, the decree, in accordance with the prayer of plaintiff's complaint, was upheld. Every complaint in an action should be founded upon a theory under which the plaintiff is entitled to recover, and should state all the facts essential to support such theory. Failing in these respects, it is radically defective, and does not state facts sufficient to constitute a cause of action. A party defrauded may rescind and restore within a reasonable time all of value which he has received under the contract, or he may affirm it and sue for damages. Gifford v. Carvill, 29 Cal. 590; Herrin v. Libbey, 36 Me. 357; Burton v. Stewart, 3 Wend. 239; Burbank v. Dennis, 101 Cal. 90, 35 Pac. 444. In the case last cited, this court held, in substance, that, where a promoter of a corporation has been guilty of fraud, the company may elect to set aside the contract or to recover the promoter's secret profits. This is not an action to recover the secret profits made by the defendants as promoters of the corporation. No accounting of such profits is sought. No rescission of the conveyance is averred or asked for. The theory of the complaint is: (1) That defendants were promoters of the corporation plaintiff. (2) As such promoters, they were guilty of fraudulent practices, whereby plaintiff was induced to purchase property for $72,000, which was only worth $36,000, and to pay therefor $10,000 in cash, and to give their notes secured by mortgages for the residue of $62,000. (3) That, these notes and mortgages being fraudulent, plaintiff may retain the property conveyed to it so worth $36,000, and maintain an equitable action for the cancellation of the notes and mortgages without further compensation for the property purchased. Conceding the facts in support of this theory to be well stated, they do not entitle plaintiff to recover. He who would rescind a contract must put the other party in as good a situation as he was before, otherwise he cannot do it. Chit. Cont. 276. And his complaint, framed with this object, must state facts showing that he has performed or offered to perform on his part every act necessary to thus place the defendant.

2. If he would confirm the fraudulent contract, and recover in damages for the fraud, he must so state the facts that the court can see that he is entitled to the relief demanded or to some specific and certain relief, or his complaint will be held bad on demurrer. In cases where an answer is filed, the court may, under section 580, Code Civ. Proc., grant "any relief consistent with the case made by the complaint and em-

braced within the issue." But we are not now dealing with such a case. Non constat that any answer will ever be interposed here, and the question arises as to the sufficiency of the complaint standing alone, and confronted by a demurrer—a case in which the demand of the complaint limits the relief; a case in which, if the complaint is adjudged sufficient, the sequence must follow that, in a court of equity a plaintiff who has been defrauded may take property worth $36,000 for $10,000, and leave the defendants to pay all taxes upon such property for five years, under their covenant so to do. In other words, that a plaintiff who has obtained property under a contract tainted with fraud on the part of the vendor may confirm such contract as to the benefit and repudiate its burdens. If to do so works injustice to the defendant, it cannot be done.

There are other objections to the complaint of equal importance, but the objection noticed is deemed fatal to the pleading, and the judgment appealed from should be affirmed.

We concur: VANCLIEF, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

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107 Cal. 258

## HOLT v. HOLT. (No. 15,676.)

(Supreme Court of California. May 23, 1895.)

FAILURE TO ENTER JUDGMENT.

In an action for divorce, where the jury returned a special verdict that the parties were not married, and the court thereupon ordered judgment for defendant, the failure of the clerk to enter it in the minute book of the court, and the fact that the trial judge was re-elected before it was so entered, do not affect the validity of the judgment.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

Action for divorce by Hallie Holt against Fred S. Holt, on the ground of cruelty. From a judgment entered for defendant on a special verdict, and from an order overruling a motion to vacate the same, plaintiff appeals. Affirmed.

Wal. J. Tuska and Beverly R. Hodghead, for appellant. W. W. Allen, for respondent.

BELCHER, C. This is an action for divorce, upon the ground of extreme cruelty. The answer denies, among other things, that the parties to the action ever intermarried, or that they ever were, or are, husband and wife. The cause came on regularly for trial on November 11, 1891, and a jury was impaneled to try the same. Witnesses were examined on both sides, and after argument by counsel the case was submitted to the jury on November 12th, upon the following special issues: "(1) Were the parties to this action married to each other? (2) If you say that the parties were married, has the defendant treated the plaintiff with extreme cruelty?" The jury rendered the following verdict: "Were the parties to this action married to each other? Answer. No." "Thereupon, on the said 12th day of November, 1891, in open court, the court orally gave and pronounced judgment in favor of the said defendant, that this action be dismissed." This order was entered by the clerk in the rough minutes of the court's proceedings on November 12th, but was not transcribed by him into the engrossed minute book of that day. No written findings were filed, and no judgment was entered in pursuance of this order. In October, 1893, the plaintiff moved the court that the cause be set down for trial. The motion came on regularly to be heard, and in support thereof the plaintiff read the pleadings in the action, and the minutes of the court as to the trial. The court thereupon denied the motion, and directed the clerk of the court to enter judgment in favor of the defendant nunc pro tunc as of November 12, 1891. A paper was then, on October 30, 1893, signed by the judge, and filed, setting out the facts, and that "the court approves and adopts the said verdict, and, as a conclusion of law, the said defendant is entitled to judgment for his costs, and the court hereby orders judgment to be entered accordingly as of the 12th day of November, 1891." Judgment was accordingly so entered, and from it the plaintiff appeals. In November, 1893, the plaintiff moved the court to vacate and set aside the judgment, findings, and decision filed October 30, 1893, upon the grounds (1) that the trial of the cause had not been completed at the time said judgment was entered; (2) that at the time the said judgment was entered, and the said findings made and filed, the term of office of the judge who tried the cause had expired, and his judicial powers relative to the trial thereof during his preceding term had ceased. After a hearing the court denied the motion, and from that order the plaintiff also appeals.

It appears that the judge before whom the case was tried, and before whom all of the proceedings under review were had, Hon. W. T. Wallace, was re-elected to the office of superior judge in 1892, and his new term of office commenced on the first Monday of January, 1893. And it is contended that the case had not been fully tried when the new term commenced, since no written findings approving and adopting the verdict of the jury had then been filed, and that thereafter the judge had no power to make findings or take any steps to complete the trial. In support of this position, counsel cite Connolly v. Ashworth, 98 Cal. 205, 33 Pac. 60, and Broder v. Conklin, 98 Cal. 360, 33 Pac. 211. The verdict of the jury to the effect that the parties to the action were not husband and wife, if approved and adopted by the court, was decisive of the action, and necessitated a judgment in favor of the defendant. No further findings were required. It is true, the action was an equitable one, and the verdict was only advisory; but it appears to have been regularly returned and entered in the minutes of the court, and thereupon the court orally ordered judgment to be entered thereon. This order necessarily included an approval and adoption of the verdict, and constituted a rendition of judgment in favor of the defendant. And when the order was made it became the duty of the clerk to transcribe it into the minute book of the court, and to enter the judgment as ordered. The failure of the clerk to do so was a failure to perform a ministerial duty which could afterwards be performed at his own instance, or by direction of the court, at any time. Estate of Cook, 77 Cal. 220, 17 Pac. 923, and 19 Pac. 431; Baker v. Brickell, 102 Cal. 620, 36 Pac. 950. It follows that, notwithstanding the judge of the court below was re-elected between the time of the trial and the completion of the record thereof, the proceedings complained of were authorized and proper.

The Connolly and Broder Cases, cited by appellant, are not in point. In each of those cases it was held that findings prepared and signed by the judge, but not filed until after his term of office had expired, could not be the basis of a valid judgment, because the "trial of a cause by the court is not concluded until the decision is filed with the clerk; and, when the term of office of the judge who tried the case expires before such decision is filed, the fact that it was signed by him, and ordered by his successor in office to be filed with the clerk, and was so filed, is not sufficient to sustain the judgment entered thereon." This is undoubtedly sound law, but it is not applicable to the facts of this case. The judgment and order appealed from should be affirmed.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

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107 Cal. 256

## PEOPLE v. MT. SHASTA MANUF'G CO.

(No. 15,774.)

(Supreme Court of California. May 22, 1895.)

VALIDITY OF INCORPORATION — MANUFACTURING COMPANY—POWER TO BUY RAILROADS.

The incorporation of a company to manufacture lumber and run a saw mill is not void because the articles state that it is formed in order to, among other things, buy, lease, sell, and otherwise deal in, railroads, tramways, and rights of way, on the ground that this involves an attempt to form a railroad corporation otherwise than as required by law; the provision in the articles merely referring to such railroads, tramways, and rights of way as might be required as parts of the manufacturing plant.

Department 2. Appeal from superior court, city and county of San Francisco; D. J. Murphy, Judge.

Quo warranto by the people of the state of California against the Mt. Shasta Manufacturing Company. From an order sustaining a demurrer to the complaint, and a refusal to allow plaintiff to amend, plaintiff appeals. Affirmed.

P. O. Chilstrom, Thos. V. Cator, and Atty. Gen. Fitzgerald, for appellant. James Alva Watt, for respondent.

TEMPLE, J. This is an information in the nature of a quo warranto, to have it adjudged that the defendant is exercising corporate functions without right, and to enjoin it from doing so. The complaint states that the defendant is doing business as a corporation; that it has a board of directors, a president, and a corporate seal; that it has capital stock, upon which it has levied an assessment, is transacting business in corporate form, and claims, in good faith, to be a corporation; that the corporators have executed, acknowledged, and filed articles of incorporation, which are not set out at large in the complaint. The articles of incorporation are executed in the manner, and are in substance and form, as required by the general provisions of the Code for the creation of private corporations, but it is contended that the articles are defective because one of the purposes for which it was formed is expressed as being "to buy, lease, sell, mortgage, and otherwise deal in * * * railroads, tramways, and rights of way; to buy, lease, sell, mortgage, operate, construct, and maintain railroads, tramways," etc., and the incorporation was not constituted as the Code requires railroad corporations to be. The general purpose for which the company was formed was to manufacture lumber and all articles made of wood; in other words, to own and run a saw mill. In such business it is frequently necessary to have tramways and railroads, as parts of the manufacturing plant. The articles in question would not authorize the corporation to buy, lease, or operate a railway for traffic. Perhaps it was not necessary to make special mention of this part of the manufacturing appliances, but such mention cannot vitiate the incorporation. Such an incorporation could not use the right of eminent domain to acquire rights of way. We think the court properly sustained the demurrer.

The court refused to allow the plaintiff to amend the complaint. This is generally a matter of absolute right, and, when it is refused, the court must be able to see that the complaint cannot be so amended as to state a good cause of action. This the court will not often be able to do, but I think it was properly so determined here. The judgment is affirmed.

We concur: HENSHAW, J.; McFARLAND, J.

(107 Cal. 262)

## TAYLOR v. HEARST. (No. 15,677.)[1]

(Supreme Court of California. May 23, 1895.)

ACTION FOR LIBEL — MITIGATION OF DAMAGES — MISTAKE—RETRACTION—NOMINAL DAMAGES—INSTRUCTIONS.

1. It is no defense that defendant did not mean to make the libelous charge against plaintiff, but intended to accuse somebody else.

2. A retraction made in the newspaper which published the libel may be given in evidence in mitigation of damages.

3. Where it was clearly established that a libelous publication was not made with ill will, it was not error to instruct the jury that punitive damages could not be awarded.

4. In an action for libel, damages may be recovered for injuries to the feelings, though they are not specially alleged or proved.

5. In an action for libel, the court cannot assume as matter of law that plaintiff is entitled to only nominal damages.

Commissioner's decision. Department 2. Appeal from superior court, city and county of San Francisco; Charles W. Slack, Judge.

Action by Joseph W. Taylor against W. R. Hearst for libel. From a judgment for defendant, plaintiff appeals. Reversed.

J. C. Bates, for appellant. W. W. Foote, for respondent.

BELCHER, C. The defendant, W. R. Hearst, was sole proprietor of the daily newspaper published in San Francisco and known as "The Examiner." On January 10, 1892, there appeared in that paper an article charging, in substance, that J. W. Taylor had a contract with the city of San Francisco to supply basalt blocks for paving streets, at the rate of $45 per 1,000, and that he and one Henry Barron, who had been appointed keeper of the corporation yard near the foot of Sixth street, and whose duties required him to keep track of material belonging to the street department, had conspired together to cheat and defraud the city by getting fraudulent receipts for blocks never delivered; that 34 fraudulent receipts were obtained for 34 loads of blocks not delivered, and that afterwards Taylor swore to and filed a demand for payment on his contract, including the 34 bogus loads; that steps were then taken to prosecute him for perjury, but it was found that the demand had been sworn to before a clerk of the board of supervisors not authorized to administer an oath, and so the only thing for the city to do was to keep Mr. Taylor's demand until the bogus 34 loads were eliminated from it. The defendant had no knowledge of this article before or at the time of its publication, but his attention was called to it, and four days later a correction thereof was published in the paper in the following words:

"A Correction.

"In an article which appeared in these columns on Sunday last referring to frauds on the public in connection with the furnishing basalt blocks to the city, the initials of J. N. Taylor were erroneously printed 'J. W.' J. W. Taylor, the contractor, had nothing to do with the transaction, and was in no way associated with Henry Barron, who was arrested at the same time as J. N. Taylor for conspiracy."

In April, 1892, plaintiff commenced this action, alleging in his complaint that he was then and had been for more than ten years engaged in the business of manufacturing and supplying basalt blocks to the city and county of San Francisco, and to various persons and corporations in the city; that the defendant was the sole proprietor and publisher of the newspaper named "The Examiner," which had a large and extensive circulation in the city and county of San Francisco and throughout the entire state of California; that on January 10, 1892, the defendant did falsely and maliciously publish in said newspaper of and concerning the plaintiff the article before referred to, a copy of which was annexed to the complaint as an exhibit, and "that by means of said false, malicious, and defamatory publication said defendant intended it to be believed and understood, and that it was generally understood by those who read said article in said newspaper, that this plaintiff had been and was guilty of the crime of stealing and thieving by the use of fraudulent receipts and swearing to false demands against the city and county, and it also was intended by said defendant that said article was to be understood and believed, and it was generally understood, that said plaintiff was dishonest in his business and occupation of contracting with the said city and county in furnishing basalt blocks, and that he merely escaped prosecution for the crime of perjury because the deputy clerk of the board of supervisors was not authorized to administer the oaths to the fraudulent demands"; and that by reason of said publication plaintiff had been greatly injured in his good name and reputation, to his damage in the sum of $10,000, for which he asked judgment.

The answer admits that defendant was the proprietor and publisher of "The Examiner," and that the said article was published therein on the 10th of January, 1892, but denies that he falsely or maliciously published the same of or concerning the plaintiff, and specifically denies all the other material averments of the complaint. It then alleges that the said charges were not made against the plaintiff, and were not intended to be considered or understood as charges against the plaintiff, but were made, and were intended to be so considered, against one J. N. Taylor, and that in the printing of said article the initials of said J. N. Taylor were printed J. W., and that as soon as said mistake was discovered a correction thereof was duly published in the news columns of the said paper in the words above set out.

The case was tried before a jury, and the verdict was in favor of the defendant. Judgment was thereupon entered that the plaintiff take nothing by the action, and that defendant recover his costs, amounting to the sum of $165.50. The plaintiff moved for a new trial, which was denied, and has appealed from the judgment and order.

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[1] Rehearing denied.

It was proved at the trial in defense of the action that there was a John N. Taylor who had had a contract with the city to furnish basalt blocks, and had presented a bill against the city for 207,004 basalt blocks, at $53 a thousand, which was sworn to by him; that the superintendent of streets deducted from the bill $349.80 on the ground that 6,600 of the blocks had not been furnished, and that there was a prosecution against Taylor for perjury, but the prosecution was dismissed because the oath was taken before the deputy clerk of the board of supervisors. It was also proved that the person who wrote the article complained of was directed by the managing editor of "The Examiner" to see the superintendent of streets, and get the actual facts as to the frauds that were being perpetrated upon the city in furnishing basalt blocks, and that he did so; and that by mistake, and without any malice towards the plaintiff, the middle initial of Taylor's name was printed "W" when it should have been "N." The only evidence introduced showing that any other persons who read the said article understood it as applying to the plaintiff, and the only evidence as to damage resulting from the publication, was that of the plaintiff himself, who testified: "I have suffered this much actual damage, that lots of my friends all over the county say: 'You are a pretty fellow; what are you going to do now? Are you going to San Quentin next?' I don't know that I have lost any money by it. I have lost a lot of credit by it."

The court refused to give to the jury any of the instructions asked by the plaintiff, but gave, among others, the following: (5) "The court further instructs you, as a matter of law, that the publication in question, being as to the plaintiff untrue and unprivileged, is libelous, and that the plaintiff is entitled to such compensatory damages as shall afford a reparation for all the injury which has naturally and proximately resulted from the publication; provided you find that the defendant meant to charge J. W. Taylor, the plaintiff, with the commission of the offenses contained in the publication, and that third persons understood that the person meant was J. W. Taylor, the plaintiff. The amount of these damages, if you find for the plaintiff, is to be determined by you in accordance with this rule, and it is within your power, under the circumstances of the case, to award the plaintiff nominal damages only." (6) "Under certain circumstances, the recovery may go beyond mere reparation or compensation, and the jury may award that which the law terms 'punitive' or 'exemplary' damages. To authorize such damages, however, it must appear from the circumstances of the case that the wrongdoer acted with a malicious purpose towards the person aggrieved, with a wicked and malignant intention to injure, and that the wrong was not the result of a mistake of fact, or the honest misapprehension as to either right or duty. From this statement you will see that 'punitive' or 'exemplary' damages cannot, as a matter of law, be awarded by you under the facts of this case." (7) "You are restricted to compensatory damages in the event that you find for the plaintiff, which I have already told you may be nominal." The plaintiff excepted to each of these instructions, and now assigns the giving of them as errors.

Libel is a false and unprivileged publication, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his business; and the proprietor of a newspaper in which a libel is published, though he had no knowledge of the publication at the time, is as responsible for it as he would have been if it had been done by him personally or under his direct supervision. To constitute libel there must be malice, actual or implied, on the part of the publisher. Actual malice exists when the publication is made through motives of ill will and with intent to injure or defame, and the law presumes malice when the article published is libelous per se. Such malice is called "malice in law," and it signifies a wrongful act intentionally done. Under our statute, in an action for libel, where the defendant has been guilty of malice, actual or presumed, "the jury, in addition to the actual damages, may give damages for the sake of example, and by way of punishing the defendant." Civ. Code, § 3294. The defendant may, however, prove any mitigating circumstances to reduce the amount of the damages (section 461, Code Civ. Proc.); and, among other things, he may prove that there was no malice in fact. But such proof is not sufficient to defeat the action or to prevent the plaintiff from recovering such damages as he has actually sustained by reason of the publication. Wilson v. Fitch, 41 Cal. 363; Lick v. Owen, 47 Cal. 252; Mowry v. Raabe, 89 Cal. 606, 27 Pac. 157; Childers v. Publishing Co. (Cal.) 38 Pac. 903. In the case last cited it is said: "Two classes of damages may be recovered in actions for libel, to wit, actual or compensatory damages and exemplary damages. Special damages, as a branch of actual damages, may be recovered when actual pecuniary loss has been sustained, and is specially pleaded. The remaining branch of actual damages embraces recovery for loss of reputation, shame, mortification, injury to feelings, etc.; and, while special damages must be alleged and proven, general damages for outrage to feelings and loss of reputation need not be alleged in detail, and may be recovered in the absence of actual proof, and to the amount that the jury estimates will fairly compensate plaintiff for the injury done. Wilson v. Fitch, 41 Cal. 386. Exemplary damages may be recovered when malice on the part of the defendant is established as a fact." The article here complained of was libelous per se. It charged J. W. Taylor with dishonesty and criminal conduct, and, according to plaintiff's undisputed testimony, must have been understood by his friends as applying to him. It is true it was made to apply to him by mistake, but that did not justify or excuse the publication. As said in the note to McAllister v. Press Co. (Mich.) 15 Am. St. Rep. 339, 43 N. W. 431, where the authorities on the subject of libel are very fully reviewed: "One who has published a libel on another cannot successfully resist the latter's action for redress by showing he did not intend to publish it, and that its publication was due to carelessness, inadvertence, or mistake. Hence it is not a sufficient defense that the publication of a libel resulted from an error in setting type." The "correction" or retraction published was properly pleaded and given in evidence, but it could operate only in mitigation of damages, and not as a full defense to the action. By instruction No. 5 the court told the jury that, the publication being untrue and libelous as to the plaintiff, he was entitled to such compensatory damages as would afford a reparation for all the injury which had naturally and proximately resulted from the publication; "provided you find that the defendant meant to charge J. W. Taylor, the plaintiff, with the offenses contained in the publication, and that third persons understood that the person meant was J. W. Taylor, the plaintiff." This was, in effect, telling the jury, and it must have been so understood, that unless the defendant meant to charge the plaintiff with the offenses contained in the publication, and third persons so understood it, the plaintiff was not entitled to recover compensatory damages for the injury he had sustained. The proviso attached to the instruction was erroneous. The publication did charge the plaintiff with offenses, and whether it did so by design, or was the result of carelessness in setting type, was a matter of no consequence, so far as the question of actual damages was involved.

It is claimed for appellant that instruction No. 6 was also erroneous, but we see in it no prejudicial error. It is true that in an action for libel the question whether there was such malice on the part of the defendant as would entitle the plaintiff to recover exemplary or punitive damages is ordinarily one of fact for the jury. But in this case it was clearly established that the publication was not made by reason of any ill will against the plaintiff or with any intention to injure or defame him. That being so, the plaintiff was not entitled to exemplary or punitive damages, and the court did not err in so telling the jury. One of the instructions asked by the plaintiff and refused was in these words: "In considering the amount of damages to be awarded, you may consider the injury to the plaintiff's feelings." This instruction should have been given. It was not necessary that damages resulting from injury to feelings be specially alleged, or that proof of such injury be specially given. It is claimed for respondent that the plaintiff was entitled at most to only nominal damages, and that in such case the verdict should not be disturbed, citing the maxim, "de minimis non curat lex." The same point was made in Lick v. Owen, supra, and the court said: "The rule may possibly be as stated in actions ex contractu, when, for the technical breach of a contract, the court can see that, as matter of law, the plaintiff would be entitled to only nominal damages. But in an action for libel the question of damages is for the jury, and the court cannot assume, as matter of law, that the plaintiff is entitled to only nominal damages." The judgment and order should be reversed, and the cause remanded for a new trial.

We concur: SEARLS, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed, and the cause remanded for a new trial.

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107 Cal. 274

## CLANCY v. PLOVER. (No. 15,832.)

(Supreme Court of California. May 23, 1895.)

MECHANIC'S LIEN—SUIT TO FORECLOSE—ATTORNEY'S FEES—PLEADING AND PROOF.

1. In an action to foreclose a mechanic's lien, attorney's fees will be fixed by the court, irrespective of any averment in the complaint, and hence a failure to determine an issue raised on such an averment is not error.

2. An allegation in the complaint as to what are reasonable attorney's fees being unnecessary, the failure of plaintiff to produce evidence thereon will not affect the validity of the judgment awarding such fees.

3. In an action to foreclose a mechanic's lien, it appeared that plaintiff sublet a portion of the work he had contracted to do upon a structure located on defendant's land to one S., and, when the work was completed, gave S. an order on defendant, which the latter refused to pay, whereupon S. filed a lien, and obtained judgment against defendant for the amount due him, together with attorney's fees and costs. *Held*, that under Code Civ. Proc. § 1193, making it the duty of a contractor to protect the owner's property from any liens of subcontractors or material men, defendant was entitled to a credit for the full amount which he had paid S. under such judgment.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; Eugene R. Garber, Judge.

Action by John C. Clancy against Patrick Plover to foreclose a mechanic's lien. From a judgment for plaintiff, defendant appeals. Modified.

Lloyd & Wood, for appellant. A. Morgenthal, for respondent.

BRITT, C. Under a contract with appellant, the respondent did, and caused to be done, the work of painting a building and other structures situated on a parcel of land, the property of appellant, in the city and county of San Francisco. The work was completed March 9, 1891. For this appellant owed respondent $703, of which sum $345 was paid, and respondent brought this action to enforce a lien asserted by him against the premises where the work was done for the unpaid balance of $358. His complaint contains an allegation that an amount specified is a reasonable allowance for attorney's fees in the action, which averment defendant denied. The court made no finding on this issue. Respondent sublet a portion of the work to one Stapleton, agreeing to pay him therefor the sum of $100. After the entire job was completed, respondent gave to Stapleton a written order on appellant, requesting the latter to pay Stapleton such sum of $100 out of the contract price then due respondent, but appellant refused to pay such order on presentation thereof. Stapleton filed in the recorder's office a claim of lien against the property for the amount due him from respondent, and, after appellant's refusal to pay said order, commenced an action to foreclose the lien, in which suit Clancy and Plover, the parties here, were made defendants. Plover, the owner, contested the case, but Clancy made default. Stapleton recovered judgment in that action for said sum of $100, together with $3.25, cost of recording his claim of lien, $50, attorney's fees, and $75.50, costs of suit,—in all $228.75,—to satisfy which Plover's premises were ordered to be sold. Plover then paid the amount of that judgment, and claimed credit in the present action for the whole of the sum so paid. But the court below allowed him credit for only $100, the amount of Stapleton's original demand, and rendered judgment in respondent's favor for $258, together with costs, and $40 for attorney's fees. Plover appeals from the judgment and an order denying a motion for new trial.

1. It has been established by the decisions of this court that no allegation need be inserted in a complaint for the foreclosure of a mechanic's lien relative to the claim of the plaintiff for attorney's fees; that an allegation on that subject, if made, does not bind even the party making it. Mulcahy v. Buckley, 100 Cal. 490, 35 Pac. 144; Insurance Co. v. Fisher (Cal.) 39 Pac. 760. Therefore, the issue made by the pleadings here on that question was immaterial, and the failure of the court to find upon the same was not error. It is said that there was no evidence before the court as to the value of respondent's counsel fee. Since the above-cited cases determine that the attorney's fee is to be fixed by the court irrespective of any averment in the complaint, and that such averment is immaterial, it is not perceived why the plaintiff must necessarily prove what he need not allege. The court is not bound by testimony touching the value of attorney's fees in suits of this nature, the limitation on its action being that it shall not abuse the discretion committed to it by the statute (section 1195, Code Civ. Proc.). We think, therefore, that the failure of the plaintiff to produce evidence on that question does not affect the validity of the judgment awarding such fees. See the opinion of Harrison, J., in Watson v. Sutro, 103 Cal. 172, 37 Pac. 201; Rapp v. Gold Co., 74 Cal. 532, 16 Pac. 325. No doubt, such evidence is admissible, and may properly be considered by the court; but its absence in the record on appeal is not a circumstance requiring a reversal, unless it should appear from an inspection of the record, and without evidence to sustain it, that the fee fixed by the court is unreasonable, which is not claimed in this instance.

2. It was the duty of the respondent to protect the appellant's property against any lien preferred by subcontractors, laborers, or material men employed by him. Code Civ. Proc. § 1193. Under the same section the owner was entitled to deduct from any amount due to respondent the amount of the Stapleton judgment and costs; and this, of course, includes the attorney's fees recovered by Stapleton. Respondent could have prevented the accumulation of such expenses by the simple expedient of paying the sum due to Stapleton. It was his debt, and not appellant's. Covell v. Washburn, 91 Cal. 560, 27 Pac. 859. It does not affect the case that an order was given upon appellant for the amount of Stapleton's claim before that action was begun, and that he refused payment of the order. The respondent could not split his demand, and, by assignment of a portion thereof, impose upon appellant, without his consent, the legal obligation of paying the assignee. Thomas v. Mining Co., 54 Cal. 578; Grain v. Aldrich, 38 Cal. 514. Respondent refers us to Adams v. Burbank, 103 Cal. 646, 37 Pac. 640. But that case differed from this in the important feature that there the owner had promised to pay the contractor's orders, and wrongfully violated his agreement, while here there was no such promise. It results that the judgment must be modified, as of the date of its entry, by striking therefrom the sum of $128.75, the excess of Stapleton's judgment paid by appellant above the sum allowed

as a credit to appellant in this action, and, as so modified, the judgment and the order denying a new trial should be affirmed.

We concur: VANCLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is modified by striking therefrom the sum of $128.75, as of the date of entry thereof, and, as so modified, the judgment and the order denying a new trial are affirmed.

107 Cal. 276

## HECKMAN v. SWETT et al. (No. 15,795.)

(Supreme Court of California. May 24, 1895.)

Salmon Fisheries—Regulation.

1. Act 1859, "to regulate salmon fisheries on Eel river" (section 2), gives owners of land fronting on such river the exclusive right to seine on their own water fronts, and provides that the bed of such river, lying between the lines of the official survey and extreme low-water mark, shall be deemed the water front of the landowner whose lands border on the river or run nearest thereto. *Held*, that one whose lines border on the south side of the river had the exclusive right to fish on the south side of an island opposite his land, where the channel between his land and the island is above low-water mark, and below high-water mark.

2. Pen. Code, §§ 634–636, regulating the times and mode of catching salmon, does not repeal provisions of Act 1859, entitled "An act to regulate salmon fisheries on Eel river" (section 2), giving persons whose lands border on the river the exclusive right to fish off the shore opposite their land.

Department 1. Appeal from superior court, Humboldt county; G. W. Hunter, Judge.

Action by J. Heckman against John A Swett and others, to quiet title to a fishing privilege, and for an injunction. From a judgment for plaintiff, defendants appeal Modified.

E. W. Wilson and P. F. Hart, for appellants John W. Turner, for respondent.

HARRISON, J. In addition to the facts presented upon the former appeal in this case (99 Cal. 303, 33 Pac. 1099), the court has now found that the change in the channel of Eel river left no portion of the lands included in surveys 36 and 42 on the north side of the river, and that at low tide the bed of the old channel is dry in places between the island and the plaintiff's land. It was held upon the former appeal that the land of the defendants is bounded by the high-water mark on the south side of the river, and that the southerly line of the plaintiff's land is the high-water mark on the north side of the river; that, as the low-water mark is on the south side of the island, and the old channel of the river between the island and the plaintiff's land is above low-water mark, the plaintiff is within the provisions of section 2 of the act of 1859 (St. 1859, p. 298), which gives to the owner of lands fronting on the river "the exclusive right and privilege of casting, hauling, and landing seines and nets on their own water front," and provides that for the purposes of that act "all bars and the bed of said river lying between the lines of the official survey and extreme low-water mark shall be deemed and held to be the water front of the landowner whose lines border on said river, or run nearest thereto." The court below, therefore, could render no other judgment than that the plaintiff was entitled to the exclusive right of casting nets and seines for salmon on the south side of the island in front of his lands, and enjoining the defendants from interfering therewith, or making claim thereto.

Counsel in the briefs filed herein have discussed at considerable length the question of the title to the lands in the bed of Eel river, and also the power of the state to alienate these lands; but, as these questions are not involved in the case, it is unnecessary to express any opinion thereon. The case presents for determination simply the question of the respective rights of the parties under the aforesaid statute of 1859 to exercise a right of casting seines and nets for salmon in the waters of Eel river, fronting upon the lands of the plaintiff. The state, by virtue of its sovereignty, has authority to regulate fisheries within its borders, and may prescribe the places as well as the times in which fish may be taken, and may make exclusive grants of fisheries in designated waters, so far as the same do not impair private rights already vested. Gould, Waters, § 189; Com. v. Vincent, 108 Mass. 447; Wooley v. Campbell, 37 N. J. Law, 163; People v. Doxtater, 75

Hun, 472, 27 N. Y. Supp. 481. By the aforesaid act of 1859 this power was exercised, in reference to the mode and times of catching salmon in Eel river, and the exercise of the right was limited to the owner of lands fronting upon the river. By the same act the owner was given a right of action against any other person who should cast or haul a net or seine in the waters of the river fronting on his land. So long as this law remains in force, the right thus conferred is appurtenant to the land, and its invasion by another is the subject of judicial cognizance. "If the plaintiff has a right to the use and enjoyment of the property, that is sufficient to have his right protected against invasion by another." Moore v. Waterworks, 68 Cal. 150, 8 Pac. 816.

These provisions of the act of 1859, which form the basis of the plaintiff's right of action, are not repealed by sections 634–636, Pen. Code. These sections are intended merely to regulate the times and mode of catching salmon. Within the times and mode thus prescribed, the owners of the lands fronting on Eel river may still exercise the right of catching salmon which was conferred upon them by the act of 1859. The judgment gives to the plaintiff the exclusive right of casting nets in Eel river, irrespective of the purposes for which they are cast, and enjoins the defendants from casting any nets in the waters fronting upon the plaintiff's land. The title of the act of 1859 is "to regulate salmon fisheries on Eel river," and the act itself purports to confer a right of action in favor of the owner of lands fronting thereon, only against those who shall "cast, haul, or draw any seine or net on Eel river for the purpose of catching salmon." The judgment is broader than is justified by the statute, and should be modified by limiting it in this respect. The court below is directed to make a modification of its judgment in accordance with this opinion, and as so modified the judgment will stand affirmed. The costs of the appeal are to be borne by the appellant.

We concur: GAROUTTE, J; VAN FLEET, J.

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5 Cal. Unrep. 38

## GRIMES v. LINSCOTT et al. (No. 15,780.)

(Supreme Court of California. May 24, 1895.)

BILL FOR INJUNCTION—AMBIGUITY.

A bill to restrain public officers from filling up a ditch along the side of a road, which fails to show whether the road is public or private, whether the ditch or water course is artificial or natural, or occupied a part of the road or was outside of it, is insufficient.

Commissioners' decision. Department 1. Appeal from superior court, Santa Cruz county; J. H. Logan, Judge.

Action by Michael Grimes against James A. Linscott and others for an injunction. From a judgment for defendants, plaintiff appeals. Affirmed.

Julius Lee, for appellant. Carl E. Lindsey, for respondents.

BELCHER, C. This action was brought to obtain an injunction restraining the defendants, who were the supervisors of Santa Cruz county, from filling up, or causing to be filled up, a ditch or water course along the side of the Carlton road, in that county. It is alleged in the complaint that the plaintiff is the owner of a tract of land bounded on the northeasterly side by the "Carlton Road," so called, and that along the southerly side of a portion of said road, which bounds plaintiff's land, there is, and has been for more than 20 years, a ditch or water course, through which a stream of water has been accustomed to flow in an easterly direction to a natural stream called the "Casserly Creek," and thence down said creek to the Pajaro river; that the defendants, acting as the board of supervisors for said county, at their regular meeting on the 7th day of June, 1893, passed and caused to be entered in their minutes an order that said ditch or water course be filled up to a level with the roadbed of said road, so as to completely stop and prevent the water from flowing therein and passing off as it had been accustomed to do, and that defendants, unless restrained from so doing, will proceed to fill up said ditch or water course, pursuant to said order; that the necessary and inevitable consequence and effect of such filling up will and must be to cause the water which otherwise would flow in said ditch or water course to be diverted to and upon the lands of plaintiff, and to overflow, spread out, and stand upon the same, which, but for such filling up, it would not do, to his great, constant, continuing, increasing, and irreparable damage and injury; and that the sole and only purpose and object of said defendants in so filling up said ditch or water course is, confessedly, to divert the waters therefrom, and to cause them to flow upon plaintiff's land, and not because such filling up is necessary, or deemed to be necessary, for the proper protection or repairing of said road. A general and special demurrer to the complaint was interposed and sustained. Plaintiff declined to amend, and thereupon judgment was entered that he take nothing by his action, from which he appeals.

The only question is as to the sufficiency of the complaint. We think the demurrer was properly sustained upon the ground of ambiguity and uncertainty. Assuming that the complaint was sufficient in other respects, still it cannot be ascertained therefrom whether the Carlton road was a public or private road, nor whether the ditch or water course was an artificial or natural water course, nor whether it occupied a part of the road or was outside of its limits. But pleadings are to be construed most strongly against the pleader, and, so construing the complaint, it must be held that the road was a public highway, and the ditch was an artificial water course, constructed upon and within the limits of the road. If such were the facts, the plaintiff had acquired and could acquire no right by prescription to have the ditch maintained, and the defendants, as the board of supervisors, had a right to order it filled up, and to cause the work ordered to be done. The reasons which prompted such action cannot be inquired into in this proceeding. The judgment should be affirmed.

We concur: VANCLIEF, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

(107 Cal. 298)

## ADAMS v. HELBING. (No. 15,453.)[1]

(Supreme Court of California. May 24, 1895.)

FORCIBLE ENTRY AND DETAINER—SUFFICIENCY OF FINDINGS—REVIEW ON APPEAL.

1. Code Civ. Proc. § 1172, provides that, on a trial for forcible entry and detainer, plaintiff need only show, in addition to the forcible entry or detainer, that he was in actual and peaceable possession at the time of the entry, or was entitled to possession at the time of the detainer. *Held*, that where the complaint charged both forcible entry and detainer, and there was a finding that plaintiff was the owner and in possession of the premises at the time of the entry, since this is sufficient to support a judgment for forcible detainer, a judgment for plaintiff would not be reversed for lack of a finding that plaintiff was in actual and peaceable possession at the time of the entry.

2. The sufficiency of evidence will not be passed upon when the only specifications are brief statements as to what the evidence shows.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

Action of forcible entry and detainer by Frank P. Adams against Louis Helbing. Judgment for plaintiff. From an order denying his motion for a new trial, defendant appeals. Affirmed.

Thos. E. Curran, for appellant. Stafford & Stafford, for respondent.

BELCHER, C. This is an action of forcible entry and detainer. The plaintiff had judgment, and the defendant appeals from an order denying his motion for a new trial.

It is alleged in the complaint that on the 20th day of August, 1889, the plaintiff was, and had been for five days previous thereto, the owner and in the actual possession of a certain building situated on the south side of McAllister street, in San Francisco, and known as "No. 1911 McAllister Street," and that on the day named, "while the plaintiff was in peaceable and actual possession thereof, the defendant, unlawfully, violently, and without cause, ejected the plaintiff and his tenant of said building then and there being, and took possession of, and has ever since held possession of, said building, forcibly and against the will of plaintiff." The answer "denies that the said plaintiff had been for five days previous to August 20, 1889, or is now, or ever has been, in the actual or any other possession of the premises in said second amended complaint described; denies that on the 20th day of August, 1889, or at any time, or at all, upon said building and premises, while plaintiff was in the peaceable or actual possession thereof, or otherwise, or at all, the defendant, unlawfully or violently, or without cause, ejected plaintiff or his tenant of said building, or took possession of, or has ever since held possession of, said building, forcibly or against the will of plaintiff, or otherwise, except as hereinafter set forth." The answer then alleges that, prior to the commencement of the action, plaintiff and defendant entered into a contract for the erection and construction of a building on the land of the plaintiff, on the south side of McAllister street, and known as "No. 1911 McAllister Street," in San Francisco and "that on or about the 20th day of August, 1889, while defendant was engaged in the erection and construction of said building in pursuance of said contract, and before the completion of said building, the said plaintiff unlawfully and illegally entered in and upon the said building, and attempted to eject the defendant and oust him from the possession thereof, and prevent the performance of the said contract by said defendant; that defendant was compelled to and did oust and eject the said plaintiff from the said premises, using no more force than was reasonably necessary." The court found that "on August 15, 1889, the plaintiff was owner and in possession of the real estate and premises designated as 'No. 1911 McAllister Street,' in the city and county of San Francisco, and was such owner and in possession thereof on the 20th day of the same month, on which last-mentioned day the defendant, by force and violence, removed the plaintiff from the possession thereof, and from thence hitherto has, by force and menace, and against the will of the plaintiff, kept the plaintiff out of the possession of said premises, and in like manner still detains the possession of said premises from the plaintiff."

1. The notice of motion for new trial stated that the motion would be made upon the ground of the insufficiency of the evidence to justify the decision, and that it was against law. It is claimed that the decision was against law, because, to maintain the action, it was necessary for the plaintiff to show that he was in the actual and peaceable possession of the house at the time of the alleged entry and ouster, and that the findings are silent as to whether such was the fact or not. It has been several times held that when a court renders judgment, but fails to find upon a material issue, the decision is against law, and may be reviewed on appeal from an order granting or refusing a new trial. Knight v. Roche, 56 Cal. 15; Spotts v. Hanley, 85 Cal. 168, 24 Pac. 738; Brison v.

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[1] Rehearing denied.

Brison, 90 Cal. 328, 27 Pac. 186. The question then is, were the findings in this case so defective as to make the decision one against law? The Code of Civil Procedure contains the following provisions:

"Sec. 1159. Every person is guilty of a forcible entry who * * * by any kind of violence or circumstance of terror, enters upon or into any real property.

"Sec. 1160. Every person is guilty of a forcible detainer who * * * by force, or by menaces and threats of violence, unlawfully holds and keeps the possession of any real property, whether the same was acquired forcibly or otherwise."

Sec. 1172. On the trial of any proceeding for any forcible entry or forcible detainer, the plaintiff shall only be required to show, in addition to the forcible entry or forcible detainer complained of, that he was peaceably in the actual possession at the time of the forcible entry, or was entitled to the possession at the time of the forcible detainer."

The complaint charges both a forcible entry and forcible detainer, and the finding that the plaintiff was the owner and in possession of the property should be construed, we think, to import that he was in the actual and peaceable possession thereof at the time he was forcibly removed therefrom, and certainly that he "was entitled to the possession at the time of the forcible detainer." But, conceding that the finding was insufficient to support a judgment for forcible entry, still, as it was sufficient to support a judgment for forcible detainer, the order appealed from cannot be reversed on this ground; for, as said in Brison v. Brison, supra: "If the complaint, as in the present instance, sets forth two or more grounds for relief, either of which is sufficient to support a judgment in favor of the plaintiff, a finding upon one of such issues is sufficient, and a failure to find upon the other does not constitute a mistrial, or render the decision 'against law.'"

2. It is also claimed that the findings were not justified by the evidence, but this point cannot be considered. The only specifications attached to the statement are found under the head of "Specification of Errors," and are brief statements of what "the evidence shows." Such specifications are insufficient. "It is not necessary that the specifications should state what the evidence does show. Such a statement is insufficient if standing alone, and surplusage if joined to a proper specification." Haynes, New Trial & App. § 150. And see Spotts v. Hanley, supra, where the above language is quoted and approved. The order appealed from should be affirmed.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

107 Cal. 309

## O'HARA v. O'BRIEN et al. (No. 15,821.)

(Supreme Court of California. May 25, 1895.)

LOCATION OF SECTION CORNER — RESURVEY — BOUNDARY—AGREEMENT BY OWNERS —EVIDENCE.

1. In locating the northwest corner of a section of which the northeast corner can be located, it is error, instead of merely following the calls of the division survey of the township, to start from a subsection corner in an adjoining township subdivided under a different survey, and thence run a mile and a half, only connecting the subdivision surveys of the two townships by assuming that their section corner stones on the township line coincide.

2. The fact that an agent, authorized to attend to the leasing of his principal's land, for the purpose of showing a tenant the line between the land of his principal and the adjoining owner, the adjoining owner not being with him at the time, located a line, measuring from lines to which other owners had plowed, on which the adjoining owner subsequently built a fence, does not estop the principal from denying that the line so staked is the true line, in that it was a conventional division line, agreed on between them.

Commissioners' decision. Department 1. Appeal from superior court, Contra Costa county; Joseph P. Jones, Judge.

Action by James O'Hara against P. O'Brien and others. From an order denying plaintiff a new trial, he appeals. Reversed.

Rhodes & Barston, for appellant. John B. Mhoon, for respondents.

VANCLIEF, C. Action to recover possession of the N. E. ¼ of section No. 1 of township No. 1 N., range 2 E., Mt. Diablo base and meridian, situate in Contra Costa county. The complaint being in the ordinary form and unverified, the answer denies generally each and every allegation thereof, and then specially alleges adverse possession of the demanded premises by the defendants during a period of more than five years before the commencement of the action, and that the action is barred by the statute of limitations. The cause was tried by a jury, which returned a general verdict in favor of defendants, whereupon judgment was rendered accordingly; and plaintiff brings this appeal from an order denying his motion for a new trial, made upon a statement of the case.

Upon the trial it clearly appeared, and was admitted by both parties, that the plaintiff owned and was entitled to the possession of said northeast quarter, and that defendants owned the northwest quarter of said section, according to the survey and subdivision thereof by the government of the United States; and, consequently, that the controversy related solely to the location of the line between the northeast quarter and the northwest quarter of said section, and involved the question of title to only a strip of land running north and south across the north half of the section, containing about 7½ acres, which lies wholly within the northeast quarter, if that quarter, according to government survey, is 40 chains square, or even if the north and south boundary lines thereof extend 40 chains west from the east boundary of the section; and there is no dispute as to the true location of the east boundary line of the section. The plaintiff employed E. C. Brown, county surveyor of Contra Costa county, to determine the true location, according to government survey, of the dividing line between the northeast and northwest quarters of the section, who testified as a witness for plaintiff that he had procured from the United States land office a copy of the original field notes of United States Deputy Surveyor L. Ransom, who had surveyed township No. 1 north in 1851, and also a copy of the field notes of E. H. Dyer, who, as United States deputy surveyor, had subdivided said township into sections and quarter sections in 1861; that by those field notes he found and identified the northeast and southeast corners of section 1 of said township by means of witness trees, etc., called for in said field notes; but could find none of the monuments, witness trees, or other landmarks referred to in those field notes by which to locate or identify the northwest or southwest corners of that section, or any of the interior corners of the quarter sections thereof. Nor was he able to find any of the monuments, witness trees, or landmarks called for in the field notes of the government surveys of sections 2, 3, or 4 of said township, by which to identify any corner of the last-named sections, or of any quarter section thereof. But it clearly appears that by starting at either the northeast or southeast corner of section 1, both of which were identified and fixed, and following the courses and distances called for in the field notes of either Ransom or Dyer, he could have located both the northwest and southwest corners of section 1, and also all the corners of the quarter sections thereof. He did not think it proper, however, to adopt this method, but, for the purpose of finding the northwest corner of section 1 in township 1, he commenced at the corner common to four quarter sections in township No. 2, which had been subdivided in 1872 by United States Deputy Surveyor Wackenruder, viz. the northeast and southeast quarters of section 34, and the northwest and southwest quarters of section 35, township No. 2. This common corner he identified by a witness tree called for by Wackenruder's field notes. Thence he ran south half a mile to a crossing of fences, which he established as the corner common to sections 34 and 35 of township 2, and which he assumed to be identical with the corner common to sections 2 and 3 of township 1. Thence he ran east 40.04 chains to a fence which the defendant claimed to be his west line; and thence continued east 40 chains, and accepted this point as the northwest corner of section 1, township 1. The result is that, instead of being 80 chains in length, as called for by the field notes of Ransom and Dyer, the north line of section 1, township 1, is only 78.78 chains in length. To reach this result the county surveyor started at a point in township 2 established by Wackenruder, and thence ran a mile and a half by courses and distances, only connecting the subdivision survey of township 2 by Wackenruder with that of the subdivision of township 1 by Dyer, assuming that the section corners of the two townships on the township line coincided, and that certain fences of the farmers were on the section and quarter section lines; whereas he should have started at the known and established southeast corner of section 1, from which Dyer started; and thence run north 80 chains to the known northeast corner of township 1, which coincides with northeast corner of section 1 of same township. This line is admitted to be the true east boundary of section 1. After reaching the northeast corner of section 1, Dyer's field notes read substantially as follows: "Thence west on true line between sections 1 and 36, forty chains, set post for quarter sec. cor., with mound, pits, and trench, as per instructions, 80 chains, set post for cor. to secs. 1, 2, 35, and 36, with mound, pits and trench. * * * Thence south on true line bet. secs. 1 and 2, forty chains, set post for quarter sec. cor. with mound, pits, and trench, 80 chains to corner of secs. 1 and 2,"—thus showing that section 1 is a full section, each of the four boundary lines thereof being 80 chains in length, and all the angles being right angles. The county surveyor also located the southwest corner of section 1 at a crossing of fences upon the unwarrantable assumption that those fences and other fences in that vicinity had been located on true section and quarter section lines. The inevitable consequence of this was to reduce the length of the south boundary line of section 1 to 78.26 chains.

Assuming that by the aforesaid methods the county surveyor correctly located the northwest and southwest corners of the section, he properly divided it into quarter sections, whereby the disputed strip of land was found to be wholly within the plaintiff's northeast quarter; and, on the other hand, if the methods pursued by the county surveyor were wrong and liable to lead to erroneous conclusions, as I think they were (Chapman v. Polack, 70 Cal. 487, 11 Pac. 764; Gordon v. Booker, 97 Cal. 586, 32 Pac. 593; Blackburn v. Nelson, 100 Cal. 336, 34 Pac. 775), and the north and south boundary lines of the section extended from the fixed east corners west 80 chains, as indicated by Dyer's field notes, the true division line between the northeast and northwest quarters would be considerably west of the location of it by the county surveyor, and consequently considerably west of the west line of the strip of land in question; so that in either case the verdict of the jury to the effect that the strip of land in question is not in plaintiff's northeast quarter, or that plaintiff was not the owner of it, was not justified by the evidence. The evidence strongly tends to prove that the strip is within the northeast quarter, and there is no substantial conflict of evidence on this point. Gordon v. Booker, supra; Wise v. Burton, 73 Cal. 166, 14 Pac. 678. Rejecting the methods by which the county surveyor determined the location of the west corners of the section, still his uncontradicted testimony, in connection with the field notes of Ransom and Dyer, as to the monuments he found and as to those he failed to find, is sufficient, prima facie, to prove that the strip of land in question lies within the boundaries of the northeast quarter of section 1, according to the government survey thereof, and it is admitted that the plaintiff is the owner of that quarter section as surveyed by the government, unless he has lost a part of it by adverse possession of defendants, or by estoppel. The mode of survey adopted by the county surveyor is considered here, and held to have been incorrect in response to the objections to it by respondents' counsel; so that in case of a resurvey for purposes of a new trial the errors of the county surveyor may be avoided. It is possible that, upon such resurvey, additional monuments called for by the field notes of Ransom or Dyer may be discovered, and, if so, they must control the calls for courses and distances; but, if no additional monuments are discovered, the west corners of the section, and the interior corners and lines of the quarter sections, must be found by means of the courses and distances called for in the field notes of Ransom and Dyer, from the established and known eastern corners, as above indicated; it being well settled that where no monuments, natural or artificial, called for by a description or by the field notes of a survey, can be found, the courses and distances called for must control. Gordon v. Brooker, 97 Cal. 586, 32 Pac. 593.

2. Assuming that the strip of land in question lies wholly within the northeast quarter of section 1, I think the evidence insufficient to justify a verdict to the effect that defendants acquired title to any part thereof by adverse possession. A patent for the north half of section 1, township 1, was issued by the United States to the railroad company May 31, 1870, and the railroad company conveyed the northwest quarter of that section to defendant O'Brien on October 18, 1872, described as the northwest quarter "according to the United States survey," and as "containing 160 acres." On February 12, 1874, the railroad company conveyed to Charles McLaughlin all its rights in and to the northeast quarter of said section, and on October 11, 1892, all the rights and title of McLaughlin passed to plaintiff. In the first place, the evidence shows that the controversy has always related solely to the location of the division line between the northeast and northwest quarters of section 1, and that defendants have never claimed title to any land in the northeast quarter, but have expressly disclaimed title to any part of that quarter as surveyed by the government. The testimony of plaintiff to this effect was not disputed, and was corroborated by the conduct of O'Brien during the survey by Brown. In the second place, the defendants never inclosed the land in question. They built a fence on what they claimed to be the division line running north from the south line of the north half of the section to a point about 20 feet south of the north line of the section. As to when this fence was built the evidence is indefinite and uncertain, but strongly tends to prove that it was built within five years next before the commencement of this action. In the third place, there is no evidence that defendants ever paid any taxes on any part of the land in question. The only answer to this point by counsel for respondents is that adverse possession had continued for a period of five years before the amendment of section 325, Code Civ. Proc., in 1878, requiring payment of taxes as a requisite condition to the acquisition of title by adverse possession. But of this there is no substantial evidence.

3. It is contended for respondents that the line upon which they built the fence was a conventional division line, agreed upon by McLaughlin and the defendants; and the grounds of this contention are that in 1885 or 1886, while Capt. Lamberton was agent for McLaughlin for the purpose of superintending the lands of the latter, and leasing the same, he staked the line upon which the defendants afterwards built their said fence, and caused a furrow to be plowed upon that line by McLaughlin's tenants of the northeast quarter of section 1. But the evidence shows that Lamberton had no authority from his principal to fix or settle boundary lines, and that he never pretended to have such authority; that he staked the line merely for the purpose of showing McLaughlin's tenants how far west they should plow; that he did not consult the defendants in regard to the location of the line, nor represent to them that it was the true division line; that the only means he employed to locate that line was measuring with a tapeline from certain lines to which farmers in that vicinity had plowed; and that he regarded his staking of the line as "guesswork." None of the defendants were present with him while he was staking the line, or ever said anything to him about the matter. Surely, there was no agreement between Lamberton and defendants as to the location of the division line between the northeast and northwest quarters of section 1, even if Lamberton had authority to make such agreement. Nor does the evidence show any acts or representations of

Lamberton by which McLaughlin or his vendee should be estopped from denying that the line staked by Lamberton is the true line. I think the order should be reversed, and a new trial granted.

We concur: BELCHER, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order is reversed, and a new trial granted.

(107 Cal. 334)

## CALIFORNIA ACADEMY OF SCIENCES v. CITY AND COUNTY OF SAN FRANCISCO et al. (No. 15,593.)[1]

(Supreme Court of California. May 25, 1895.)

DEDICATION—WHAT CONSTITUTES PUBLIC USE.

A dedication of property to a corporation of limited membership, formed purely for scientific purposes, is not for a "public use," and, therefore, a dedication to such a corporation of unoccupied city land by a board of supervisors, authorized to dedicate such land for a "public use" only, under St. 1868, p. 379, is invalid.

Department 1. Appeal from superior court, city and county of San Francisco; John F. Finn, Judge.

Ejectment by the California Academy of Sciences against the city and county of San Francisco and others. There was a judgment for defendants, and plaintiff appeals. Affirmed.

Holladay & Holladay, for appellant. H. T. Creswell, for respondents.

HARRISON, J. The land claimed by the plaintiff is embraced within the pueblo claim of the city of San Francisco, which was confirmed to the city by the decree of the circuit court, May 18, 1865. It is situate west of the charter line of 1851, and is within that portion of the city and county commonly known as outside lands, and is a portion of the land referred to in the act of congress of March 8, 1866 (14 Stat. 4). After the passage of this act, the supervisors passed an ordinance known as "Order No. 800," which was ratified by the legislature by an act approved March 27, 1868 (St. 1868, p. 379). By the first section of this ordinance the board of supervisors were authorized and directed to devise and adopt a plan for the subdivision of these outside lands into blocks and lots, "and to select and set apart for public uses such lots and portions of said land as said board may deem necessary." The second section provided that, after the adoption of the plan, the board of supervisors should cause a map of the lands to be made according to this plan, "and upon such map shall be designated the lots and portions of land set apart for public uses, and the particular use for which each lot or portion of land shall have been set apart." Provision was also made for hearing applications for changes in the plan, and making alterations therein, and delineating them upon the map, and that, when such alterations should have been delineated, the map should become the official map, and the portions of land thereon designated for public purposes should be deemed to have been dedicated as such. By virtue of the provisions of this ordinance, the committee on outside lands prepared a map, which they presented to the board of supervisors, and accompanied the same with a report showing the various selections of lots and portions of land set apart for public uses, and designating one of these selections to be "for the use of the Academy of Sciences." Before the final adoption of the map, the lot involved in this action was, upon the recommendation of the committee on outside lands, substituted for the one that had been originally reported by them, and was delineated thereon, and the map was by ordinance declared to be the official map, and all the lots and lands designated on said map were declared to be set apart and dedicated to the uses for which they had been designated on the map. Upon this map the words, "Academy of Sciences" were placed within the space corresponding to the description of the lot involved herein. Other acts were performed by the supervisors indicative of an intention to set apart the lot in question for public uses, and upon other official maps, subsequently made, the lot is marked "Academy of Sciences." By virtue of these acts of the city and its officers, the plaintiff claims the right to the possession of the lot. The plaintiff was never in the occupancy of the lot, but in December, 1887, a resolution was passed by its trustees, and entered in its records, "accepting the dedication" of the lot, and a copy of this resolution was presented to the board of supervisors, and filed with its clerk. In February, 1888, the supervisors passed a resolution granting the use of the lot to the board of education, and thereafter this latter body erected a schoolhouse thereon, and is still occupying the lot. The plaintiff was incorporated June 27, 1853, under the laws of this state for the incorporation of scientific associations, by the corporate name of "California Academy of Natural Sciences," and on February 24, 1871, was reincorporated under the same laws by the name of "California Academy of Sciences." There is no corporation, association, or institution in this state by the name of "Academy of Sciences" other than the plaintiff herein. The record does not disclose the method by which membership is had in the plaintiff, but it is stated that it has no capital stock, and that during its whole existence it has derived its support from the monthly dues of its members, and from sums paid for life memberships in the society, and from voluntary contributions. It also appears that it is managed by a board of trustees, and that the services of its officers are rendered without compensation. The court below rendered judgment in favor of the defendants upon the ground that the plaintiff is a private corporation, and that the board of supervisors had no power to set apart the land in question for any other than public purposes. From this judgment, and an order denying a new trial, the plaintiff has appealed.

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[1] Rehearing denied.

At the time of the adoption of the official map under order No. 800, and the placing thereon upon the lot in question the words "Academy of Sciences," the corporate name of the plaintiff was "California Academy of Natural Sciences," and there is nothing in the record to indicate that the board of supervisors intended by this delineation to designate the plaintiff, or whether it was its intention to set apart the lot for an "Academy of Sciences" that might thereafter be created or organized for public purposes. It is unnecessary, however, to determine what was the intention of the board of supervisors, as, unless that body had the power to set apart the land for the plaintiff, none of its acts could effect that purpose. The decree of the circuit court confirming the pueblo claim of the city declared that the confirmation was in trust for the benefit of the lot holders under grants from the pueblo, town, or city of San Francisco, or other competent authority, and as to any residue, "in trust for the use and benefit of the inhabitants of the city." By an act of July 1, 1864 (13 Stat. 333), congress had released to the city all claim to land within its corporate limits, as defined in the charter of 1851, and on March 8, 1866, the United States (14 Stat. 4) confirmed the claim of the city, and granted to it its interest in said lands, upon the trust that it should be disposed of and conveyed by the city to parties in bona fide actual possession thereof on the passage of the act, "except such parcels thereof as may be reserved and set apart by ordinance of said city for public uses." Order No. 800, which was validated by the legislature, conferred upon the supervisors the power to set apart and delineate upon the official map lots or portions of land for public uses only, and only the lots which should be designated on the map for public uses are dedicated as such. It must be observed that, at the time this ordinance was validated by the legislature, the selection and designation of lots upon the map had not been made, and the act of the legislature in validating the ordinance is only a letter of authority to the supervisors to make the selection and designation according to its terms, and is not to be construed as a ratification or adoption of an act already performed by them. As, therefore, there was no authority in the board of supervisors to select or designate upon the map of the lands any lot or portion of land for any other than a public purpose, it follows that the lots or portions of land so selected and designated are limited to a public purpose, and can be claimed or kept only for such public purpose. Any selection or designation upon the map by the supervisors for any other than a public purpose would be an act without authority, and could confer no right in the land so designated. The plaintiff herein is a private corporation, with limited membership, and can in no respect be regarded as invested with the care of the public, or subject to public control. The laws under which it is incorporated clearly indicate that it is essentially private, and has none of the characteristics of a public corporation. It is undoubtedly the fact that the public derives a benefit from its labors and its contributions to science, but this is merely an incidental result of its organization and existence, and it is not the essential object for which it was incorporated. The public derives similar benefit from the organization and labors of any association for scientific or sociological investigation, whether incorporated or not; but this fact does not render such organization a public body, or its object a public purpose, within the meaning of the ordinance and statutes referred to. The judgment and order are affirmed.

We concur: GAROUTTE, J.; VAN FLEET, J.

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5 Cal. Unrep. 40

## FIRST NAT. BANK OF SOUTH BEND v. KELSO. (No. 15,816.)

(Supreme Court of California. May 25, 1895.)

APPEAL—ASSIGNMENT OF ERROR.

An assignment of error, on motion for a new trial, that the "evidence is insufficient to justify the third finding of fact, in that there is no evidence to show that there is due and owing plaintiff" a certain sum, is insufficient to question on appeal the sufficiency of the evidence to sustain such finding that no part of the principal has been paid except a certain sum.

Department 1. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Action by the First National Bank of South Bend against John Kelso. There was a judgment for plaintiff, and, on defendant's motion for a new trial being denied, he appeals. Affirmed.

Edward L. Foster, for appellant. Reel B. Perry, for respondent.

PER CURIAM. Action on a promissory note for the sum of $2,000, besides interest, dated April 1, 1893, payable three months after date, executed by appellant in favor of the respondent. The complaint was filed October 12, 1893, and contained, among other allegations, an averment to the effect that no part of the principal sum or the interest mentioned in the note had been paid. This allegation was denied in the answer, and the defendant also pleaded that the time of payment had been extended by written agreement of the parties. It appears from the bill of exceptions that the controverted fact at the trial was whether the plaintiff had given to the defendant the extension of time pleaded by him in his answer. The court found in favor of the plaintiff, and rendered judgment in his favor. The defendant moved for a new trial, which was denied, and he has appealed.

One of the grounds urged in the motion for a new trial is the insufficiency of evidence to sustain the decision of the court, and the specification of this insufficiency is as follows: "The evidence is insufficient to justify the third finding of fact, in that there is not sufficient evidence to show that there is due and owing plaintiff from defendant the sum of $2,000, together with interest thereon from July 1, 1893, at the rate of ten per cent. per annum." The third finding of fact is as follows: "That no part of the principal sum of said note, or of the interest thereon, has ever been paid, save and except the sum of fifty dollars on account of interest; and that there is due and owing plaintiff from defendant the sum of $2,000, together with interest thereon from July 1, 1893, at the rate of ten per cent. per annum." Upon the appeal herein counsel for the appellant makes no other contention than that there was no evidence in support of the finding of the court that the note had not been paid. The appellant did not, however, in the bill of exceptions, specify this as one of the particulars in which the evidence was insufficient to justify the decision, and for that reason he cannot now be heard in support of his contention. The assignment of error is limited to the latter part of the third finding, and does not question that portion thereof which finds, "that no part of the principal sum of said note, or of the interest thereon, has ever been paid, save and except the sum of fifty dollars on account of interest." The judgment and order are affirmed.

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(107 Cal. 291)

## WOOD et al. v. BLANEY. (No. 15,737.)[1]

(Supreme Court of California. May 24, 1895.)

ESTOPPEL—FRAUDULENT REPRESENTATIONS — LIABILITY OF AGENT.

1. Where an agent procures his principal's approval to a contract of sale by telling him that he has received the cash deposit provided for in the contract, he will, under Code Civ. Proc. § 1962, subd. 3, be estopped from showing that he did not receive the deposit in cash, but in a note of the vendee.

2. Where a vendor's agent receives from the vendee a cash deposit, to be held by him till the happening of a certain condition, after the happening of the condition and rescission of the contract he continues to hold the deposit as agent of the vendor, and is liable for its conversion.

Commissioners' decision. Department 1. Appeal from superior court, Santa Clara county; W. G. Lorigan, Judge.

Action by T. Wood and another against Charles D. Blaney. From a judgment for defendant, and an order denying a new trial, plaintiffs appeal. Reversed.

W. C. Kennedy, for appellants. Wilcox & Patton, for respondent.

SEARLS, C. This is an action to recover $500, alleged to have been received by defendant, as the broker and agent of plaintiffs, in the sale of certain real estate, and converted to his own use. The cause was tried by the court, and written findings filed, upon which judgment was entered in favor of the defendant. Plaintiffs appeal from the judgment and from an order denying their motion for a new trial.

The testimony and findings show that plaintiffs were the owners of a 44-acre tract of land lying near San Jose, in the county of Santa Clara, and, being desirous of selling the same, commissioned and employed the defendant, Blaney, who was doing business as a real-estate broker under the name and style of Charles D. Blaney & Co., to make such sale at the price of $16,000. On the 5th day of February, 1891, Blaney found a purchaser for said premises at the agreed price in one Charles H. Sinclair, of San Francisco, and, as agent of plaintiffs, Blaney entered into a written contract with said Sinclair for the sale to him of said premises for the price of $16,000, payable as follows: $500 down, the receipt whereof was acknowledged in the contract; $1,000 in 20 days; $4,500 in 60 days; and the balance upon mortgage payable at certain specified dates, with interest, etc. Blaney was to furnish an abstract of title to the property within 10 days, and within 10 days thereafter Sinclair was to accept the title as good, or object to the same as not good. If the title was found good, Sinclair was to complete the deferred payments as per the contract, or forfeit all deposits; but, should the title not be found good, all deposits were to be returned to Sinclair, and the contract avoided. The deposits of $500 and $1,000 were to remain in the hands of Blaney & Co. until title was shown to be good, etc. The contract was signed by Charles D. Blaney & Co. (who were described in the instrument as agents of the owners) and by Sinclair. A day or two after making the agreement, Blaney presented it to the plaintiffs for their written approval, who thereupon asked Blaney if he had taken the deposit of $500 in coin, to which the latter responded that he had, and thereupon plaintiffs indorsed upon such contract their written approval of the same. Blaney did not in fact receive $500 in coin from Sinclair, as specified in the agreement and as represented by him to the plaintiffs, but took from Sinclair his promissory note for $500, payable to him, the said Blaney, at 30 days from February 5, 1891. The title was found good. Before the expiration of the 20 days fixed for the payment of the $1,000, an extension of the time of such payment for 15 days was mutually agreed upon between the plaintiffs and Sinclair. Sinclair made default in all the payments. Subsequent to such default he sought to make other and different terms with plaintiffs, but they, having learned that his financial standing was bad, refused to make any other or further terms with him, and in April, 1891, he, the said Sinclair, went into voluntary insolvency, and the $500 note so given by him to Blaney became worthless. Plaintiffs, soon after the failure of Sinclair to consummate his agreement, sold the property in question to a third party for $16,000. Neither plaintiffs nor Sinclair made any tender of performance of the contract; that is to say, Sinclair did not tender payment and plaintiffs did not tender a deed or offer to do so, but said contract was abandoned by plaintiffs and Sinclair. The $500 so acknowledged as having been paid is the identical sum of money averred to have been converted to his own use by defendant, and to recover which this action is brought. Plaintiffs demanded from defendant said sum of $500 before suit brought, which he refused to pay. The court found also that plaintiffs did not suffer any damage or injury by reason of the failure of Sinclair to complete his contract, or by reason of Blaney's taking said note of Sinclair instead of coin, or by reason of said Blaney's asserting at the time of the approval by plaintiffs of said contract that he had received $500 in coin. At the trial the court permitted the defendant, against the objection of plaintiffs, to contradict the written contract, and his declaration to plaintiffs that he had received upon the agreement for a sale the sum of $500 cash, and to testify that he did not in fact receive any money from the purchaser, etc. This ruling is assigned as error. Several errors are also predicated upon the insufficiency of the evidence in support of various findings, as well as error of law in the decision of the court, contained in the conclusion of law that the defendant was entitled to a judgment. These alleged errors all proceed upon the theory that the defendant was estopped by the contract of sale and by his declarations from denying that he had in fact received the sum of $500 on account of the said sale, and they may be considered together.

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[1] Rehearing denied.

Subdivision 3 of section 1962 of the Code of Civil Procedure, among conclusive presumptions, declares that: "Whenever a party has, by his own declaration, act or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act or omission, be permitted to falsify it." Bigelow, in his work on Estoppel (4th Ed.) at page 552, in discussing the elements essential to an estoppel in pais by conduct, lays down the following rule: "(1) There must have been a false representation or a concealment of material facts. (2) The representation must have been made with knowledge, actual or virtual, of the facts. (3) The party to whom it was made must have been ignorant, actually and permissibly, of the truth of the matter. (4) It must have been made with the intention, actual or virtual, that the other party should act upon it. (5) The other party must have been induced to act upon it." Pickard v. Sears, 6 Adol. & E. 469; Stephens v. Baird, 9 Cow. 274; Canal Co. v. Hathaway, 8 Wend. 480; Dezell v. Odell, 3 Hill, 215; Dresbach v. Minnis, 45 Cal. 223; Bleven v. Freer, 10 Cal. 172; Martin v. Zellerbach, 38 Cal. 300; Appeal of Wright, 99 Pa. St. 425. The facts of this case bring it squarely within the rule as above enunciated. Defendant, Blaney, virtually admitted, and the court found, that he falsely represented to plaintiffs that he had received $500 as a deposit on account of the sale, when he had taken what proved to be a worthless note. He had full knowledge of the falsity of the statement. Plaintiffs were ignorant of the facts, and, relying upon the statement as true, were induced thereby to approve the contract precisely as defendant intended they should do. Under such circumstances defendant was and is in morals, law, and equity bound to make good his statement, and estopped, independent of all considerations of agency, from showing its falsity to the injury of plaintiffs. The late case of Myers v. Byars (Ala.) 12 South. 430, is in point. Briefly stated, the facts were: In an action to recover $1,000 for money had and received, it appeared that one Landrum had sued a lottery company to recover a prize of $5,000, and plaintiff had intervened in the action, claiming as against Landrum a part of the prize. Defendant, who was the attorney of Landrum, agreed that in case plaintiff would withdraw his intervention he would hold $1,000 of the prize money to be collected, subject to a contest between plaintiff and Landrum in the courts, and to be paid to plaintiff in the event of his recovery. When plaintiff brought the action it was held that defendant was estopped to deny the fact that he had the money which had been paid over to him. Like considerations apply here, and defendant should not have been permitted to deny his former statement that he had received and held the $500. Respondent contends, however, that conceding all this, still the plaintiffs were not entitled to recover, for the reason that the contract of sale was rescinded, and defendant, being required by the written contract to hold the money until the title was found good, became and was upon the abandonment of the contract the agent of Sinclair, the vendee, and liable to him therefor. We think this contention cannot be sustained. The evidence and findings alike show that defendant was employed by plaintiffs to sell the land. As their agent, he contracted for the sale, and its terms, as is shown by the written agreement. It was for them, and as their agent, that he professed to have received the $500, and to have acknowledged its receipt from Sinclair. Concede that by the terms of the agreement he was to hold the deposit until the title was found good, or even until the payment of $4,500 fell due. All of those things had transpired long before the written demand upon him in evidence made August 10, 1891, or the later demand of the plaintiffs admitted at the trial to have been made upon him November 2, 1891. Defendant owed no duty to Sinclair. If the contract was abandoned, and the latter was entitled to recover back his deposit, less the damage plaintiffs had sustained by reason of its breach, it was against the plaintiffs that he was entitled to recover, and not against their agent, the defendant. Whether or not Sinclair was entitled to recover from the plaintiffs, and, if yea, how much, or whether or not the plaintiffs were gainers or losers by the transaction, were questions that did not concern him. Bogart v. Crosby, 80 Cal. 195, 22 Pac. 84, and cases there cited. In Phelps v. Brown, 95 Cal. 572, 30 Pac. 774, the recovery was had upon the ground that the defendants were in fact the agents of the plaintiff, who was a vendee, and who had made default. The judgment and order appealed from should be reversed, and a new trial ordered.

We concur: VANCLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, and a new trial ordered.

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(107 Cal. 282)

## RAUER v. BRODER et al. (No. 15,855.)[1]

(Supreme Court of California. May 24, 1895.)

ACTION ON NOTE—EVIDENCE—PRESENTATION FOR PAYMENT.

1. Proof of the execution and indorsement of a note is not necessary where the allegations to that effect are not denied in the answer.

2. Under Civ. Code, § 10, providing that the time within which any act provided by law is to be done shall be computed by excluding the first and including the last day, a note dated September 1, 1890, payable 60 days after date, is due October 31, 1890, and, in order to bind the indorser, must, in the absence of excuse, be presented on that day, as required by Civ. Code, § 3131, subd. 5.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Action by J. J. Rauer against Robert Broder, W. H. Sigourney, and others on a note. From a judgment for plaintiff, W. H. Sigourney appeals. Reversed.

Bull & Cleary and A. W. Crandall, for appellant. F. A. Berlin and Edward J. McCutchen, for respondent.

SEARLS, C. This is an action on a promissory note dated September 1, 1890, made by Robert Broder, for $2,880, payable 60 days after date, without grace, with interest at 6 per cent. per annum, to W. H. Sigourney, or order, "due at the bank of Visalia of Herrell & Son." Robert Broder, the maker of the note, made default. Defendant W. H. Sigourney answered, and a trial was had before the court without the intervention of a jury, and judgment entered in favor of plaintiff and against said defendants, from which judgment, and from an order denying his motion for a new trial, defendant Sigourney appeals.

The first point made by the appellant is that there was no sufficient evidence of the execution of the note by Robert Broder, the alleged maker thereof, or of its indorsement by Sigourney or Charles H. Wood. A copy of the note is set out in the complaint, with the indorsements thereon, and it is specifically averred therein that it was made by Robert Broder, indorsed by Sigourney and Wood before maturity, and by the American Bank & Trust Company. None of these averments are denied in the answer except the indorsement by the American Bank & Trust Company, as to which last-mentioned indorsement there was proof. As to the others, no evidence was necessary. The only important contention in the case relates to the sufficiency of the demand upon the maker, and notice of dishonor to defendant Signourney as an indorser. As before stated, the note was dated September 1, 1890, and was payable 60 days after date. "The time within which any act provided by law is to be done is computed by excluding the first day and including the last, unless the last day is a holiday, and then it is also excluded." Civ. Code, § 10. There are no days of grace allowed in this state. Id. § 3181. Defendant Sigourney was an indorser before maturity of the promissory note, and, not having waived demand and notice, it was essential to his liability that such demand should have been made upon the very day upon which the note fell due, which was on Friday, October 31, 1890. The demand not having been made upon the maker of the note until Saturday, November 1, 1890, was one day too late (subdivision 5, § 3131, Civ. Code), and, no excuse therefor having been claimed or proven, the effect was to discharge defendant Sigourney from his liability as an indorser. It follows that defendant's motion for a nonsuit should have been granted, and that the finding of the court below "that at maturity the said note was duly presented to said Robert Broder (the maker), and payment thereof demanded," etc., is wholly unsupported by the evidence. The judgment and order appealed from should be reversed, and the cause remanded for such action as may be consistent with this opinion.

We concur: BRITT, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, and the cause remanded for such action as may be consistent with this opinion.

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[1] Rehearing denied.

107 Cal. 327

## UNION INS. CO. OF CITY OF SAN FRANCISCO v. AMERICAN FIRE INS. CO. OF CITY OF NEW YORK. (No. 15,755.)

(Supreme Court of California. May 25, 1895.)

CONTRACT OF REINSURANCE—WHEN TAKES EFFECT.

A reinsurer is not liable to the insurer for a loss which, unknown to either party, occurred before the reinsurance was effected, where the parties contracted with reference to a custom that reinsurance took effect from the time when it was granted.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Action by the Union Insurance Company of the city of San Francisco against the American Fire Insurance Company of the city of New York to enforce a contract of reinsurance. From a judgment for defendant, plaintiff appeals. Affirmed.

Carter P. Pomeroy, for appellant. Van Ness & Redman, for respondent.

SEARLS, C. This action was brought to enforce a contract of reinsurance entered into by the parties hereto on the 6th day of June, 1889. The cause was tried by the court without a jury upon the amended complaint and answer thereto, and upon an agreed statement of facts. Written findings were filed, and judgment entered thereon in favor of defendant, from which judgment plaintiff within 60 days next after the rendition thereof appealed. The agreed statement of facts upon which the cause was tried, after stating that the plaintiff, on May 24, 1889, insured certain property of the Seattle Lumber & Commercial Company in the sum of $4,000 against loss or damage by fire, contains the following: "(3) That subsequent to the said insurance of the said property, and on, to wit, June 6, 1889, and between 3:15 and 4 p. m., the said property so insured as aforesaid was destroyed by fire, by reason of which said destruction of said property the said Seattle Lumber & Commercial Company lost and was damaged in a sum in excess of four thousand dollars. (4) That on said June 6, 1889, but subsequent to the destruction of said property as aforesaid, the plaintiff notified defendant, at the office of defendant in the city and county of San Francisco, California, of its said insurance upon said property, and requested of and from defendant reinsurance thereon in the sum of one thousand dollars; whereupon defendant agreed to and did reinsure plaintiff thereon in said sum, and did agree to issue to it a policy of reinsurance in the usual form, and for the premium usually chargeable upon risks of the character assumed. That at the time of said application and agreement neither plaintiff nor defendant knew of the prior destruction of said property." The question presented under the pleadings and stipulated facts is simply this: Did the defendant, under its agreement of reinsurance, contract to indemnify plaintiff against loss and liability for and during its original contract of insurance, or was the undertaking of defendant to indemnify plaintiff against such loss as might thereafter occur? "Insurance is a contract whereby one undertakes to indemnify another against loss, damage, or liability arising from an unknown or contingent event." Civ. Code, § 2527. "A contract of reinsurance is one by which an insurer procures a third person to insure him against loss or liability by reason of such original insurance." Civ. Code, § 2646. "A reinsurance is presumed to be a contract of indemnity against liability, and not merely against damage." Civ. Code, § 2648. "When an insurer finds it prudent or convenient to protect himself from loss by reason of any liability he has assumed under a policy, he may contract with another to relieve him from that liability, and take it upon himself. This is to reinsure; and by the contract the reinsurer, except as to the matter of premium, which may be more or less than that paid on the original policy, as the parties may agree, undertakes, with reference to the first insurer, what the first insurer undertakes with reference to the insured, and subject to like rights, duties, and obligations." May, Ins. (3d Ed.) § 9. Section 2531, Civ. Code, provides that "any contingent or unknown event, whether past or future, which may damnify a person having an insurable interest, or create a liability against him, may be insured against." Section 2587 provides, among other things, that: "A policy of insurance must specify: (1) The parties between whom the contract is made. * * * (5) The risks insured against; and, (6) the period during which the insurance is to continue." In the present case, as will be seen by the agreed statement, no policy in fact issued, and the theory urged by appellant is that the reinsurance was for and during the entire term of the original insurance, and covered any unknown loss which might have occurred within said term, prior to the application for and granting of the reinsurance. Respondent, on the other hand, claims that the undertaking of the defendant was to indemnify plaintiff against such loss and liability as might occur from and after the granting of the reinsurance. The contract, according to the stipulation, was that "defendant agreed to and did reinsure plaintiff in said sum ($1,000), and did agree to issue to it a policy of reinsurance in the usual form, and for the premium usually chargeable upon risks of the character assumed." The general rule is that a policy, if delivered, takes effect from its date, unless it be otherwise stated, or unless there is evidence of a contrary intent. If the premium be paid, and the policy be not delivered till afterwards, the policy takes effect by relation as of its date, even though a loss intervenes. May, Ins. § 400; Russ v. Insurance Co., 23 N. Y. 516; Whitaker v. Insurance Co., 29 Barb. 312; Lightbody v. Insurance Co., 23 Wend. 18; City of Davenport v. Peoria M. & F. Ins. Co., 17 Iowa, 276. It is said: "The circumstances and intent of the parties are to control." May, Ins. § 240. The same author, continuing, adds: "And where the policy was in fact a reinsurance, and was for a year, but specifying no time when the year was to begin, it was held that it began from the date of the prior policy, though that was some months prior to the issue of the latter policy;" citing as authority the case of Philadelphia Life Ins. Co. v. American L. & H. Ins. Co., 23 Pa. St. 65. Referring to the case cited, it appears that on the 24th of February, 1851, the American L. & H. Ins. Co. insured the life of one Maxwell Nusbaum for $2,500 for one year, with the privilege of another year. On the 31st day of May, 1851, the insurers obtained an insurance of $1,000 of their risk from the Philadelphia Life Insurance Company for the term of one year, but the time when the year was to begin or end was not stated. It appeared that Nusbaum had gone to California, and had lost his life at a fire in San Francisco, May 4, 1851, which fact was unknown to the parties in Philadelphia, where the insurance was had, when the second policy issued. The court, in holding the reinsurer liable, placed its decision upon the circumstance that, while the policy of reinsurance was for one year, and did not state the date at which the risk was to commence, yet, as the reinsurers charged one whole year's premium, while the original policy had then only say nine months remaining, it indicated an intention to reinsure from the date of the original policy. Lawrie, J., said: "The contract and the circumstances express themselves in seeming contradiction of each other, and our duty is to make them harmonize by construction. We cannot alter the facts to suit an inference drawn from the mere words of the policy, but we must suit the inference to the facts. Without the circumstances, we would draw one inference as to the intention of the parties; with them, we must draw a different one. The fact that the reinsurance was for one year, on a risk running for one year from the 24th February, and in consideration of a proportional share of the premium as from that date, settles the question, and starts the year of the reinsurance from that date." In the present case we find no circumstance indicating the mutual intention of the parties to give to their contract a retrospective effect. The stipulated facts show that at all the times mentioned it was the custom among fire insurance companies doing business upon the Pacific coast granting reinsurance to other fire insurance companies to charge and collect premiums as and from the date of reinsurance, and to write their policies so as to cover the reinsured company from the date upon which the reinsurance would be granted. Both plaintiff and defendant were fire insurance companies doing business in San Francisco, and may be presumed to be familiar with these customs, and, in the absence of a showing to the contrary, to have contracted with reference to them. Indeed, plaintiff alleges in effect that its contract with defendant was subject to the customs in vogue and understood by insurance men, when it avers that defendant "did agree to and did reinsure plaintiff thereon in said sum, and did agree to issue to it a policy of reinsurance in the usual form, and for the premium usually chargeable upon risks of the character assumed." Where there is a known usage of trade, persons carrying on that trade are held to have contracted in reference to the usage (unless the contrary appears), and the usage forms a part of the contract. Brown v. Howard, 1 Cal. 423; Taylor v. Castle, 42 Cal. 367; Auzerais v. Naglee, 74 Cal. 60, 15 Pac. 371.

Without pursuing the authorities further, we are of opinion:

1. Where the exact time of the commencement and termination of the risk are specified in the policy, or, if no policy has been written, in the contract, such specification governs.

2. Where no time has been expressly indicated, the circumstances of the case will be considered for the purpose of determining it.

3. If there are no circumstances indicating the intention of the parties, and no time is specified in the contract, the risk will be deemed to have commenced at the date of the contract.

4. In the case last mentioned, if before the contract of insurance is made the property has ceased to exist, although unknown to the parties, the risk never attaches.

In consonance with these views of the law, we are of opinion the judgment appealed from should be affirmed.

We concur: BRITT, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

107 Cal. 317

## REDINGTON v. PACIFIC POSTAL TELEGRAPH CABLE CO. (No. 15,695.)

(Supreme Court of California. May 25, 1895.)

ACTION AGAINST TELEGRAPH COMPANY—INCORRECT TRANSMISSION OF MESSAGE—NEGLIGENCE—EVIDENCE.

1. In an action against a telegraph company for failure to correctly transmit an unrepeated message, it appeared that the plaintiff delivered to defendant a message directed to an officer, requiring him to levy on property to the amount of "nineteen hundred and three dollars." In sending the message the company omitted the syllable

"teen" in the first word, making it read "nine" instead of "nineteen." The message blanks of defendant in terms limited its responsibility to the cost of transmission, unless the message was repeated. The plaintiff called but one witness, an expert electrician, who had served 21 years as a telegraph operator, who gave it as his opinion that owing to a rest of one to three seconds which would occur between the first syllable of the word "nineteen" and the balance of the message, if the current had ceased to flow, the omitted syllable could not have been lost without the receiving operator's knowledge, if he was competent. *Held*, that the evidence was sufficient to sustain a finding of gross negligence on defendant's part, making it liable for the damage sustained.

2. In an action against a telegraph company for incorrectly transmitting a message, it is not error to exclude testimony as to the amount of business of the office from which the message was sent, offered to show that an operator of the highest capacity was not called for there, when the evidence offered does not show the amounts collected on the individual messages handled.

3. Where a witness for plaintiff has testified, on cross-examination, to facts not called for by anything in his examination in chief, he cannot be contradicted in regard thereto.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

Action by W. P. Redington against the Pacific Postal Telegraph Cable Company for failure to correctly transmit a message. Judgment for plaintiff, from which, and an order denying its motion for a new trial, defendant appeals. Affirmed.

Lloyd & Wood, for appellant. Chickering, Thomas & Gregory, for respondent.

SEARLS, C. This is an action to recover damages for the failure of the defendant (a telegraph company) to correctly transmit an unrepeated telegraphic message. Plaintiff had judgment for $555 and costs, from which judgment, and from an order denying its motion for a new trial, defendant appeals. The case is this: The defendant is a telegraph company, engaged in transmitting and receiving messages for hire by telegraph over its lines, one of which extends from San Francisco to Visalia, in the county of Tulare, state of California. On the 28th day of March, 1890, plaintiff caused a message to be delivered to defendant at San Francisco for transmission to Visalia, directed to D. G. Overall, sheriff of the county of Tulare, directing said sheriff to attach the property of Woodruff and Dobson under a writ of attachment issued out of the superior court of the city and county of San Francisco, in an action in which the plaintiff herein was plaintiff and Woodruff and Dobson were defendants, which said writ was set out in the message, and commanded the sheriff to attach sufficient property of the defendants therein to satisfy plaintiff's demand for "nineteen hundred and three dollars," etc. The writ was in the usual form. The said message was transmitted to Visalia, and delivered to said sheriff, but when delivered the word "nineteen" in said writ was changed and altered so that it read "nine," thus causing the writ to read $903 instead of $1,903. The writ was duly levied for $903, and before the mistake was discovered other writs of attachment were levied upon the same property. The total receipts upon the sale of the property of the attachment debtors, over and above the sum of $903 and costs, was the sum of $555, which plaintiff would have received in addition to $903 had the message been correctly transmitted. The said message was not repeated. Plaintiff, within 30 days after sending, duly notified defendant of his loss, and demanded satisfaction therefor. The message was upon the usual blank of defendant, and was preceded by the following printed agreement or notice: "All messages taken by this company subject to the following terms: To guard against mistakes, the sender of a message should order it repeated; that is, telegraphed back to the originating office. For repeating one-half the regular rate is charged in addition. And it is agreed between the sender of the following message and this company that said company shall not be liable for mistakes or delays in the transmission or delivery, or for nondelivery, of any unrepeated message, whether happening by negligence of its servants or otherwise, beyond the amount received for sending the same; nor for mistakes or delays in the transmission or delivery, or for nondelivery, of any repeated message beyond 50 times the sum received for sending the same, unless specially insured; nor in any case for delays arising from unavoidable interruptions in the working of their lines, or for errors in cipher or obscure messages. And this company is hereby made the agents of the sender, without liability, to forward any message over the lines of other company, when necessary, to reach its destination. Correctness of the transmission of messages to any point on the lines of this company can be insured by contract in writing, stating agreed amount of risks, and payment of premium thereon at the following rates, in addition to the usual charge for repeated messages, viz.: One per cent. for any distance not exceeding 1,000 miles, and two per cent. for any greater distance. No employé of company is authorized to vary the foregoing. The company will not be liable for damages in any case where the claim is not presented in writing within fifty days after sending the message. John W. Mackay, President. W. C. Van Horne, Vice President. Send the following message, subject to the above terms, which are hereby agreed to." Plaintiff prepaid to defendant the sum of $6.70 for sending said message, for which sum defendant offered in its answer to permit plaintiff to take judgment under and pursuant to section 997 of the Code of Civil Procedure of this state.

The foregoing is a condensed statement of facts stipulated between counsel for the respective parties as existing in the case, and used as evidence on the part of plaintiff. At the trial plaintiff called a single witness, W. W. Slater, an electrician, who stated that he had had 27 years' experience, 21 years as a telegraph operator, and 6 years as an electrician, who explained the Morse alphabetical system, etc., and who, as the substance of his testimony, gave it as his opinion that the word "teen" lost from the message in the course of transmission could not have been lost without the knowledge of the receiving operator, if competent, and that if it was not known by the sending or receiving operator it would be because they or one of them was not a competent operator. The witness alluded to the causes which might arrest the electric current, and gave as the central reason why a competent receiving operator should know if there was a cessation of its flow that the rest or space of time necessary to receive the syllable "teen" (one to three seconds) would indicate to him something wrong, whereupon it would become his duty to call for a repetition. Upon the close of plaintiff's testimony defendant's counsel moved the court for a judgment of nonsuit, upon the ground substantially that the message in question was transmitted over the wires of the defendant under the agreement contained in the agreed statement, and was not repeated, and that "there has been no evidence showing any gross negligence on the part of defendant corporation or its employés, and that in the absence of proof of a repetition of a message, and in the absence of proof of the gross negligence on the part of the defendant or its employés, the plaintiff has failed to make any case." The court overruled the motion, and such ruling is assigned as error.

The message here was in all material respects identical with the one involved in the case of Hart v. Telegraph Co., 66 Cal. 579, 6 Pac. 637, in which this court held that a similar stipulation, that the liability of the company for any mistake or delay in the transmission or delivery of a message shall not extend beyond the sum received for sending it, unless the sender orders the message to be repeated by sending it back to the office which first received it, and pays half the regular rate additional, is a reasonable precaution to be taken by the company, and binding upon all who assent to it, so as to exempt the company from liability beyond the amount stipulated for any cause except willful misconduct or gross negligence on the part of the company; and that in an action to recover damages beyond the amount stipulated the burden of proof is on the plaintiff to show such willful misconduct or gross negligence. The onus, then, of proving willful misconduct or gross negligence on the part of the defendant devolved upon the plaintiff, and is not in the face of the stipulation to be presumed from the mere fact of a mistake, but must be proven by independent facts, or by circumstances connected with the principal fact, and warranting the conclusion or inference of willful misconduct or gross negligence. There is no claim of willful misconduct.

Did the evidence establish a prima facie case of gross negligence on the part of the defendant? The degrees of negligence are correlative to the degrees of care. Law writers have criticised the practice of dividing negligence into degrees, and have declared that the term "ordinary negligence" involves a solecism, "since, if the negligence were ordinary (that is, in accordance with the usual course of practice among all men of average prudence), it would cease to be negligence at all." Shear. & R. Neg. § 48. The same authors admit, however, that terms in use to define "negligence" are well understood, and any attempt to dispense with them would promote confusion rather than clearness of conception. The accepted definition of "gross negligence" is "the want of slight care." Id. § 49. Gross negligence is the want of slight diligence. Kranz v. Thieben, 15 Ill. App. 482; Bank v. Graham, 85 Pa. St. 91; Wright v. Clark, 50 Vt. 130; Smith v. Railroad Co., 24 N. Y. 222. Gross negligence is an entire failure to exercise care, or the exercise of so slight a degree of care as to justify the belief that there was an indifference to the interest and welfare of others. Railroad Co. v. Cocke, 64 Tex. 151. Gross negligence is that entire want of care which would raise a presumption of a conscious indifference to consequences. Manufacturing Co. v. Bradley, 52 Tex. 587.

The question of negligence is a mixed question of law and fact, and is said to involve two questions: (1) Whether a particular act has been performed or omitted; and (2) whether the performance or omission of this act was a breach of legal duty. The first of these is purely a question of fact; the second a pure question of law. Shear. & R. Neg. § 52. "The question of negligence must be submitted to the jury as one of fact, not only where there is room for differences of opinion between reasonable men as to the existence of the facts from which it is proposed to infer negligence, but also where there is room for such a difference as to the inferences which might fairly be drawn from conceded facts. Where this is the case, the issue must go to the jury, no matter what may be the opinion of the court as to the value of the evidence or the credibility of the witnesses." Id. § 54. Tested by this rule, the evidence on the part of plaintiff presented such a state of facts that the inference to be drawn therefrom might well lead to a difference of opinion between reasonable men, and hence become a proper question for a jury or for the court sitting in lieu thereof. Hart v. Bridge Co., 80 N. Y. 622; Dahl v. Railroad Co., 62 Wis. 652, 22 N. W. 755; Railroad Co. v. Hotham, 22 Kan. 41; Schierhold v. Railroad Co., 40 Cal.

417. It follows that the court below did not err in denying defendant's motion for a nonsuit.

The second error assigned relates to the sufficiency of the evidence to justify the finding of the court that, "in the transmission of said telegraphic message, the defendant was guilty of gross negligence and carelessness, and it was because of such gross negligence and carelessness that the words 'nineteen hundred and three dollars' in the said message contained as written by the sender were changed and altered to the words 'nine hundred and three dollars.'" The defendant introduced evidence tending to show that the day upon which the message was transmitted from San Francisco to Visalia (March 28, 1890) the weather was cloudy, with light rains from San Francisco south to Los Angeles, and that in rainy weather the electric current is liable to be momentarily diverted from the wire by contact of such wire with trees, buildings, or crossing wires, etc., and generally upon all branches of the case the testimony of the defendant was sufficiently convincing that defendant was not guilty of gross negligence to raise a grave doubt as to the propriety of the above-quoted finding. To state the evidence at length or to discuss it at large can be of no avail, for the reason that a doubt, however grave as to the correctness of the finding, where, as here, there is a conflict in the evidence, is not, under the settled rule of this court, sufficient to authorize a reversal. We judge the case upon the facts from the cold record, and it may well be that, had we been in the place of the trial court, heard the witnesses as they detailed the facts, observed their demeanor and mode of testifying, the doubt which now exists as to the conclusion reached by such court would never have arisen. The rule of this court, that the verdict of a jury or a finding of fact by a court will not be reversed where there is a substantial conflict in the evidence upon which such verdict or finding is based, is so firmly established as to amount to a maxim. The order appealed from cannot be reversed because the findings are not supported by the evidence.

It is further urged that the court "erred in refusing to permit defendant to show the receipts and expenses of the Visalia office." The evidence in question consisted of a writing showing the monthly receipts and expenditures of the Visalia office during the year 1890, from which it appeared the receipts were $1,469.84 and the expenses $667.24. The object of the testimony was no doubt to show that the Visalia office was an unimportant one, having but a small volume of business, and hence not calling for the highest capacity in an operator. As the memorandum presented did not show the amounts collected upon the individual messages received or sent, it was too indefinite to be of value in determining the volume of business. The defendant was permitted to show, and did show, that the office at Visalia was classed as a third-class office, and the number of dispatches sent and received per day was testified to by the operator without objection. There was no error in the ruling under these circumstances.

The only other error assigned is predicated upon a ruling of the court upon a question put to the witness F. P. Medina, as follows: "Do you know what is the custom in the railroad service as regards the repeating of train orders?" When the question was objected to, the court remarked: "I don't know myself that the railroad question is important." Thereupon counsel for defendant stated, in substance, that he wanted to contradict plaintiff's witness (Slater), and show that he knows nothing about it. "I want to discredit him. It would be of no consequence; only to discredit their only witness, and to show that he does not know what he is talking about." The witness Slater had testified that it was not usual in the railroad office to repeat messages directing the movement of trains, but this was upon cross-examination, and not responsive to anything concerning which he had testified in chief, and, being upon a collateral matter, the answer was not open to contradiction. There is another answer to alleged error. The witness afterwards, and without objection, testified to the very matter objected to, his answer being as follows: "I do know of messages being repeated in the railroad business. All train orders, all orders regarding the movement of trains, are repeated," etc. The judgment and order appealed from should be affirmed.

We concur: BRITT, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

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107 Cal. 285

## THRUSTON v. CLARK. (No. 18,423.)

(Supreme Court of California. May 24, 1895.)

MISCONDUCT OF OFFICER—REMOVAL—INCRIMINATING EVIDENCE.

1. Under Pen. Code, § 772, providing for the removal of officers for violation of duty, a sheriff cannot be removed from office, while serving his second term, for offenses committed during his first term.

2. A prosecution under Pen. Code, § 772, providing for the removal of public officers for violations of duty, is a criminal case, within Const. art. 1, § 13, declaring that no person shall be compelled to be a witness against himself in any criminal case.

Commissioners' decision. Department 1. Appeal from superior court. Glenn county; Seth Millington, Judge.

Action under Pen. Code, § 772, by Joseph D. Thruston against P. H. Clark, to remove defendant from the office of sheriff. From a judgment for plaintiff, defendant appeals. Reversed.

J. C. Ball and J. H. Ball, for appellant. Chas. L. Donohoe and George D. Dudley, for respondent.

SEARLS, C. This is a proceeding under section 772 of the Penal Code to remove the appellant, P. H. Clark, from the office of sheriff of the county of Glenn, and to recover a judgment for $500 against him in favor of Joseph D. Thruston, as an informer under said section. The cause was tried by the court, written findings filed, upon which judgment was entered, depriving the defendant of his office as sheriff of Glenn county, and that Joseph D. Thruston have and recover from said P. H. Clark the sum of $500 and costs. Defendant appeals from the judgment, and from an order denying his motion for a new trial. The judgment and order appealed from must be reversed, for many reasons, some of which are as follows:

1. It appeared from what may be termed the complaint that the defendant was duly elected sheriff of the county of Glenn, and qualified on the 11th day of May, 1891; that he was re-elected to the same office on the 8th day of November, 1892, and qualified on or about December 9, 1892. In other words, he was his own successor, and under the act organizing the county of Glenn, approved March 11, 1891, may be presumed to have taken office under his second term on the first Monday of January, 1893. There are in the complaint about a dozen separate and distinct specifications of acts averred as violations of law, of which some one-half, as nearly as can be determined, were for alleged misconduct during defendant's first term of office. As to these charges or specifications, the demurrer should have been sustained. Section 772 of the Penal Code, under which this proceeding is prosecuted, is as follows: "When an accusation in writing, verified by the oath of any person, is presented to a superior court, alleging that any officer within the jurisdiction of the court has been guilty of charging and collecting illegal fees for services rendered, or to be rendered, in his office, or has refused or neglected to perform the official duties pertaining to his office, the court must cite the party charged to appear before the court at a time not more than ten nor less than five days from the time the accusation was presented; and on that day, or some other subsequent day not more than twenty days from that on which the accusation was presented, must proceed to hear, in a summary manner, the accusation and evidence offered in support of the same, and the answer and evidence offered by the party accused; and if, on such hearing, it appears that the charge is sustained, the court must enter a decree that the party accused be deprived of his office, and must enter a judgment for five hundred dollars in favor of the informer, and such costs as are allowed in civil cases." It will appear from the foregoing that the specific object of the legislature is to remove from office a class of officers who have been guilty of malfeasance or misfeasance in such offices. It is not to punish such persons for wrongs perpetrated outside of, but within the scope of, the duties imposed upon them by the precise office in question. In Smith v. Ling, 68 Cal. 324, 9 Pac. 171, it was held that a proceeding for the removal of an officer under section 772, supra, could not be maintained after the accused had ceased to hold office. See, also, Woods v. Varnum, 85 Cal. 639, 24 Pac. 843. By parity of reasoning, an officer cannot, under the same section, be removed from office for a violation of his duties while serving in another office, or in another term of the same office. Each term of an office is an entity separate and distinct from all other terms of the same office. If defendant violated any duty imposed upon him as an incumbent of the office of sheriff during a former term, the law furnishes a mode or modes for his punishment, but to remove him from an office to which he has been subsequently elected is not the punishment for such violation of duty prescribed by any law of this state. There are other objections to the accusation or complaint, and the demurrer should have been sustained.

2. At the trial the prosecution, for the purpose of making out its case, called as a witness the defendant, P. H. Clark; and, against his objection and protest, the court required him to testify, and he gave evidence in the cause tending to sustain the charges against him. This action of the court is assigned as error, and, in view of the fact that in the event of another trial the same question is liable to arise, we will briefly notice it here. Section 13 of article 1 of our constitution, following a like provision in amendment 5 of the constitution of the United States, declares that no person shall "be compelled in any criminal case, to be a witness against himself." Removal from office under the summary proceeding provided for by section 772, supra, is a punishment for wrongdoing by the class of officers designated in chapter 2 of title 2 of part 2 of such Code. There are two methods of prosecution for willful or corrupt misconduct in office provided by chapter 2. One is by an accusation in writing, presented by the grand jury, stating the offense charged in ordinary and concise language, under which the accused is entitled to and must be tried by a jury, and upon a conviction the judgment is that the defendant be removed from office. Pen. Code, §§ 758–770. The other method is the summary method provided by section 772 of the same chapter, supra. In all its essentials of cause and effect, the latter is a criminal proceeding, equally with the former. The proceeding is a nondescript, but resembling somewhat a qui tam action. But whatever its garb, it is in body and spirit, in its aim and object, a process for the punishment of crime. When the constitution declares that

no person shall be compelled in any criminal case to be a witness against himself, it must be construed to apply to all cases in which the action prosecuted is not to establish, recover, or redress private and civil rights, but to try and punish persons charged with the commission of public offenses. A criminal case is an action, suit, or cause instituted to punish an infraction of the criminal laws, and, with this object in view, it matters not in what form a statute may clothe it; it is still a criminal case, and the person charged therein is protected from being an enforced witness against himself by the aegis of the constitutions, national and state. This whole question was considered, and, as we think, set at rest, by the supreme court of the United States in Boyd v. U. S., 116 U. S. 616, 6 Sup. Ct. 524. The proceeding was one in rem, to establish the forfeiture of certain goods alleged to have been fraudulently imported without paying the duties thereon pursuant to an act of congress. The law authorized the court, on motion of the government attorney, to require the defendant to produce in court his invoices, etc., or upon failure so to do, the allegations of the prosecution as to their contents were to be taken as true. The court made an order accordingly, and the defendant produced the invoice, but excepted to the action of the court upon the ground that the act of congress was in violation of the constitution. Bradley, J., in an elaborate opinion reversing the judgment, after stating that under the act the prosecution might have proceeded by indictment against the defendant, proceeds as follows: "If the government prosecutor elects to waive an indictment, and to file a civil information against the claimants,—that is, civil in form,—can he by this device take from the proceeding its criminal aspect, and deprive the claimants of their immunities as citizens, and extort from them a production of their private papers, or, as an alternative, a confession of guilt? This cannot be. The information, though technically a civil proceeding, is in substance and effect a criminal one." The court adds: "We are further of opinion that a compulsory production of the private book and papers of the owner of goods sought to be forfeited in such a suit is compelling him to be a witness against himself, within the meaning of the fifth amendment to the constitution." In the later case of Lees v. U. S., 150 U. S. 476, 14 Sup. Ct. 163, which was a civil action, in form, to recover a penalty for importing an alien under a contract to perform labor, etc., the defendant was called and compelled to give evidence in favor of the government. Mr. Justice Brewer, in disposing of this branch of the case, said "This, though an action civil in form, is unquestionably criminal in its nature, and in such a case a defendant cannot be compelled to be a witness against himself. It is unnecessary to do more than to refer to the case of Boyd v. U. S.," etc. It follows that the action of the court in requiring the defendant to give testimony against himself was in violation of the right guarantied to him under the constitution.

The other errors assigned need not be noticed. The judgment and order appealed from should be reversed, and the court below directed to sustain the demurrer to th accusation, with leave to amend.

We concur: HAYNES, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, and th court below directed to sustain the demurre to the accusation, with leave to amend.

107 Cal. 199

## HELM v. McCLURE et al. (No. 15,803.)

(Supreme Court of California. April 30, 1895.)

DEDICATION OF LAND FOR HIGHWAY—EVIDENCE—OBSTRUCTION—REMEDY OF ABUTTING OWNER.

1. D., at one time the owner of a large tract, sold land abutting on each side of a strip known as "D. Avenue," which opened into a town street. Plaintiff's lot had a frontage on the strip and the strip was used for passage by the person whose property abutted on it, and by others, for more than 15 years, and was the only means of access from abutting property to the street. D. then conveyed the strip to defendants, who erected improvements which cut off plaintiff's access to the street. D. knew of the travel over the strip, and several witnesses testified as to his declarations that it should remain a street. *Held*, that the evidence was sufficient to sustain a finding that the strip was dedicated to the public as a highway.

2. Whether land has been dedicated for a highway is a question of fact, to be determined from the circumstances of each case, which mus show an intention by the owner to dedicate th land, and an acceptance by the public.

3. The evidence of the former owner on the subject of dedication of land for a highway is relevant, but not conclusive that it was not so dedicated.

4. One whose access to a highway is cut off by an obstruction thereof sustains an injury in such a special sense, under Civ. Code, § 3493, that she may maintain an action for the abatement of the nuisance.

5. The fact that plaintiff had constructed an embankment in front of her lot, from which she reached the street by a bridge, did not affect her right of action.

6. An objection that plaintiff's lot did not abut on the alleged highway is untenable where the highway extended to a creek which was entirely on plaintiff's land, and plaintiff's land extended to a line which the court found from the evidence was the boundary of the highway.

Commissioners' decision. Department 1. Appeal from superior court, Mendocino county; R. McGarvey, Judge.

Action by M. J. Helm against Frank McClure and another to abate a nuisance. From a judgment for plaintiff, defendants appeal Affirmed.

J. A. Cooper, for appellants. Hudson & Sayre and J. H. Seawell, for respondent.

BRITT, C. Action begun May 18, 1893, to abate an alleged public nuisance, plaintiff claiming to have sustained special damage. After trial the court found that for 15 years last past there has been a public road in the county of Lake, about 43 rods in length, which is an extension northeasterly of Main street in the town of Upper Lake; that, for upwards of three years last past, plaintiff has been the owner and in possession of a lot of land on the west side of, and adjacent to, said public road; that the only means of entrance and exit to and from plaintiff's lot is over such highway, and she had been accustomed to travel with vehicles and on foot over the same, to her lot, until about December 1, 1891, when defendants erected a dwelling house and fence in said road, whereby access to and egress from her lot is wholly prevented; that plaintiff has suffered no pecuniary damage by reason of such obstructions, but has been injured in a "manner different in degree and in kind from what the public in general have suffered"; that the defendants, who are husband and wife, are the owners of the land on which the obstructions rest, subject to the right of the public to use the same as a highway. The findings were filed October 14, 1893. The judgment directed the removal of the house and fence. Defendants moved for a new trial, which was denied, and have appealed from the judgment, and the order denying such motion.

The principal matters agitated here are whether the evidence supports the conclusions of the court that the place where defendants erected their structures is a highway, and that plaintiff has sustained detriment different in kind from that suffered by the public at large. The evidence shows that the alleged highway has for many years been known locally as "Dewell Avenue," and for brevity we may refer to it here as the "Avenue." From the evidence in the record, including a map of the way and premises involved, it appears that about the year 1870 one Benjamin Dewell was the owner of the land "all around the premises claimed to be a road," as well as that included in the avenue itself. From time to time he sold the land abutting on both the east and west sides of the avenue, in parcels of varying dimensions,—probably five in all. The parcel including plaintiff's lot was conveyed by Dewell to one Waller as early as 1874. It had a frontage on the west side of the avenue of a little more than 20 rods, and has been subdivided into four lots, owned by as many different persons, but all fronting on such avenue. Dewell yet owns, and, it seems, resides on, the land to the northward of the avenue, into which, at its northern extremity, he has a gateway. For more than 15 years such avenue has been marked and inclosed at its northern end by Dewell's fence and gate, and on its east and west sides by the fences of the persons to whom Dewell sold the abutting parcels of land, or their successors in interest, and open at its southern extremity into the northern end of Main street, in the town of Upper Lake. The avenue is thus a cul-de-sac. It is about 6 feet wider than said street, which latter is 70 feet in width, the east line of the avenue being continuous with the east line of the street; but the west line of the street, at the point of junction, is about 6 feet further east than the west line of the avenue. A creek (or slough, as it is commonly called in the evidence) 15 or 20 feet wide courses along the westerly side of the avenue the greater part of its length. During the winter season water runs in this slough to the depth of several feet. The plaintiff's lot is about 18 rods in length, east and west, and about 4 rods in width. It includes at its eastern end the greater part of the width of said slough, but appellants deny that it extends to the line of the alleged highway,—a matter to be noticed further on. The south line of plaintiff's lot, assuming that it extends to said avenue, intersects the same at a point about 7 rods north of the junction of the latter with said Main street. Plaintiff constructed an embankment or breakwater 4½ feet high on her lot, along the west side of said slough, to prevent the overflow of water therefrom. This embankment prevented communication between her lot and the avenue, unless by means of a bridge across the slough; and she designed to rest one end of such a bridge on the embankment, and had hauled materials for the bridge, and deposited the same in the avenue, on the east side of the slough, when defendants removed the materials, and then built their fence, and obstructed the roadway so that plaintiff could not reach her lot therefrom, or construct the bridge. Dewell conveyed to defendant Luella McClure a strip of land lying lengthwise of the avenue, and in the same, about 54 feet in width and 300 feet in length, having for its southern boundary the south end of the avenue, where the same unites with said Main street, and for its western boundary the east line of the tract previously sold to Waller. This strip, 54x300 feet, taken out of the western side of the avenue, was fenced and otherwise improved by defendants, leaving a narrow lane, 20 feet or little more in width, in the eastern part of the avenue, yet open for passage. Such fence and improvements are the obstructions which the judgment requires to be abated as a nuisance. It does not appear precisely when the conveyance was made by Dewell to Luella McClure, but it was probably about the year 1890. In November of that year, defendant Frank McClure had begun his house, and was then forbidden by the witness Dunton to obstruct the avenue. There has never been any expenditure of labor or money by the highway authorities of the county or road district on the way in question. Its character as a highway depends upon its dedication for that purpose by Dewell while he was yet the owner, and its acceptance as such by the public. Concerning this question there was evidence, in addition to the matters above stated, that the avenue has been used for passage by many persons other than those whose lands abut upon it, while as to these latter there appear to be six or eight proprietors, whose principal, if not sole, means of exit from and access to their respective lots are afforded by the disputed roadway. They and their predecessors have customarily used it in reaching the town of Upper Lake. It seems a fair inference from the evidence to say that the so-called avenue has, as regards its use, partaken rather more of the character of a village street than of a strictly rural lane. Mr. Dewell knew of the travel over the avenue, and that somewhat numerous persons were using it as a roadway, for, it seems, at least 15 years, but took no measures to prevent such use. One Cook, the former owner of a parcel of land adjoining plaintiff's lot, testified that at the time he purchased his lot, in 1874, he made inquiry of Dewell about the character of the avenue, and Dewell replied that it was a street "as far south as the property extended that he sold to Waller"; that it was his intention, "for the benefit of settlers, and for his own benefit, to open up this street." One Fritz testified that about the year 1877, under similar circumstances (he intending to buy an abutting lot yet further north than the Waller tract), Dewell told him to complete the purchase; that the avenue always would be a street, to that lot, —never would be stopped.

We understand the law to be well settled that whether a dedication of land for highway purposes has occurred in any instance is a conclusion of fact to be drawn from the circumstances of the particular case; that such circumstances must clearly show an unequivocal intention, manifested by appropriate words or conduct, or both, on the part of the owner, to devote his land to the wayfaring uses of that somewhat vague entity called "the public"; that the public must accept the proffered dedication, but such acceptance may be signified, and the dedication made perfect, by public user in accordance with the apparent offer of the owner. Harding v. Jasper, 14 Cal. 647; San Francisco v. Calderwood, 31 Cal. 589; Smith v. City of San Luis Obispo, 95 Cal. 470, 30 Pac. 591; People v. Marin Co., 103 Cal. 223, 37 Pac. 203; Hall v. Kauffman (Cal.) 39 Pac. 756. The evidence in the present case, above outlined, was sufficient to fulfill the requirements of the law as here stated, and as illustrated by the cases cited. It is true that Mr. Dewell testified that he had never dedicated the land for highway purposes, and had no intention to do so, and denied the declarations testified to by Cook and Fritz, and there is evidence of acts and declarations on his part inconsistent with such intent; his testimony was relevant, but not conclusive, evidence upon the subject of his actual purpose. City of Chicago v. Chicago, R. I. & P. Ry. Co., 152 Ill. 561, 38 N. E. 768. There was thus a conflict of evidence, which the trial court resolved in favor of plaintiff. The finding of a highway should stand.

We are of opinion, also, that the plaintiff sustained injury in such a special sense that she was entitled to maintain this action. Civ. Code, § 3493. The obstructions cut off access from her land to the highway. Hargro v. Hodgdon, 89 Cal. 628, 26 Pac. 1106. Appellants claim that the embankment constructed by plaintiff on the west side of the slough of itself prevents her access to the roadway, and therefore she cannot be specially damnified by their obstructions. True, the evidence shows that plaintiff must reach the avenue, since the embankment was constructed, by a bridge across the slough, one end of which must or may rest on the embankment; but this does not establish that plaintiff's own structure, and not those of defendants, cause plaintiff's injury. If it did, then a fence or wall would have the same effect, and the result would be that only uninclosed lots would be protected by the rule plaintiff invokes here.

Appellants further contend that the plaintiff has not suffered special damage, because, they say, her lot does not abut upon the alleged highway; that the slough intervenes between the east boundary of her lot and the west line of the avenue. The map accompanying the record shows that at one point the entire width of the slough is on plaintiff's lot; so that, if appellant's assumption that the alleged highway reaches only the east margin of the slough be correct, plaintiff might still construct a bridge entirely on her own land, and reach the roadway, but for the obstructions of the defendants. Besides, it was admitted at the trial that the defendants have fenced the parcel of land conveyed to defendant Luella by the deed of Dewell, and the map shows that this parcel abuts upon the lot of plaintiff throughout the width of the latter lot. The court found that defendants' fence is around land comprised in a highway, and we have seen that the evidence sustains the finding. It necessarily follows that, as shown by the record, the east line of plaintiff's lot is coincident with the west line of the highway.

Appellants question the sufficiency of the complaint. It is certainly not a model of pleading, but we do not think it fatally defective in the particulars urged by them. The judgment and order appealed from should be affirmed.

We concur: HAYNES, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

107 Cal. 345

### PEOPLE v. SIMONSEN. (No. 21,183.)

(Supreme Court of California. May 28, 1895.)

CRIMINAL LAW—PROOF OF CORPUS DELICTI—ADMISSIONS.

A conviction cannot be had for obtaining property under false pretenses on the extrajudicial statements and admissions of defendant alone as to the falsity of the statements, such falsity being part of the corpus delicti, which must be proved otherwise.

Department 1. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

H. Simonsen appeals from a conviction for obtaining property by false pretenses. Reversed.

Geo. Hayford, for appellant. Atty. Gen. Fitzgerald, for the People.

GAROUTTE, J. The defendant was convicted of the crime of obtaining property under false pretenses, and prosecutes an appeal from a judgment and order denying his motion for a new trial. No briefs have been filed in the case. It is claimed that the evidence is insufficient to support the verdict, and we think the claim has merit. The facts of the case may be stated as follows: Defendant secured several hundred dollars from the prosecuting witness, Wolters, by reason of the following representations and pretenses: Defendant stated to Wolters that he (defendant) was the owner of a certain tract of land in the state of Minnesota, and proposed to secure a loan from said Wolters, giving as security therefor a deed to this tract of land. The money was loaned, and the deed given as contemplated and agreed. It is charged in the information that the representations made by defendant to Wolters as to his ownership of land in Minnesota are false, and that in fact he owned no land as represented. At the trial the only evidence offered by the prosecution to prove that defendant did not own any land as represented were the extrajudicial statements and admissions of the defendant himself to that effect, and we hold them insufficient to prove the fact. It is elementary that the corpus delicti must be established before extrajudicial statements and admissions of a defendant are admissible in evidence and can be considered as tending to establish the fact to which they relate. The falsity of the representations made by defendant as to his ownership of the land is a material and essential element and portion of the corpus delicti, and a defendant's admissions alone can never be relied upon to establish as sufficient any fact which is a necessary ingredient to form the body of the crime. The term "corpus delicti" means exactly what it says. It involves the element of crime. Upon a charge of homicide, producing the dead body does not establish the corpus delicti. It would simply establish the corpus; and proof of the dead body alone, joined with a confession by the defendant of his guilt, would not be sufficient to convict, for there must be some evidence tending to show the commission of a homicide, before a defendant's confession would be admissible for any purpose. Upon a charge of arson, mere proof that a building was destroyed by fire does not establish the corpus delicti; and the defendant's confession of his guilt, made extrajudicially in connection with such proof, is not sufficient to sustain a judgment of conviction, for there is no evidence of the commission of a crime other than the defendant's statements, and the law, in the exercise of a jealous care over its subjects, demands something more. To be sure, the appearance of the dead body, the nature of the wounds, the evidences of a struggle, the physical circumstances surrounding the affair, may furnish evidence of the corpus delicti; they may indicate that a crime has been committed; but there must be proof of the fact from some source other than the defendant's admissions. A building may be burned under such suspicious circumstances as to indicate the act of an incendiary, and thus a corpus delicti established, and the doors opened for the defendant's admissions and confessions; but there must be some evidence of some kind tending to show the incendiary character of the fire, aside from these admissions and confessions. Laying aside the evidence of defendant's admissions, there is nothing whatever in the record even pointing towards the commission of a crime, and this condition furnishes a sure and conclusive test that the falsity of the representations is a necessary element of the corpus delicti. Indeed, the falsity of these representations as to the ownership of the land form the core of the charge, and make the defendant's conduct and acts a crime, when otherwise they would be entirely innocent and lawful. For these reasons we conclude the evidence offered at the trial failed to establish prima facie the corpus delicti, and that defendant's admissions cannot be relied upon to supply the defect in the proof. As supporting the general principles of law here declared, we cite 3 Greenl. Ev. § 30; People v. Jones, 31 Cal. 565; People v. Thrall, 50 Cal. 416; People v. Alviso, 55 Cal. 230. In the Jones Case a quotation is made from Sam v. State, 33 Miss. 352, which indicates inferentially that, joined to defendant's admissions, proof of death is sufficient against a defendant in a case where a homicide is charged, and that upon a charge of arson proof of the burning of the building is sufficient; but the doctrine of the Jones Case itself goes to the full lengths here laid down. There appear to be no other errors in the record. For the foregoing reasons, the judgment and order are reversed, and the cause remanded for a new trial.

We concur: HARRISON, J.; VAN FLEET, J.

107 Cal. 382

## AHERN et ux. v. McCARTHY. (No. 15,761.)

(Supreme Court of California. June 1, 1895.)

DEED ABSOLUTE—WHEN A MORTGAGE—EVIDENCE.

1. Defendant held a second mortgage on plaintiffs' land. On default on the first mortgage, both mortgagees threatened to foreclose, whereupon plaintiffs conveyed the land absolutely to defendant, who took possession, and leased part of the premises for a small rental to plaintiffs, and assumed the payment of the first mortgage, and each of the parties executed to the other a release of all claims. *Held*, that the evidence was not sufficient to show the deed a mortgage.

2. A deed absolute in form, given to secure the payment of a debt, is an equitable mortgage, and may be so proved by parol evidence.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; D. J. Murphy, Judge.

Action by Jeremiah Ahern and wife against Bridget McCarthy to have a deed absolute in form declared to be a mortgage. From a judgment for defendant, plaintiffs appeal. Affirmed.

Reddy, Campbell & Metson, for appellants.
E. R. Taylor, for respondent.

BELCHER, C. On the 6th of October, 1886, the plaintiffs, who were husband and wife, executed to the defendant a deed, absolute in form, of a lot of land in the city of San Francisco, and in September, 1890, they commenced this action to obtain a decree adjudging that the said deed was in fact a mortgage, given to secure the payment of money due and to become due from plaintiffs to defendant, and that they be allowed to redeem the property on payment of the amount found due the defendant, and also that defendant be required to account for the rents and profits of the property while in her possession. The answer denied that the deed was given to secure the payment of any money, or that it was or was intended to be a mortgage, and alleged that it was given and received as an absolute conveyance. The court below found upon all the issues raised by the pleadings against the plaintiffs, and gave judgment in favor of the defendant, from which, and from an order denying their motion for a new trial, the plaintiffs appeal.

The appellants contend that the findings were not justified by the evidence, and that is the only ground urged for a reversal. It is a general and well-settled rule of law that a deed absolute in form, if given to secure the payment of a debt, will be treated in equity as a mortgage, and the facts and circumstances attending its execution may be shown by parol evidence. The law upon this subject is stated in Pom. Eq. Jur. (2d Ed.) § 1196, as follows: "The general doctrine is fully established, and certainly prevails in a great majority of the states, that the grantor and his representatives are always allowed in equity to show, by parol evidence, that a deed absolute on its face was only intended to be a security for the payment of a debt, and thus to be a mortgage, although the parties deliberately and knowingly executed the instrument in its existing form, and without any allegations of fraud, mistake, or accident in its mode of execution. As in the last preceding case, the sure test and the essential requisite are the continued existence of a debt. If there is no indebtedness, the conveyance cannot be a mortgage. If there is a debt existing, and the conveyance was intended to secure its payment, equity will regard and treat the absolute deed as a mortgage. The presumption, of course, arises that the instrument is what it purports on its face to be,—an absolute conveyance of the land. To overcome this presumption, and to establish its character as a mortgage, the cases all agree that the evidence must be clear, unequivocal, and convincing, for otherwise the natural presumption will prevail. Whenever a deed absolute on its face is thus treated as a mortgage, the parties are clothed with all the rights, are subject to all the liabilities, and are entitled to all the remedies of ordinary mortgagors and mortgagees. The grantee may maintain an action for the foreclosure of the grantor's equity of redemption. The grantor may maintain an action to redeem and to compel a reconveyance upon his payment of the debt secured. If the grantee goes into possession, he is in reality a mortgagee in possession, and as such is liable to account for the rents and profits."

It was shown in this case that on the 22d day of September, 1884, the plaintiff Mary Ahern was the owner of the lot in question, and living thereon with her family, and that on that day she and her husband executed to the German Savings & Loan Society their promissory note for the sum of $2,000, payable one year after date, with interest at the rate of seven-twelfths of 1 per cent. per month, payable monthly in advance, and at the same time, to secure payment of the note, executed to the said society a mortgage upon the said lot. Afterwards, on the 27th day of the same month, the plaintiffs executed to the defendant their promissory note for the sum of $1,900, payable two years after date, with interest at the rate of seven-twelfths of 1 per cent. per month, payable monthly, and, to secure payment thereof, executed to defendant a mortgage upon the said lot. It was provided in this mortgage that it was subject to the mortgage to the German Savings & Loan Society, and "that, in case default be made in the payment of the principal or interest of the note and mortgage to the German Savings & Loan Society, then the promissory note above described and secured by these presents shall immediately become due and payable." Mrs. Ahern and the defendant, whose maiden name was Bridget Wallace, were sisters, and the latter resided with the former from time to time until she was married in 1888. In August, 1886, several months' interest was due and unpaid on each of said notes, and the plaintiffs had no money, or means to raise money, to pay the same. Both mortgagees threatened to foreclose unless payment was made, and the question was what should be done. At some time the plaintiffs placed the property in the hands of a real-estate agent for sale, and he reported that he had been offered $5,000 for it. The defendant advised the plaintiffs not to sell the property, but to convey it to her, and they concluded to and did withdraw it from the agent. Defendant promised, if plaintiffs conveyed it to her, to lease to them the lower floor of the building for three years at $10 per month rent, and that the rent for 20 months should be applied to the payment of an indebtedness of $200 due from the plaintiffs to other parties, and also that she would assume the payment of the note and mortgage to the German Savings & Loan Society. The negotiations between the parties continued until October 6th, when the deed in controversy was executed. At that time, and as a part of the transaction, the defendant satisfied her mortgage on the record, and delivered to the plaintiffs the note and mortgage. She also executed to the plaintiffs the lease she had promised to give them, and each of the parties executed to the other a release of all claims and demands, of whatsoever nature, accrued or existing up to that date. The plaintiffs also gave written notice to a tenant on the upper floor of the building that they had conveyed the property to the defendant, and that he would therefore for the future pay rent to her. Thereafter the plaintiffs occupied the lower floor of the building under their lease, and the rent therefor was paid and applied as it was agreed it should be. In August, 1889, the defendant paid the note to the German Savings & Loan Society, and the mortgage given to secure the same was satisfied and discharged. The above is a brief outline of the undisputed facts of the case. As to most of the other facts the evidence was conflicting. The plaintiffs testified that the defendant agreed to take and hold the deed as security for the payment of the debts, secured by mortgages on the property, until such time as they could pay the same. The defendant denied that there was any such agreement or understanding, and said, in effect, that the deed was given and accepted as an absolute conveyance.

Whether the deed can be treated as a mortgage or not must depend upon whether there was a continuing indebtedness from plaintiffs to defendant to be secured by it; for, if there was no indebtedness, there clearly could be no mortgage. In view of all the facts and circumstances shown, and particularly in view of the fact that at the time of the execution of the deed the parties thereto expressly released each other from all claims and demands accrued or existing up to that date, we do not see how it can be said that the evidence was "clear, unequivocal, and convincing" that there was an existing debt, and that the deed was intended to secure its payment. In our opinion, the judgment cannot be reversed upon the ground that the findings were not justified by the evidence, and we therefore advise that the judgment and order be affirmed.

We concur: SEARLS, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

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(107 Cal. 369)

## SUTTER v. OMNIBUS CABLE CO. (No. 15,669.)[1]

(Supreme Court of California. May 31, 1895.)

NEGLIGENCE—WHAT CONSTITUTES.

It is negligence for a street-car driver, after stopping his car on a busy street, to detach his horses, and swing them from the track into the street, without observing whether any teams are approaching from the rear, whereby a collision occurs.

Department 2. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Action by William Sutter, an infant, by his guardian, against the Omnibus Cable Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Lloyd & Wood and W. H. L. Barnes, for appellant. A. Morgenthal, for respondent.

TEMPLE, J. This action was brought to recover damages for personal injuries alleged to have been caused by the negligence of defendant. Plaintiff recovered judgment, and defendant appeals from the judgment, and from an order refusing a new trial. The point presented here is that there was not only a total lack of evidence tending to show negligence on the part of defendant, but that it was proven by evidence which was not contradicted that the injury was caused by inevitable accident. The following extract from the opinion of the learned judge of the trial court gives a short and concise statement of the facts in regard to the event: "Peter Duffey, the said driver, a witness for defendant, explained how the horses came to run away. It seems that defendant keeps its stables at the corner of Third and Tehama streets, where horses are changed to and from the cars, which are propelled by horses on this Third street line. On the day in question, when the defendant's horses ran away and injured this lad, the said driver was taking his car along Third street, and when he came to Tehama street he stopped his car, pulled the pin which holds the pole to the car in front,—and to which the horses were attached,—swung his team, attached to this pole, around at right angles to the car, and into the portion of the street or roadway lying between the car track and the curbstone of Third street, intending to take the team into the stable, and replace them with another and fresh span of horses. When the driver so swung his team around, and from the front of the car, they collided with a team being driven up from behind the car. The team, consisting of two horses, was attached to a wagon, and was rapidly traveling in the same direction as the car, probably following the car, so far as can be inferred from the evidence. The car driver said: 'Just as I was swinging my team around, a wagon came by, right by the car, and struck my off horse, banging right up against my team, banged the off horse right up against the right one, and they got on a jump.' The horses then ran away, dragging the driver with them, throwing him down and pulling away from him, and then dashing along Tehama street, and injuring the boy, as before noted. The driver testified on cross-examination that he neither looked nor listened for any approaching team when he unhitched the horses from the car and swung them off from the car tracks into the roadway, where they were struck by the team attached to the wagon. He said, in effect, that it was not his business to look or listen for approaching teams; that he didn't expect a team would run against his horses; that it was the business of approaching teams to avoid a collision with him. It would appear from this witness' testimony that he swung his car team directly into this approaching team. At any rate, the collision was immediate, so he testified, on the swinging of the car team into the roadway." Third street is the direct line to the S. P. R. R. Depot, and is much traveled by trucks and other vehicles. The horses were turned to the right,—directly into the approaching team. The car being confined to the tracks, persons driving along the street, in the same direction, would not anticipate that the team would turn across the track. Coming from behind, they could not see the movements of the driver or team. Can we say, as matter of law, that to swing the team across the track into the crowded, busy street, under such circumstances, does not tend to prove negligence? For my part, I cannot see how the jury could have found otherwise than as they did. Appellant's counsel says, if the driver had looked, he would have seen teams approaching, and, if this was negligence, it would have been negligent to have turned his horses, so long as any one was near, and he could have stood all day; and he thinks that the application of a modicum of common sense would show him that he was not bound to look to see if some reckless and vicious person would not run into him. All this might tend to prove that it is negligent for defendant to turn its horses at this point, but the illustration of counsel is not a fair one. The driver turned his horses into a team which was already abreast of him. If he had seen that there was room to turn his horses, and get into the street far enough from an approaching wagon to be seen, he might expect drivers of other vehicles to avoid colliding with him. If the place selected for turning his horses was so crowded with teams that he could not do this, means should have been provided to stop the rush long enough to turn; and, if this could not be done, he ought not to have attempted the movement. It would be a demonstration that the place chosen was inappropriate. The judgment and order are affirmed.

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[1] Rehearing denied.

We concur: HENSHAW, J.; McFARLAND, J.

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107 Cal. 340

## MILLER et al. v. KEHOE et al. (No. 15,785.)

(Supreme Court of California. May 27, 1895.)

FRAUDULENT CONVEYANCES—ACTION BY ASSIGNEE —RIGHT TO COSTS.

1. Where the evidence was conflicting, the finding of the court thereon will not be disturbed.

2. An assignee cannot recover property conveyed in fraud of creditors several months before the insolvency proceedings were instituted.

3. In an action by the creditors and assignee of a grantor to set aside a conveyance, a decree of sale which allows the creditors' attorney's fees and the assignee's costs to be deducted from the proceeds of sale of the land, and, after paying the creditors, the residue to be paid to the grantee, and giving the assignee no share in the fund, is erroneous, as counsel fees are not recoverable by the successful parties against one who is adversely interested, nor is an assignee entitled to costs where the case was decided against him.

Department 2. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Action by Henry Miller and others against Margaret Kehoe and another to set aside a conveyance. From a judgment for plaintiffs, defendants appeal. Modified in part. Affirmed in part.

Smith & Murasky, for appellants. E. A. Belcher, for assignee. Mastick, Belcher, Van Fleet & Mastick and N. D. Anderson, for respondents.

McFARLAND, J. This action was commenced by the plaintiffs, Miller, Horn, and Chapman, against the defendants, Margaret Kehoe and her husband, John W. Kehoe. It was averred in the complaint that said plaintiffs were creditors of the defendant John Kehoe; that said John was the owner of certain described real property which he had conveyed to his wife, the defendant Margaret, with intent to defraud his creditors; and that he had commenced proceedings in insolvency which prevented plaintiffs from obtaining judgments against him. The purpose of the action was to have the conveyance from said John to said Margaret declared fraudulent, and to have the property conveyed sold, and the proceeds of the sale applied to the satisfaction of defendant's debts. It is averred that the action was brought on behalf of said plaintiffs, and also in behalf of other creditors "who may come in and make themselves plaintiffs to this action and contribute to the expenses thereof"; and it appears that certain other creditors did come in as plaintiffs. It was also prayed that, when an assignee in insolvency of said John W. Kehoe should be appointed, he should also be made a party; and E. G. Rudolph, having been afterwards appointed as such assignee, appeared, and filed a pleading, in which he also averred that said conveyance from John to Margaret Kehoe was fraudulent, and prayed that it be decreed that the property described therein was part of the assets of said insolvent, John Kehoe, and passed to said assignee, Rudolph. The defendants, John and Margaret Kehoe, answered, denying that said conveyance was fraudulent, and averring that the property described therein was acquired with the separate funds of the said Margaret, and was her separate property. The court found that the said conveyance was made without any consideration, and with intent to hinder, delay, and defraud the plaintiffs and other creditors. It found, however, against the assignee, Rudolph; finding that he "is not and was not entitled to have the said deed canceled or annulled, nor to recover the said property as assets of the said insolvent estate to be administered by him in insolvency." But the court allowed him his costs. In the judgment, the court, after adjudging the said conveyance to be void as against plaintiffs and other creditors, and that certain amounts of money were due the various plaintiffs, decreed that a receiver appointed for that purpose should sell the said real property, and out of the proceeds of the sale pay the costs, and then to the attorneys for certain plaintiffs $900 as attorneys' fee, and to the attorney for certain other plaintiffs the sum of $400, and to the attorney for said assignee in insolvency $400; that the balance of "said fund" should be distributed among the creditors in accordance with their respective rights; and that the residue should go to the defendant Margaret J. Kehoe. The defendants, Margaret and John Kehoe, appeal from the judgment, and from an order denying a new trial.

The contention of appellants that the evidence is insufficient to support the finding that the conveyance from John to Margaret Kehoe was made to hinder and defraud creditors cannot be maintained. There was evidence on both sides of that issue; and, as it presents a substantial conflict, we cannot disturb the finding. Neither do we think that there was any material error committed with respect to the admissibility of evidence offered on that issue.

As the conveyance was made several months before the proceeding in insolvency was instituted, the court was right in holding that the assignee in insolvency was not entitled to recover the property as assets of the insolvent estate.

We think, however, that the court below erred in decreeing that attorney's fees should be paid to the plaintiffs or to the assignee in insolvency out of the gross proceeds of the sale of the property. That would be to make the defendant Margaret pay the attorneys' fees of plaintiffs out of the "residue" coming to her; and for this there is no warrant of law. For a short time the law of the state allowed certain attorney's fees to the prevailing party in an action; but that provision was repealed in 1855 (St. 1855, p. 250); and since then "the measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties." The general rule is that counsel fees are not recoverable by a successful party in an action either at law or equity (Williams v. McDougall, 39 Cal. 85; Salmina v. Juri, 96 Cal. 418, 31 Pac. 365), except in the enumerated instances where they are expressly allowed by statute. Counsel for respondents contend that this part of the decree can be maintained under the rule, sometimes applied in equity, that where it is necessary to bring an action for the preservation or distribution of a fund, and the action is brought by one beneficiary for the benefit of himself and all the other beneficiaries, the plaintiff may have a reasonable counsel fee out of the fund. This is merely compelling all the persons for whose benefit the action is brought to bear their share of the expenses of the suit, and is equitable and just. But evidently the rule applies only to a case where all the parties have a common interest. It clearly does not allow a plaintiff who brings suit for himself and others interested with him to recover counsel fees against a defendant who denies the right of any and all the beneficiaries, and sets up in himself an independent and hostile right or title to the thing in litigation. In the latter case the plaintiff would be no more entitled to recover counsel fees from the defendant than he would be in an action of debt or ejectment. The only case cited by respondent on the point is Patrick v. Montader, 13 Cal. 434. In that case the court, without discussing the question, merely says that "the plaintiff's reasonable costs, disbursements, and counsel fees should be first deducted from the fund." But the case was a contest between attaching creditors over money in the hands of the sheriff, who had obtained it through a sale of an insolvent debtor's property; the amount of the money being much less than the demands of the creditors. Here, then, the money in the hands of the sheriff was a fund belonging to the attaching creditors, in which they were all interested, and in which the judgment debtor in the attachment suits had no interest whatever. There was no "residue" coming to him, and he was not a party to the action. And the money in the hands of the sheriff was the "fund" out of which the attorney's fee was allowed. But in the case at bar the residue of the proceeds of the sale of the property in excess of the amount due the creditors, with ordinary costs and expenses of sale, was no part of any "fund" belonging to plaintiffs out of which they could carve counsel fees. If there was any "fund" at all, within the meaning of the rule invoked, it was only that part of the proceeds of the sale of the property which was necessary to satisfy the claims of the creditors. Alemany v. Wensinger, 40 Cal. 288, presents a proper case for the allowance of counsel fees, for in that case all the parties had a common interest in the property or fund involved in the action. With respect to the assignee in insolvency, it is clear that he was not entitled to counsel fees even upon respondents' theory, for it was expressly found that he had no interest in what is called the "fund." Neither do we see how he can have costs out of said fund.

The cause is remanded, with directions to the superior court to modify the judgment by striking out all that part thereof which directs the receiver to pay out of the proceeds of the sale attorney's fees to the attorneys of any of the plaintiffs, and to pay any attorney's fees to the said assignee in insolvency; and also by striking out that part of said judgment which decrees that the costs of said assignee be "paid out of said fund." In all other respects the judgment is affirmed.

We concur: TEMPLE, J.; HENSHAW, J.

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(107 Cal. 214)

## PEOPLE ex rel. RICKS WATER CO. v. ELK RIVER MILL & LUMBER CO. (No. 15,720.)[1]

(Supreme Court of California. May 2, 1895.)

POLLUTION OF WATER COURSE.

1. A complaint for nuisance, charging defendant with polluting the waters of a river with

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[1] Rehearing denied.

offensive matter from "a sawmill, outhouses, stables, and other fixtures which usually accompany a sawmill," will embrace a finding that the cause of pollution was a hog pen and the manure pile of a stable maintained in connection with the sawmill.

2. Where there are lower riparian owners, one has no right to pollute the waters of a stream by maintaining a cow stable and hog pen on its banks, but must keep his stock a reasonable distance therefrom.

Department 2. Appeal from superior court, Humboldt county; G. W. Hunter, Judge.

Action by the people of the state of California, upon the relation of the Ricks Water Company, against the Elk River Mill & Lumber Company, to abate a nuisance. From a judgment for plaintiff, defendant appeals. Affirmed.

F. A. Cutler and S. M. Buck, for appellant. J. F. Puter, Barclay Henley, J. N. Gillett, and Atty. Gen. Hart, for respondent.

TEMPLE, J. This appeal is by the defendant from the judgment and upon the judgment roll. The action was brought on relation of the Ricks Water Company to abate certain structures as nuisances. Among other things, it was charged that the defendant had constructed and was maintaining on the banks of the south fork of Elk river "a large sawmill, and also a cookhouse, outhouses, barn, and stables, and other fixtures which usually accompany a sawmill." It was averred "that said defendant has caused and permitted, and does cause and permit, all sewage, offal, waste, and fetid matter from said sawmill, cookhouse, and stables to be drained and deposited in the waters of said stream, and continues to do so, thereby contaminating, polluting, and rendering the same unwholesome, and unfit for culinary and other general domestic purposes, and offensive to the senses." As to most of the structures mentioned, the court found that they did not constitute nuisances, but it was found as follows: "That on the banks of said stream, just above the mill dam, defendant had erected a large stable, in which it houses from twenty-five to thirty head of cows; that the droppings from these cattle are deposited upon the banks of said stream, and near thereto, where the land gradually slopes to the same; that there now exists at said point a pile of manure about seventy feet in length, eight feet deep, and sixteen to eighteen feet in width, and which has been accumulating there for years; that the defendant allows and permits this large pile of manure to lie there and rot on the bank of said stream, and the drainage therefrom flows directly into the waters of said stream, and pollutes the same, and renders the waters thereof offensive to the senses and unwholesome and unfit for domestic uses; that defendant also maintains near said stream a corral or pen, in which it keeps about twenty-five hogs; that the said stream forms one side of said pen, and the urine and droppings and filth from said hogs find their way into said stream, thereby polluting the waters thereof, and rendering the same offensive to the senses and unwholesome and unfit for domestic uses." And as matter of law it was found that the hog pen and manure pile constitute nuisances, and defendant was enjoined from maintaining them. From this part of the decree defendant appeals, and his first point is that this finding is not within the issues. The hog pen and manure pile are not mentioned in the complaint, and it is not found that they are such fixtures as usually accompany a sawmill. The complaint, however, speaks of outhouses and stables, and I think the findings sufficiently show that the cow stable and hog pen are maintained in connection with the mill plant; and, notwithstanding appellant's criticism, that the manure pile is caused by the cow stable. Beyond this, the complaint seems to be that the court did not suppress the stable itself, rather than the use of it, which renders it a nuisance. I do not think there was any error here of which the defendant can complain.

2. The court found that Elk river is not a navigable stream. It is contended that it follows from that fact that fouling its waters cannot constitute a public nuisance. But it is found that "the waters of Elk river at and below the defendant's dam were, and have been, and now are, used by a considerable number of persons, who reside along the banks of said stream below the defendant's mill and dam." This constitutes such a public use as would make a pollution of the water by any unreasonable use a public nuisance. We may leave out of view, therefore, the claims of the Ricks Water Company and the inhabitants of the city of Eureka altogether. While, as to lower riparian owners, the defendant is entitled to a reasonable use of the water, he has no right to pollute the stream by putting such matter directly into it. The decision does not go to the extent that appellant apprehends. It does not determine that one may not depasture stock upon the lands comprising the watershed drained by the river, because they would necessarily pollute the water, nor that he cannot maintain stables and hog pens upon the land, but only that they must not be in, or directly upon, the banks of the stream. It holds that this is an unreasonable use of such streams by a riparian owner as against lower riparian owners. But if stock, not confined upon the river banks, following their natural instincts, cause such pollution, it would be a different matter. So, if the hog pen and the cow stable were at a reasonable distance from the river, the fact that the winter rains washed some impurities into the stream would be something of which lower riparian proprietors could not complain. The acts enjoined are equivalent to actually putting the polluting material directly into the water. If the conformation

of defendant's land is such that he cannot carry on a dairy without putting such filth directly into the water, then he must find some other use for the land. This seems to be the effect of the rule laid down in People v. Gold Run Ditch & Mining Co., 66 Cal. 138, 4 Pac. 1152. The judgment is affirmed.

We concur: McFARLAND, J.; HENSHAW, J.

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5 Cal. Unrep. 31

### BANCROFT v. BANCROFT. (No. 15,848.)[1]

(Supreme Court of California. May 8, 1895.)

CONTRACTS—MENACE—UNDUE INFLUENCE.

1. A contract for sale of stock, which plaintiff owned and had pledged to a bank, was not obtained by "menace," within the definition of Civ. Code, § 1570, "a threat of injury to the character," where defendant said that he would inform the bank that plaintiff was not the owner of the stock if plaintiff did not make the contract.

2. Nor can the contract be said to have been obtained by undue influence, plaintiff being a mature man, in the possession of all his faculties, who for several years had been manager of the corporation in which were the shares, though defendant, who was the owner of the majority of the corporation's stock, and plaintiff's uncle, had been accustomed in a great measure to direct plaintiff's action, and was a tyrannical and overbearing man.

Department 2. Appeal from superior court, city and county of San Francisco; J. M. Sewell, Judge.

Action by W. B. Bancroft against H. H. Bancroft for damages for inducing plaintiff to make a contract. A demurrer was sustained to the complaint, and plaintiff appeals. Affirmed.

Mastick, Belcher & Mastick, for appellant. E. J. McCutchen, for respondent.

McFARLAND, J. A demurrer to the amended complaint was sustained, and, plaintiff declining to further amend, judgment was rendered for defendant, from which plaintiff appeals. The complaint is substantially as follows: Defendant is the uncle of plaintiff, and ever since the latter's boyhood plaintiff was under the control and direction of defendant, and in his employ, and a part of the time resided with him. Defendant was accustomed in a great measure to guide and direct plaintiff's actions in business and other matters; was tyrannical and overbearing, and impatient of opposition; and thus had and retained great influence over plaintiff, who was accustomed to rely upon and be guided by defendant in matters of business. Defendant owned much more than a majority of the stock of a certain corporation called the Bancroft Company, and entirely controlled and managed its affairs. Defendant was the president of said corporation, and plaintiff was employed as the manager of its business. In September, 1887, plaintiff became the owner of 1,345 shares of the stock of said corporation, and continued to own the same until the 13th day of February, 1891. In November, 1890, plaintiff borrowed $3,500 from the People's Home Savings Bank, and as security therefor pledged to said bank said 1,345 shares of stock. On February 12, 1891, defendant demanded of plaintiff that plaintiff should transfer and deliver to defendant the said 1,345 shares of stock, and all his interest in the assets and property of said corporation, for the sum of $5,000, and then and there "informed plaintiff that unless he should forthwith transfer to him (defendant) the said stock and property on the terms aforesaid, he (defendant) would inform the said bank that plaintiff was not the owner of said stock, or any part thereof, and that plaintiff had pledged said stock without right or authority." He also said that he (defendant) would not pay more than $2,000 of said indebtedness of plaintiff to said bank, and would levy assessments on the stock of said corporation to the extent of closing out its business. "Thereupon plaintiff, solely through the influence possessed over him by defendant, and his habitual fear of defendant, and terrified by the threats aforesaid, and fully believing that defendant would carry said threats into execution, and would make to said bank and to others the statements so threatened, and that by reason of such statements plaintiff's character and reputation would be blasted and destroyed in the community in which he was residing and doing business, on the 13th day of February, 1891, acceded to said demand." Thereupon defendant directed plaintiff to deliver said stock to the said Bancroft Company, and to give to said company a bill of sale of all his interest in the property of said corporation, which plaintiff did on said day, "solely for the reasons aforesaid." The said company paid said indebtedness to said bank, and paid the balance of the $5,000 to plaintiff. It is averred that "plaintiff's consent to so transfer and deliver said stock to said corporation and to execute the bill of sale aforesaid was not freely given, but was obtained solely by the means aforesaid, and in consequence of the menace and the undue influence so exercised by defendant as aforesaid." Also "that, as plaintiff is informed and believes, the value of said 1,345 shares of stock on the said 13th day of February, 1891, was the sum of fifty thousand dollars, as was then well known to defendant, and plaintiff has been damaged by the wrongful acts of defendant as aforesaid in the sum of forty-five thousand dollars." It is also averred, upon information and belief, that after said transaction defendant so mismanaged the affairs of said corporation that "the said shares of stock became and were at the commencement of this action greatly depreciated, and of little or no value." The prayer is for "judgment against defendant for the sum of forty-five thousand dollars and for costs of suit." It does not appear when the action was commenced, but the present complaint was filed November 6, 1893, 19 months after the alleged cause of action accrued.

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[1] Rehearing granted.

The foregoing are the material averments of the complaint somewhat condensed. The demurrer was both general and special, and we think that it was properly sustained for a want of a statement of sufficient facts to constitute a cause of action. The theory of the complaint is that plaintiff's consent to the said sale of the stock was not "free." The Code provides that "an apparent consent is not real or free when obtained through (1) duress; (2) menace; (3) fraud; (4) undue influence; or (5) mistake." Civ. Code, § 1567. The averments of the complaint certainly do not show duress, fraud, or mistake. It is contended that they show "menace," because they show a threat of "injury to the character," under section 1570, Civ. Code. The averment on this point is that defendant said he "would inform the bank that plaintiff was not the owner of said stock." But plaintiff, as the complaint shows, was the owner of the stock; and, this being so, it is impossible to conceive that a mere idle threat of defendant to say that plaintiff was not the owner was such an attack on his character as to overcome his free will. In an opinion delivered by the learned judge of the court below when sustaining the demurrer he says that the complaint does not show any ground for avoiding the sale through want of the free consent of plaintiff, unless that ground be undue influence; and that in such a case the remedy is rescission. Section 1566, Civ. Code, provides that "a consent which is not free is nevertheless not absolutely void, but may be rescinded by the parties in the manner prescribed by the chapter on rescission." Defendant contends that the remedy of rescission is only cumulative, and that in such a case a party, without rescinding, may maintain an action for damages under the general provision of section 3281. Nevertheless no case has been found, and counsel seem to admit that no case can be found, where a general action for damages has been maintained upon the ground of undue influence in procuring a contract. If such an action can be maintained, then the principle that a party must rescind promptly can be avoided. But we need not determine this point definitely, because, in our opinion, the facts averred do not make a case for either rescission or damages on the ground of undue influence. The complaint does not attribute to plaintiff either infancy or idiocy or any mental or moral imbecility. He was a mature man, in the possession of all his faculties, and for several years before the transaction complained of had been the general business manager of the Bancroft Company, with full and special opportunity to know its affairs and condition. And it is impossible to contemplate that under these circumstances he was induced by any facts, which he avers as constituting undue influence, to sell for $5,000 property which was worth $50,000. The judgment is affirmed.

We concur: HENSHAW, J.; TEMPLE, J.

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(107 Cal. 363)

## PERRY v. MALARIN. (No. 15,736.)[1]

(Supreme Court of California. May 29, 1895.)

INJURY TO PASSENGER ON STREET CAR.

In an action to recover for injury while a passenger on a street car, it appeared that the car was being driven five to seven miles an hour, in a suburban district, when the horses, becoming frightened, pulled the car off the track, and ran away; that plaintiff, out of fear, jumped from the car, and was injured. Those who remained in the car were uninjured. *Held*, that defendant was not guilty of negligence.

Department 2. Appeal from superior court, Monterey county; N. A. Dorn, Judge.

Action by Leila Perry against Juan Malarin to recover for personal injuries while a passenger on a street car. From a judgment for plaintiff, defendant appeals. Reversed.

S. F. Geil, J. J. Wyatt, and R. H. Willey, for appellant. W. A. Kearney and C. F. Lucey, for respondent.

TEMPLE, J. On the 18th of February, 1893, plaintiff and her sister were passengers on a street car running from Pacific Grove, in Monterey county, to the Hotel Del Monte. It was an open car, drawn by two horses. Plaintiff sat upon the rear seat. As the car passed the Pacific Ocean House, on Alvarado street, the team shied, and pulled the car from the track. Plaintiff's sister (as she testified) was thrown from the car by the jolt made when it left the track. Plaintiff was not thrown out, but, after the car had been drawn about 120 feet, jumped out, and in so doing was injured. From the track the horses moved rapidly along the street, first towards the sidewalk, and then the driver was able to pull them in towards the track, when they again moved towards the sidewalk, and were finally stopped when the car was against the curb; having gone about 180 feet after the derailment. Had plaintiff remained in the car, as she might have done, she would not have been injured, but she says she jumped out, fearing that the car would strike against the curb and be overturned. The street was not paved, and was perfectly level. The curb was 13 inches high. Defendant operated the street railroad, and plaintiff brings this action to recover damages for the injury which she alleges was caused by defendant's negligence.

Though defendant does not admit that the rule applies to this case, he accepted the proposition that the mere fact of the accident raises a presumption of negligence, and casts upon the defendant the burden of showing how and why the accident occurred, and that it was one which he could not have guarded against by the use of the utmost skill, diligence, and foresight. Appellant contends that this was done by testimony which is uncontradicted. He proved that the track was in perfect condition; that the car was properly constructed, and in good order; that the driver was experienced and careful; and that at the time of the derailment he was at his post, holding the reins in one hand and the brake in the other. The derailment was not caused by any defect in the appliances or want of attention on the part of the driver. His witnesses also testified that the horses were gentle, well broken, and had been used on the road continuously for about two years, and had never been known to shy or become unmanageable before. He also showed how and why the derailment occurred; that, while the car was proceeding at the usual speed, an express wagon was driven rapidly in front of the team, and suddenly stopped, and a man with a bundle jumped suddenly in front of the horses, and towards them, thereby startling them, and causing them for the moment to become unmanageable. There was, however, testimony for plaintiff to the effect that one of the horses was what is called a "California broncho," and that he had once run away; also, that the car was moving at an unusual speed when the accident occurred. Plaintiff testified: "A little before we came to the Pacific Ocean House, on Alvarado street, the horses started to go very much faster, and were going at almost a run, when all of a sudden they gave a sudden jerk, and pulled the car from the track," etc. And, again: "I did not see the horses pulling the car from the time the car left the track until I jumped from the car. I think the horses were running, from the speed with which the car was going, and the sudden jerk they made when they left the track." Her sister testified: "The car ran rapidly from the time they pulled the car from the track until I saw my sister jump," etc. "Q. Did the team go at an unusual rate of speed on that day? A. They were simply tearing along. * * * I have frequently rode on those cars before. The driver was driving much faster than usual from the time he entered Alvarado street." Other witnesses, testifying for the defendant, stated that the horses were not going at an unusual speed, but were trotting along at the rate of from five to seven miles per hour. I think it must be admitted that testimony introduced by defendant, taken by itself, was sufficient to rebut the presumption of negligence. If it was not sufficient, it is difficult to imagine any testimony which could have sufficed for that purpose. There was a perfect track, car and harness in good repair, gentle horses, and a skillful driver, alert and at his post, and the showing of how and why the accident occurred; and, since the event which startled the horses could not have been foreseen, it is manifest that all was done which could have been done by the utmost skill and care. The bare statement of a witness that one horse had once run away, without showing when or under what circumstances, or that defendant knew it or ought to have known it, does not tend to show negligence.

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[1] Rehearing denied.

The question, then, is, does the mere fact that the horses were going at an unusual speed tend to prove negligence? I think not. The drive seems to be a long one, and between a village (Pacific Grove) and Monterey city. Apparently they were in the habit of driving in a trot, or from five to seven miles per hour could not be the usual speed. The horses may have been going at an unusual speed, and yet not at a dangerous gait. The allusion to their running evidently had reference to the movement after they became frightened. It cannot be doubted that after that time everything was done which could have been done. The jury were evidently carried away by sympathy for the plaintiff, which is quite natural. But, however deplorable the injury may be, defendant cannot be mulcted for it, unless he has been negligent. I think he has successfully rebutted the presumption arising from the fact of the accident. The judgment and order are reversed, and a new trial ordered.

We concur: McFARLAND, J.; HENSHAW, J.

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## PERRY v. MALARIN. (No. 15,753.)[1]

(Supreme Court of California. May 29, 1895.)

Department 2. Appeal from superior court, Monterey county; N. A. Dorn, Judge.

Action by Kate Perry against Juan Malarin for injuries received while a passenger on one of defendant's street-railway cars. Judgment for plaintiff, and defendant appeals. Reversed.

S. F. Geil, J. J. Wyatt, and R. H. Willey, for appellant. W. A. Kearney and C. F. Lucey, for respondent.

TEMPLE, J. This is an appeal from a judgment, and from an order refusing a new trial. The action is for damages alleged to have resulted from the negligence of the defendant. The facts are quite similar to those shown in the case of Perry v. Same Defendant (No. 15,736; just decided) 40 Pac. 489, the injuries having been caused by the same accident mentioned in that case. The evidence in this case is, however, more favorable to defendant than it was in that case, although in the main features it is the same or quite similar. For reasons similar to those stated in the opinion rendered in that case, the judgment and order are reversed, and a new trial ordered.

We concur: McFARLAND, J.; HENSHAW, J.

[1] Rehearing denied.

## STODDARD v. SUPERIOR COURT OF STANISLAUS COUNTY et al.

(S. F. 101.)

(Supreme Court of California. May 6, 1895.)

WRIT OF PROHIBITION.

The proper proceeding to review an order for injunction is by certiorari, and not by prohibition.

In bank. Appeal from superior court, Stanislaus county; W. O. Minor, Judge.

Petition by G. R. Stoddard, as collector, for a writ of prohibition against the superior court of Stanislaus county and another. Denied.

C. C. Wright and R. Percy Wright, for plaintiff.

BEATTY, C. J. The petition for a writ of prohibition herein is denied, for the reason that the court is of the opinion that a writ of certiorari to review any order for an injunction the superior court may make will better conserve the rights of all parties than the writ prayed for.

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5 Cal. Unrep. 35

## CUNNINGHAM et al. v. NORTON. (No. 15,764.)

(Supreme Court of California. May 23, 1895.)

GUARANTY—CONSIDERATION—ACTION BY ASSIGNEE—NOTICE OF ASSIGNMENT.

1. In an action by an assignee on a guaranty executed to plaintiff's husband for rent under a lease of his property making rents payable to her, plaintiff and her husband testified that the guaranty, the date of which was blank, was executed before the delivery of the lease, and as part of the same transaction. The guarantor admitted that when he signed the guaranty he did not know whether the lease had been delivered, or whether the lessee was in possession of the premises. *Held*, that the guaranty was good under Civ. Code, § 2792, providing that, where an original obligation is entered into in consideration of a guaranty, no other consideration is necessary for the guaranty.

2. An objection of no consideration for a guaranty cannot be made where the complaint thereon alleges that it was made for a good consideration, and this is not denied in the answer.

3. No notice of the assignment of a guaranty for rent is necessary before suit by the assignee, where the guarantor has not made any payment of rent to the assignor.

4. The assent of the guarantor to the assignment of a guaranty for rent is not necessary.

5. In an action on a guaranty to pay rent "which remains due and unpaid," it is immaterial whether the lessee could have paid the rent or not.

Commissioners' decision. Department 2. Appeal from superior court, San Mateo county; George H. Buck, Judge.

Action by Richard Cunningham, administrator, and another, against W. H. Norton, as guarantor, for rent. From a judgment for plaintiffs, defendant appeals. Affirmed.

John M. Lucas, for appellant. Edw. F. Fitzpatrick, for respondents.

HAYNES, C. Richard Cunningham was the owner of certain premises known as the "San Bruno Hotel," and leased the same to M. J. McBride; the rent to be paid to his wife, Mary Cunningham, since deceased. Norton, the appellant here, executed a written guaranty that he would pay to Richard Cunningham all rents that might remain due and unpaid, "according to the terms of the written lease of the San Bruno Hotel"; and this action is upon said guaranty, to recover the sum of $550, which the lessee had failed to pay. The complaint alleged that the guaranty was executed and delivered at the time the lease was delivered, and in consideration of the delivery of the lease, as well as for other good and valuable consideration, and that, prior to the commencement of the action, Richard Cunningham, to whom the guaranty was executed, assigned to Mary Cunningham, for a good consideration, said demand and cause of action. The answer denied these allegations, and denied "that there is due from defendant" said or any sum whatever. No other allegations were put in issue by the answer. The cause was tried without a jury, and findings and judgment went for plaintiffs, and this appeal is from the judgment and order denying defendant's motion for a new trial.

Some exceptions were taken to evidence, but, as none of them are specified as error, they cannot be noticed.

It is specified that there was no evidence showing that there was any consideration to support the guaranty. Appellant does not discuss the evidence. He seems to rely upon the claim or assertion that the guaranty was not executed or entered into at the same time the lease was executed. The date of the guaranty was left blank, but Mrs. Cunningham, who was then in life, testified that she was present when the guaranty was signed by defendant; that the lease had not been delivered; that she would not give the lease until he signed the guaranty; and that the whole transaction was done at the same time and place. The defendant testified that McBride, the lessee, was his son-in-law; that he went to the office when the paper was executed, at McBride's request, to become security for him upon the lease, and that he did it to help him, and that he did not know whether the lease had been delivered at that time, or not; and that McBride was then in possession of the leased premises. Upon cross-examination he admitted that he did not know whether McBride was in possession, or not, but supposed he was, while Richard Cunningham testified positively that the lease was not delivered, nor McBride let into possession, until after the guaranty was executed by defendant. The guaranty was therefore good, under section 2792 of the Civil Code.[1]

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[1] Civ. Code, § 2792, provides: "Where a guaranty is entered into at the same time with the original obligation, or with the acceptance of the latter by the guarantee, and forms with that obligation a part of the consideration to him, no other consideration need exist."

Appellant also contends that the assignment of the cause of action arising upon the guaranty could not be made without an expressed consideration. The complaint, however, alleged that it was made for a good consideration, and this was not denied in the answer. No notice of the assignment was necessary before suit. The defendant not having made any payment to the assignor, he was not prejudiced. It is immaterial whether McBride could have paid the rent or not. It is conceded that he had not paid it. The fact that he had not was not denied in the answer. The guaranty was not that the lessee was good or solvent, or that the rent was collectible from the lessee, but that he would pay if the lessee did not. The consent of the guarantor to the assignment was not necessary, nor were the rights of the guarantor against McBride affected thereby. I find no contradiction or inconsistency in the findings, and none are pointed out by counsel. The findings are clearly justified by the evidence, they are not against law, and the court did not err in ordering judgment for the plaintiff. The judgment and order appealed from should be affirmed.

We concur: BELCHER, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

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107 Cal. 373

## HEYDENFELDT v. JACOBS et al. (No. 15,717.)

(Supreme Court of California. May 31, 1895.)

LIFE INSURANCE POLICY—WIDOW AND CHILDREN AS PAYEES—DISTRIBUTION OF PROCEEDS—PERSONAL LIABILITY OF EXECUTORS—ESTOPPEL.

1. An allegation that deceased left "seven minor children, to wit, plaintiff, * * * then about twenty years and ten months," and six others, who are named, is a sufficient averment of plaintiff's minority.

2. A provision that a life insurance policy shall be payable to "C., wife of S., or any wife that may survive him, and minor children living at the time of his death," does not limit the payment to the children of any particular wife, but refers to all minor children of the insured.

3. Under a life insurance policy payable to the wife of the insured, or any wife that may survive him, and minor children living at the time of his death, the beneficiaries take per capita, and the law of descents and distributions does not apply.

4. A policy of life insurance payable to the widow and surviving children of the insured is no part of the assets of the estate, and, if collected by the executors, the latter are personally liable to the beneficiaries for the amount.

5. Where the executors are sued personally for wrongfully collecting the proceeds of an insurance policy payable to the heirs, the statement in the complaint that, when they collected such proceeds, defendants were acting as executors, is immaterial.

6. In an action against executors personally by an heir of deceased to recover the proceeds of a life insurance policy in which plaintiff was a beneficiary, defendants alleged that such proceeds had been inventoried as a part of the assets of the estate, and included in the final distribution, and that plaintiff had appeared in proceedings connected with the administration of the estate, and made no objections to the proceeds of such policy being so treated and distributed. *Held*, that this did not show an estoppel, there being no allegation that defendants did not know, and had no means of knowing, to whom the policy belonged, or that they relied on the acts of plaintiff, and were thereby induced to treat the proceeds as assets.

Department 2. Appeal from superior court, city and county of San Francisco; Charles W. Slack, Judge.

Action by Frederick O. Heydenfeldt against Julius Jacobs and others to recover a part of the proceeds of a life insurance policy. From a judgment for plaintiff, defendants appeal. Affirmed.

Pierson & Mitchell and Knight & Heggerty, for appellants. T. M. Osmont, for respondent.

McFARLAND, J. The plaintiff is the son of Solomon Heydenfeldt, deceased. The said deceased, in his lifetime, procured a policy of insurance upon his life from the Brooklyn Insurance Company of New York for $10,000, payable to "Catherine, wife of Solomon Heydenfeldt, or any wife that may survive him, and minor children living at the time of his death." Said Catherine having died during the lifetime of the deceased, he married Elisabeth A. Heydenfeldt, who is now his widow. He also left seven minor children, of whom plaintiff is one. The defendants who are executors of said deceased, collected said policy from said insurance company, and this action is brought to recover from defendants one-eighth of the amount of said policy. Defendants demurred to the complaint on general and on some special grounds, and, their demurrer having been overruled, they answered. Plaintiff made a motion for judgment on the pleadings on the ground that the answer did not set up any defense, and, after argument, the motion was granted, and judgment for plaintiff was entered. Defendants appeal from the judgment.

If the views of the court below were correct as to the legal merits of the case, then the judgment upon the pleadings was right; for proof of the averments in the answer would have been immaterial, and the denials were merely of matters of law. And we think the views of the court were correct. There is no denial in the answer that respondent was a minor child of the deceased at the death of the latter, but it is contended that the averment on that subject in the complaint is insufficient. The averment is that at the time of the death of the deceased there were "seven minor children, to wit, plaintiff above named, Frederick O. Heydenfeldt, then of the age of about twenty years and ten months," and six others, who are named. It is not necessary to consider how the words "about twenty years and ten months" should be construed if they stood alone, for, as they are immediately preceded by the statement that plaintiff was a minor, the whole clause is clearly sufficient as an averment of his minority. The deceased had children by both wives, and it is contended that the policy ran to the surviving widow and her minor children. But we think that the true construction of the language (above quoted) clearly is that the policy was payable to his present wife, Catherine, or to any wife who might survive him, and to the minor children of the insured. There is no limitation to his children by any particular wife. The contention that the amount of the policy should go one-third to the widow and two-thirds to the seven children, according to the statute of succession, cannot be maintained. The fund was not a part of the assets of the estate of the deceased, and the law of descents and distributions has no applicability to the case. The persons named in the policy take per capita. Felix v. Ancient Order of United Workmen, 31 Kan. 81, 1 Pac. 281; Campbell v. Wiggins, Rice, Eq. 10.

The appellants were sued personally and not as executors. The unnecessary statement in the complaint of the fact that when they collected the policy they were acting as executors is of no consequence. The policy was no part of the assets of the estate, and appellants had no right, as executors, to collect; and, if liable at all, they are liable personally,—as they were sued,—and not as executors. And, having wrongfully come into possession of the amount of the policy, —whether by mistake or otherwise,—they became trustees "of the thing gained for the benefit of the person who would otherwise have had it." Civ. Code, §§ 2223, 2224. Whether or not the respondent could have maintained an action for his share of the policy against the insurance company is a question not here involved.

The point for a reversal most insisted on by appellants is based on an alleged estoppel. It is averred in the answer that the amount of said policy was treated by appellants as part of the assets of the estate of said Solomon Heydenfeldt, deceased; that they so reported, inventoried, and accounted for it; and that there was a final distribution of all of the estate, which included the amount of said policy, under the last will of said deceased, to the said Elisabeth, widow as aforesaid, and to her assignee, Crittenden. It is further averred that since July 21, 1891, the respondent had notice and knowledge that the proceeds of the said policy were included in the inventory of the estate of said deceased, and were claimed to be a part of said estate subject to distribution under said will; that he appeared personally and by counsel in the proceedings connected with the administration of said estate; that he made no objection to said proceeds being considered and distributed as part of said estate, and that the same was done with his knowledge and consent; and that, therefore, he "is now estopped from setting up any claim to any portion of said proceeds of said life insurance policy." We are satisfied, however, that the case made out by the averments of the answer is lacking in nearly all the essential elements of an estoppel. Dean v. Parker, 88 Cal. 283, 26 Pac. 91. It is not averred, for instance, that the appellants did not know, or had no means of knowing, to whom the proceeds of the policy belonged. Indeed, it is almost impossible to conceive how, under their averments in the answer, they could have been ignorant of the true state of the title to said proceeds. Moreover, there is no averment that they relied upon the alleged conduct of the respondent, and were induced thereby to deal with said proceeds in manner as alleged in the answer. A contest for the proceeds of the policy could not have been inaugurated by respondent in the probate court. The judgment is affirmed.

We concur: HENSHAW, J.; TEMPLE, J.

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### HEYDENFELDT v. JACOBS et al. (No. 15,748.)

(Supreme Court of California. May 31, 1895.)

Department 2. Appeal from superior court, city and county of San Francisco; Charles W. Slack, Judge.

Action by Ine O. Heydenfeldt against Julius Jacobs and others to recover a part of the proceeds of a life insurance policy. From a judgment for plaintiff, defendants appeal. Affirmed.

Pierson & Mitchell and Knight & Heggerty, for appellants. T. M. Osmont, for respondent.

PER CURIAM. Upon the authority of Heydenfeldt v. Jacobs (No. 15,717, this day decided) 40 Pac. 492, the judgment herein is affirmed.

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107 Cal. 391

### SANDELL et al. v. SHERMAN et al. (No. 15,683.)

(Supreme Court of California. June 3, 1895.)

Examination of Witness—Instructions—Malicious Prosecution—Burden of Proof—Advice of Counsel.

1. It is no abuse of discretion for the court to excuse a witness from testifying further on cross-examination, where much time had been taken up on one point, and counsel did not ask permission to examine further on other matters.

2. Where a charge, taken as a whole, is correct, error cannot be based on certain expressions, which, when standing alone, are erroneous.

3. In an action for malicious prosecution, a charge that plaintiff must show such facts as will warrant the jury in finding malice and want of probable cause is not erroneous, as leaving to the jury the determination of what constitutes probable cause.

4. In an action for malicious prosecution, a charge that defendants are not liable if they believed and acted on the advice of counsel, after a full and fair statement of the case, is not erroneous because it does not further state that defendants must have acted in good faith.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Action by Catherine Sandell and another against Obadiah D. Sherman and others for malicious prosecution. From a judgment for defendants, plaintiffs appeal. Affirmed.

George Lawrence, for appellants. Ash & Mathews, for respondents.

SEARLS, C. Action for the malicious prosecution of an application in the superior court to have a guardian appointed of the estate of Catherine Sandell, the female plaintiff. Defendants had a verdict and judgment, from which judgment, and from an order denying their motion for a new trial, plaintiffs appeal.

The first error assigned by appellants is based upon an alleged abuse of discretion by the court, at the trial, in excusing Margaret C. Broeder from further testifying, while under cross-examination, and before the same was completed. Mrs. Broeder, the witness, was one of the defendants in the case, and a daughter of Mrs. Sandell, the female plaintiff. She had testified at length to the effect that her mother, the plaintiff, had long been in feeble health, and weak in body and mind; that at the age of 70 years she had married Sandell, the other plaintiff, who was a young man. She then detailed the troubles that followed; the conveyance of property by her mother to her husband; and as to her belief in the incapacity of her mother to manage her property; and her statements to counsel of the facts, and the advice of the latter to apply for a guardian over her mother's property, which was done, etc. The cross-examination, covering over six pages of the transcript, was confined to questioning the witness as to her testimony before the superior court in the proceeding for the appointment of a guardian, and, in so doing, probably led the court below to believe that time was being needlessly consumed. The court thereupon remarked as follows: "I think you have taken enough time, Mr. Lawrence, with this witness. I will excuse you, madam." Counsel for appellants did not then suggest any other point upon which he desired to cross-examine the witness. Had he done so, and asked to be permitted to examine upon other branches of the testimony, permission would probably have been granted to do so. The scope within which cross-examination is to be confined, and the time requisite therefor, are subject to certain well-defined rules, largely a matter of discretion with the trial court. In the present instance no abuse of such discretion is apparent, and no cause for reversal is presented.

The only other objections urged in favor of reversal relate to the instructions given to the jury. Their length (over 17 pages of the transcript) precludes their being set out in full. Excerpts taken from them, and presented as independent propositions, unsupported and unexplained by the context, would lead to the conclusion that error is involved; but, when taken together, as a whole, and certain expressions used therein are viewed in the light of the accompanying explanations, it is believed they contain a correct exposition of the law applicable to the case. To illustrate, this sentence is found in the instructions: "I instruct you that the affirmative of the issue here is upon the plaintiffs. They must, in this case, show such facts, in order to establish their cause, as will warrant you in finding that there was malice and want of probable cause on the part of these defendants, in doing the things which they did, and they must establish that by a preponderance of testimony." Appellants contend that this instruction left the jury to determine for themselves what facts constituted probable cause, whereas probable cause is always a question of law; citing Ball v. Rawles, 93 Cal. 222, 28 Pac. 937; Eastin v. Bank, 66 Cal. 125, 4 Pac. 1106; Fulton v. Onesti, 66 Cal. 575, 6 Pac. 491; Harkrader v. Moore, 44 Cal. 152; Grant v. Moore, 29 Cal. 644. What facts and circumstances amount to probable cause is a pure question of law. Whether they exist, or not, in any particular case, is a pure question of fact. The former is exclusively for the court; the latter, for the jury. Newell, Mal. Pros. p. 14. The same author says, at page 276, what in most cases is manifestly true, viz.: "The question of probable cause is a mixed question of law and fact. Whether the circumstances alleged to show it probable are true, and existed, is a matter of fact, and to be determined by the jury; but whether, supposing this to be true, they amount to probable cause, is a question of law." It has been sometimes regretted by the courts that it is not by the law of England, as by that of Scotland, a question for a jury. Perryman v. Lister, L. R. 3 Exch. 197, L. R. 4 H. L. 521. But considerations of public policy have hitherto, both in England and this country, dictated the rule as hereinbefore enunciated. But, conceding all this, it is not perceived that the court erred in the paragraph quoted. It will be observed that the object of the instruction was to impress upon the minds of the jury the fact that the burden of proof, under the pleadings, was upon the plaintiffs to establish the two propositions essential to a recovery, viz. malice and a want of probable cause. The language of the instruction follows closely the rule as contained in the books in reference to the proofs necessary to be made by a plaintiff in such cases. The court had already instructed the jury that they were the sole and exclusive judges of the facts, but that "the question of want of probable cause is a question for the court, as a question of law," and had stated to the jury that if certain facts, which were enumerated, existed, probable cause was shown, and they should find for defendants, and that certain other enumerated facts, if found to exist, would show a want of probable cause for instituting the proceedings complained of, and the verdict should be for the plaintiff. The jury was not instructed to determine whether or not the established facts do or do not amount to probable cause. The expression used by the court was not an apt one, perhaps; but that it misled the jury into supposing that they were to find upon the question of law as to probable cause is a conclusion which, in the face of the repeated instructions of the court on that subject, cannot be fairly reached.

The other objections to the instructions are more technical than real. The more important one is founded upon the language of the third instruction given at the request of defendants. It is as follows: "(3) I instruct you that if the defendants, before filing the petition to have a guardian appointed for the plaintiff, sought the advice of counsel, a respectable attorney at law, and of good standing, regularly admitted to practice, and who was practicing his profession in all the courts of this state, and stated to him all the case on which the application for guardianship was based, and made a full and fair statement of all the facts of that case to their counsel, and he advised that they file a petition for the appointment of a guardian for the plaintiff in this action, and, believing and acting on such advice, they filed their petition, it is a good defense in this case, and it makes no difference if their petition was denied by the court." It is urged that this instruction was erroneous, for the reasons (a) that it leaves out the element of good faith on the part of defendants in seeking the advice of counsel; (b) that it does not charge that they should have stated to the attorney all the facts within their knowledge, or which they reasonably could have obtained; (c) that it does not state that the attorney advised them in good faith; (d) it does not contain the element of good faith on the part of defendants; (e) it contradicts plaintiffs' third instruction. The general rule in reference to the advice of counsel as a defense in actions for malicious prosecution, and which is amply supported by authority, is as follows: "Where a party has communicated to his counsel all the facts bearing on the case, of which he has knowledge, or could have ascertained by reasonable diligence and inquiry, and has acted upon the advice received, honestly and in good faith, the absence of malice is established, the want of probable cause is negatived, and the action for malicious prosecution will not lie." Newell, Mal. Pros. p. 310, and cases there cited. See, also, Potter v. Seale, 8 Cal. 218; Levy v. Brannan, 39 Cal. 485; Wild v. Odell, 56 Cal. 136, 137; Jones v. Jones, 71 Cal. 89, 11 Pac. 817. Tested by the foregoing rule, we fail to see any serious objection to the instruction. If the defendants made a "full and fair statement of all the facts of the case to their counsel," and if he advised that they file a petition for the appointment of a guardian, etc., and if they, "believing and acting on the advice," did so, they must have acted in good faith. The question of the good faith of counsel in giving the advice is not an element in the problem. Nor is any contradiction observed between the instruction and the third instruction given at the request of plaintiffs. The latter is much fuller in detail than the former, but states the law precisely the same, and then proceeds to instruct the jury that if the defendants consulted an attorney as a means of covering malice, and did not believe the advice given to them, or did not act in good faith under the advice, or did not believe there was cause for the institution of the proceeding, or if they instituted such proceeding from a fixed and malicious determination of their own, and not from the advice of counsel, or that they did not make a full, fair, and true statement of all the facts known to them to their attorney, then it was no defense, and, if the proceeding was prosecuted maliciously, then the verdict should be for plaintiffs. It is worthy of remark, also, that, at the close of the instruction immediately following the one objected to, the court instructed the jury that they were "the judges of the facts whether the defendants made a full and fair statement of all the facts to their attorney before obtaining his advice to file a petition for the appointment of guardian." The instructions, taken as a whole, contained a full and fair exposition of the law applicable to the case, and were as favorable to plaintiffs as either the facts or law would warrant. The judgment and order appealed from should be affirmed.

We concur: BRITT, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

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107 Cal. 378

## GRIFFIN & SKELLEY CO. v. MAGNOLIA & HEALDSBURG FRUIT-CANNERY CO. et al. (No. 15,607.)

(Supreme Court of California. May 31, 1895.)

VENUE—PRACTICE—RULING ON DEMURRER.

1. Const. art. 12, § 16, providing that a corporation may be sued in the county where the contract is made, or where the breach occurs, etc., is merely permissive; and by joining another defendant, whose residence is in a different county, plaintiff waives the benefit of such provision.

2. A ruling on a demurrer to a complaint cannot be made until after a decision on a motion for change of venue. Ah Fong v. Sternes, 21 Pac. 381, 79 Cal. 33, followed.

In bank. Appeal from superior court, city and county of San Francisco; Charles W. Slack, Judge.

Action by the Griffin & Skelley Company against the Magnolia & Healdsburg Fruit-Cannery Company and another for breach of contract. From an order overruling a motion for change of venue, defendants appeal. Reversed.

Ruthledge & Pressley, A. B. Ware, and W. S. Goodfellow, for appellants. Mastick, Belcher & Mastick, for respondent.

HARRISON, J. The plaintiff commenced this action in the superior court of the city and county of San Francisco against the defendants to recover from the corporation defendant certain damages that had resulted from its breach of contract with plaintiff, and to recover from the defendant Merchant, upon an allegation that he is a stockholder in the corporation defendant, his proportionate amount of the corporate liability of his codefendant. The principal place of business of the defendant corporation is in the county of Sonoma, and the residence of Merchant is in the same county. Upon an affidavit showing these facts, the defendants asked that the place of trial be changed to Sonoma county, and the plaintiff resisted the application upon the ground that the contract between it and the defendant corporation was made in San Francisco. The court denied the motion, and from this order the defendants have appealed.

Section 16 of article 12 of the constitution provides: "A corporation or association may be sued in the county where the contract is made, or is to be performed, or where the obligation or liability arises, or the breach occurs, or in the county where the principal place of business of such corporation is situated, subject to the power of the court to change the place of trial, as in other cases." It is contended on behalf of the plaintiff that by virtue of this section the action was properly commenced in the city and county of San Francisco, and that the court properly refused to change the place of trial. In Brady v. Times-Mirror Co., 39 Pac. 209, the plaintiff commenced the action in San Diego county against the corporation, whose place of business was in the county of Los Angeles, and joined with it, as a codefendant, Otis, whose residence was in the county of Los Angeles. The defendants moved for a change of the place of trial, and, in reversing the order denying their motion, we said, in reference to this section of the constitution: "Under the provisions of this section, if the action had been brought against the Times-Mirror Company alone, the plaintiff's right to have the action tried in San Diego would be undoubted; but by including in the action other defendants, whose residence is outside of the county of San Diego, she waived the right given by this provision of the constitution, and the motion of the defendants must be determined by the provisions of the statute." See, also, Smith v. Smith, 88 Cal. 572, 26 Pac. 356. This provision of the constitution is in entire harmony with the provisions of the Code of Civil Procedure, and raises no conflict therewith. The plaintiff may at all times avail himself of the privilege given by the section, if the only defendant in the action is the corporation; but if he chooses to join as defendants in the action others, whose residence is in a different county, he waives the benefit of the provision. Such joining of other defendants is his own act, and he cannot in this manner deprive them of a right held by them. Ah Fong v. Sternes, 79 Cal. 33, 21 Pac. 381. If a plaintiff would avail himself of the privilege given by this exception to the general rule, he must bring himself clearly within the exception, and is not at liberty, while availing himself of this privilege, to deprive a defendant other than the corporation of a right equally great, which the statute has given him, to have the cause of action against him tried in the county of his residence. This provision of the constitution is merely permissive to the plaintiff. Fresno Nat. Bank v. Superior Court, 83 Cal. 491, 24 Pac. 157. And the provision therein that the court may "change the place of trial, as in other cases," indicates that it is no more controlling upon the action of the court than if it were a mere statutory enactment. Being a provision of the constitution, the legislature cannot deprive the plaintiff of the privilege which it confers, but he has not thereby received any greater privilege than if the same provision had been made by statute. In either case it is only a rule of procedure to be acted upon by the court in connection with other rules of procedure.

The plaintiff was not required to make Merchant a defendant in the action. His liability as a stockholder is distinct from that of the corporation, and only a several judgment for his proportion of the corporate liability can be rendered against him. Civ. Code, § 322. Whether he could be united in the same action with the corporation does not arise upon this motion. That question can arise only upon a demurrer to the complaint, and a ruling upon such demurrer could not be made until after a decision upon the motion to change the place of trial. Ah Fong v. Sternes, supra. The order is reversed.

We concur: GAROUTTE, J.; McFARLAND, J.; TEMPLE, J.; HENSHAW, J.

VAN FLEET, J., being disqualified, did not participate in the foregoing decision.

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107 Cal. 402

## DEMARTINI et al. v. CITY AND COUNTY OF SAN FRANCISCO et al. (No. 15,742.)

(Supreme Court of California. June 4, 1895.)

DEDICATION OF STREET—ACCEPTANCE—EVIDENCE—INJUNCTION SUIT—BURDEN OF PROOF.

1. To defeat a suit to enjoin the city authorities from taking possession of land in the posses-

sion of plaintiff as being a part of a street, it is incumbent on defendants to show the city's right thereto.

2. Where plaintiffs had been in possession of land under claim of title for more than 20 years, and the evidence was conflicting as to the extent to which the public used the land, but it clearly tended to show that the user was merely permissive, a finding that no part of it had ever been dedicated or accepted as a public street will not be disturbed on appeal.

3. Where land was not a part of one of the originally reserved streets, but came to private ownership under an alcalde grant, the right to take it as a public street depends upon whether it has been dedicated as such.

Department 1. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Action by A. Demartini and others against the city and county of San Francisco and another to enjoin defendants from opening up a street. From a judgment for plaintiffs and an order denying a motion for a new trial, defendants appeal. Affirmed.

Harry T. Creswell and A. Heyneman, for appellants. Tilden & Tilden, for respondents.

VAN FLEET, J. Plaintiffs brought this action to enjoin the superintendent of streets of the city and county of San Francisco from removing the improvements from, and opening up as a public street, a certain strip of land in said city and county. Plaintiffs had judgment in the court below. The defendants moved for a new trial, which was denied, and they appeal from the order upon a statement of the case. Fifty-vara lots numbered 38 and 14 are situated in the block or square of said city and county lying between Broadway and Pacific and Kearny and Montgomery streets. Lot 38 is a rectangle, situated on the northwesterly corner of the block, with a front of 137½ feet on Broadway and a like extent on Kearny. Lot 14 lies immediately to the east of and adjoining lot 38, with the same frontage on Broadway as the last-named lot, and running back southerly to an equal depth. The plaintiffs claim to be the owners and in possession of that portion of 50-vara lot 14, lying adjacent to lot 38 on the east, having a front of 59 feet and 9 inches on Broadway, and running back the full depth of 137½ feet. Commencing at Kearny street, and running along and upon the most southerly part of said 50-vara lot 38, is a narrow alley or street known as "St. Charles Street," some 17½ feet wide, which is opened up the full depth of said lot 38; while running from Broadway, and on the entire easterly line of that part of lot 14 above described, as claimed by plaintiffs, is an alley 14 feet wide, known as "Rowland Alley." The land in dispute is a strip 17½ feet wide and about 59 feet and 9 inches long on the southerly end of plaintiffs' lot, as now claimed by them, and which, if thrown open, would extend St. Charles street or alley so as to connect it with Rowland alley. The claim of the defendants is that the premises in dispute comprise and constitute a part of St. Charles street, and is a public way, made so by dedication of the owners thereof and acceptance by the public. The plaintiffs claim, to the contrary, that the land in dispute never was dedicated or opened as a street, and has never been open to public use or travel; that St. Charles street is a cul de sac, which never at any time extended across any portion of said lot 14, but terminated at the easterly line of lot 38.

The court below found: "(1) That the plaintiffs are and have been in possession of all of the land and premises described in the complaint, claiming title thereto, ever since the month of July, 1884, and that the possession of said lot of land has been held by the predecessors of the plaintiffs ever since prior to the year 1865; and that there are and have been for many years improvements upon all of said premises, which improvements are the property of plaintiffs. (2) That St. Charles street, mentioned and described in the complaint, does not extend easterly from or beyond the easterly line of fifty-vara lot 38, and said St. Charles street does not pass across, along, or upon any portion of fifty-vara lot No. 14, and that no part of the land described in the complaint has ever been dedicated or accepted or used as a public street or highway, and no part thereof is a public street."

The main contention in the case is that these findings are not supported by the evidence, but from a careful examination of the evidence we think this claim cannot be maintained. As to the first finding, there is in fact no substantial conflict in the evidence, and the lower court would not have been warranted in a conclusion contrary to that reached. Counsel's position with reference to this finding would seem to be substantially the same as that pressed upon his motion for a nonsuit,—that it was essential for plaintiffs, in order to maintain their action, to establish title in fee in themselves. In this view counsel is mistaken. It was only necessary for that purpose that plaintiffs show actual occupation or possession at the time of bringing the suit. This being presumptive evidence of title, it was incumbent upon the defendants to show a better right in order to defeat the action. In Tate v. Sacramento, 50 Cal. 242, it is said: "At the commencement of the action the plaintiff was, and for many years had been, in the actual occupation of the premises in controversy. His possession was prima facie evidence of title, and must be presumed to have been rightful, until the contrary appear. But the defendant contends that the land on which the plaintiff's building stands constitutes a part of Third street, north of I street, and that the buildings are a nuisance, which the city authorities may lawfully remove. In support of this claim it was incumbent on the defendant to show affirmatively that Third street, north of I street, had been dedicated as a public street." The evidence shows, as suggested, without substantial conflict, that, as found by the court, plaintiffs and their predecessors have been in possession of the premises, under claim of title, for more than 20 years.

As to the second finding, there is not only a substantial conflict in the evidence upon which it rests, but we think it clearly preponderates in favor of the facts as found by the court. The evidence shows that the alley now known as "St. Charles Street," but which at different times has been known as "St. Charles Place," and sometimes as "St. Charles Alley," had been from early in the "fifties" used by the residents on that block and in that neighborhood as a convenient way between their homes and places of business. During these early years that portion of the city was not thickly settled, and, the district being hilly, it was the habit of the residents to go upon trails or paths wherever it was most convenient to travel, without reference to established streets. At this time, at least down to 1854, there were no houses on lot 14. In 1856, Mr. Fiske, who owned the part of 50-vara lot 38, across which St. Charles street runs, fenced up the street, but the owners on the south of the alley paid him for one-half of the width, and he again opened it; and in January, 1857, an agreement was entered into by those owning 50-vara lot 38, by which it was declared that the strip of land now known as "St. Charles Street" "shall remain subject to our disposition, and under our control, for our mutual use and benefit." At that time Mrs. Jane Rowland owned the portion of 50-vara lot number 14, now owned by plaintiffs, including the land in dispute; and, as Broadway was not then cut through or graded, Mrs. Rowland asked and was granted permission to use St. Charles alley or street as a way to get to and from her lot, and a fence which Mr. Fiske had erected on the line between lots 38 and 14 was removed for that purpose. This left a way open for people to go from Kearny street, by way of St. Charles street, across lots and through to Montgomery street, as had been their habit before the fences were put up. Subsequently, however, when Broadway was opened and graded, and the people on lot 14 could get out that way, they opened, by agreement among themselves, a private way, now called "Rowland Alley," and used that as a means of ingress and egress to and from their homes. This was about 1863–64, and thereupon Mrs. Rowland herself put up a fence on the line between lots 38 and 14, where it had formerly been established by Mr. Fiske, and fenced the strip of land now in dispute off from its connection with St. Charles street or alley. This fence has, with one or two short interruptions, remained to the present time, confining St. Charles street to a cul de sac, extending only across lot 38. In putting up this fence Mrs. Rowland left a gate for foot passengers from her lot into St. Charles street, and for some years people in the neighborhood, and tradesmen administering to their wants, and perhaps others, were accustomed to use this gate as a means of getting from St. Charles street to Rowland alley and thence to Broadway, and also in going through by way of St. Charles street to Montgomery place and Montgomery street. The evidence is quite conflicting as to the extent to which travel was wont to go across the disputed land during any of the period mentioned, but it very clearly tends to show that whatever user there was by the public was a mere sufferance or permissive use by the owners of the fee. This is largely true, also, as to St. Charles street as now opened, and likewise of Rowland alley. It is very doubtful if, under the evidence, those alleys can be regarded as other than private ways, opened by the consent and for the use and convenience of the contiguous owners, and as not intended as public streets. Certainly, as to the land in question, while there is evidence of its use by the public at different times in the manner we have stated, there is no evidence of such unequivocal intent by the owners to dedicate to such use as would warrant us in overturning the finding to the contrary. "To constitute a valid and complete dedication, two things must concur, to wit, an intention by the owner, clearly indicated by his words or acts, to dedicate the lands to public use; and an acceptance by the public of the dedication." San Francisco v. Canavan, 42 Cal. 554. "Dedication is never to be presumed without evidence of an unequivocal intention on the part of the owner." Quinn v. Anderson, 70 Cal. 456, 11 Pac. 746. While user may be sufficient to show an acceptance by the public of an offer to dedicate, it is not sufficient of itself to establish dedication by the owner, except it appear clearly that such user was with the knowledge and consent of the latter, or without his objection, and under such circumstances as to fairly give rise to the presumption that the owner intended to dedicate to such use. The appellants claim that Mrs. Rowland, in 1856, in a declaration or schedule filed of her separate property, recognized St. Charles street or alley as then existing across lot 14, and some stress is laid upon this fact as an evidence upon her part of dedication. But the description of her lot in that schedule shows that Mrs. Rowland did not regard or recognize St. Charles street as crossing her lot, but as running along its southern boundary. She describes her lot as beginning on the northerly line of St. Charles street, and running northerly to Broadway 137½ feet,—showing that she then supposed the street to exist entirely without the limits of lot 14. And all her other acts at about the same time, and ever subsequently, show clearly that she did not regard the street as crossing her lot.

Much stress is also laid upon the fact that upon the engineer's map, and other official maps of the city, the strip in dispute appears to have been laid down as a part of St. Charles street or alley; but this of itself raises no conclusive presumption that the land has become a public street, either by dedication or otherwise. Where, as here, the land was not a part of one of the originally reserved streets, but came to private ownership under an alcalde grant, the right to take it as a public street depends upon whether it has been dedicated as such. Whelan v. Boyd, 93 Cal. 500, 29 Pac. 69. The evidence shows that at and before the time those maps were made and filed these premises were fenced, and have never since been opened to use as a street. The order is affirmed.

We concur: HARRISON, J.; GAROUTTE, J.

(107 Cal. 221)

## PEOPLE ex rel. RICKS WATER CO. v. ELK RIVER MILL & LUMBER CO. (No. 15,907.)

(Supreme Court of California. May 2, 1895.)

NAVIGABLE STREAMS — WATER RIGHTS — PUBLIC WATER COMPANIES—POLLUTION OF STREAM —INJUNCTION.

1. The south fork of Elk river was a small stream, insufficient to float saw logs, except during extreme winter freshets and with the aid of dams; and, though it was used at such times and in that way in early years, the use was abandoned as impracticable. *Held*, that the stream was not made navigable by Pol. Code, § 2349, declaring navigable all branches of Elk river which were at any time used for floating logs.

2. Const. art. 14, § 1, which makes the use of water for sale, rental, or distribution a public use, does not abridge the rights of an upper riparian owner on the stream from which a city water company distributes water.

3. Though the use of a stream by an upper riparian owner in the operation of a sawmill rendered the lower waters unfit for public consumption, it could not be enjoined at the instance of a city water company, which subsequently appropriated the lower waters to supply the public, on the ground that it was in violation of Pen. Code, § 374, prohibiting the pollution of streams from which the inhabitants of towns are supplied.

4. Where the lower riparian owners did not complain of such use, and most of them depended on the lumbering business and the operation of the mill for their support, the court would not, at the instance of the attorney general, who appeared for such owners to enable the making of a proper decree, suppress the use made by the upper owner.

Department 2. Cross appeals from superior court, Humboldt county; G. W. Hunter, Judge.

Action on the relation of the Ricks Water Company against the Elk River Mill & Lumber Company. From the decree rendered, both parties appeal. Affirmed.

Barclay Henley, J. N. Gillett, L. F. Puter, E. W. Wilson, and Atty. Gen. Hart, for plaintiff. F. A. Cutler and S. M. Buck, for defendant.

TEMPLE, J. This action was brought to restrain the defendant from polluting the waters of Elk river, from which the Ricks Water Company obtains water to sell to the inhabitants of the city of Eureka. The complaint charges defendant with polluting Elk river (1) by maintaining its barns, slaughterhouse, corral, and stables so near the stream that the water becomes polluted thereby; (2) by maintaining water-closets so that the drainage from them flows into the stream; (3) by allowing sawdust to find its way into the stream; (4) by discharging into the stream slops from its kitchen; and (5) by impounding a large number of redwood logs in the stream, from which logs a dark, juicy liquid escapes, and which logs are covered with dust and other deleterious substances, by all of which the water is polluted and discolored, so as to be unfit for domestic use. The court declined to enjoin the defendant from impounding logs in the stream, or from dumping sawdust upon the banks, or from allowing the kitchen drainage to flow into the stream, or to abate the privies as nuisances. From that portion of the decree, and from a refusal to award a new trial, plaintiff takes this appeal. The court did enjoin the defendant from allowing the accumulation of manure and filth on the banks of the stream above its dam, and allowing the washings from the same and from the hog pen to escape into the stream. From that portion of the decree awarding the plaintiff this relief the defendant has appealed.

In a separate count the plaintiff also averred that Elk river is a navigable stream, and was made so by section 2349, Pol. Code; that in 1886 defendant wrongfully constructed, and has ever since maintained, a dam across said stream, whereby said stream has been and is wholly obstructed. Upon this issue the court found, in effect, that the south fork of Elk river is a small stream, insufficient to float single saw logs except during extreme winter freshets and with the aid of dams to increase the flow of the stream; that it is not navigable, and was not made so by section 2349, Pol. Code. By that section all streams emptying into Elk river are declared navigable "which are now or at any time have been used for the purpose of floating logs or timber." It is found that the south fork of Elk river had been so used in former years during extensive floods, and with the aid of dams, but that its use for that purpose was found impracticable, and had been abandoned. It is contended that this legislative declaration makes the river a navigable stream. I do not think so. In the first place, it will not be presumed that the language of the act refers to such a use as would not bring the river within the definition of a navigable stream. Conceding that the definition includes all streams floatable for logs, still it must be capable of being used to an extent that would make it of some value as a highway; or at least a stream that would be so used for some portions of the year. That it could be so used for a few days in the rainy season and by the aid of dams would not make the river navigable.

The court also found that the bed of the stream is private property. Perhaps this is only another finding that the river is nonnavigable. If the stream is in fact nonnavigable, it is not a public way, and the legislature cannot make it such by merely enacting a law declaring it navigable. Private property cannot be taken for a public use without compensation. The fact that a small stream trickles through land which the public proposes to take for a highway does not authorize its being taken without compensation. On this point, see Gould, Waters, § 111, and authorities cited in the note. The finding upon the subject is fully supported by the law and the evidence. The dam is therefore not a purpresture.

The charge in the complaint in regard to putting sawdust into the stream is found untrue. It is found that the sawdust is burned, and that such care is taken that very little gets into the water, and that which does reach the stream has no appreciable effect upon the water. It was also found that the water is not essentially impaired by the waste water from the kitchen, or by the escape of oily substances or waste matter from the mill, or by the erection of privies or the escape of offal from the slaughterhouse. It cannot be denied that there was evidence tending to sustain all these findings. There was evidence which tended to show that the water was not polluted to such a degree by any or all the matters complained of as to render it unfit for use or unwholesome. Even the expert witnesses did not agree upon this proposition. But when the sources of pollution are suppressed which are enjoined by the decree, it cannot be said that, aside from the coloring matter which comes from the impounding of the logs, there is evidence that the water is materially polluted. The evidence shows that the offal from the slaughterhouse is not thrown into the stream, and does not get into the water; that only a portion of the drainage from the kitchen reaches the stream; that the privies are not over, or immediately upon, the banks of the stream. The people who are employed at defendant's mill themselves comprise a portion of the public. They have as much right to live on the south fork of Elk river as the inhabitants of Eureka have to live at Eureka. The one community cannot be suppressed for the benefit of the other. Since they have the right to live there, they have a right to maintain privies, taking all reasonable precautions against unnecessarily polluting the water. All natural streams to some extent operate as sewers. The surface of the land is drained by them, and all industries, as well as mere inhabitancy, tend to add to the impurities of the natural streams. The inhabitants and property owners upon these streams cannot be compelled to remove from them, or be expropriated for the benefit of urban communities. It is contended that the law of the case is changed by section 1, art. 14, of the state constitution, which makes the use of water for sale, rental, or distribution a public use. Certainly it was not intended by that provision to appropriate such water for the use of the public without compensation. The section recognizes the use as one in behalf of which the right of eminent domain may be invoked, and asserts the right of the state to regulate and control the sale, rental, and distribution of the same. People v. Stephens, 62 Cal. 209; McCrary v. Beaudry, 67 Cal. 120, 7 Pac. 264.

Nor do I see how the plaintiff's case is helped by section 374 of the Penal Code. I do not doubt the power of the legislature to make criminal the acts therein specified, when the direct effect of such acts is to pollute such waters. But there is nothing in the language of the section which makes it necessary to suppose that it was intended thereby to deprive riparian owners of property rights. It is not necessary to say that in the interest of public health the legislature cannot so restrict the rights of such owners as to materially interfere with the value of such rights. Such intent will not be presumed when the language leaves it doubtful. The section, if it can be construed as limiting riparian rights at all, only has that effect as to certain riparian owners. In this case the defendant had expended, as it is found, $90,000 in his mill and other property connected with his business many years before water was taken from the stream for the supply of Eureka. The use it is making of the stream, as between itself and inferior riparian owners, may be a reasonable one. It was so found. After he had built his mill and had been for years engaged in manufacturing lumber, the relator built its works, and in defiance of law, which provides that it shall only supply the city with pure water, commenced taking the water from the stream, 4½ miles below the mill, to sell to the inhabitants of Eureka. The water had been condemned by the board of health of the city of Eureka before it was taken by the relator. Apparently the relator is attempting through this proceeding to enable itself to perform its duty to sell pure, fresh water. Instead of taking pure water, as the court found it could have done, it will make this stream pure by destroying the property of the defendant. On the supposition made, the industry and the mode of conducting it were perfectly lawful before the relator constructed its works, and would have continued to be so but for the unlawful selection of this stream as the source from which relator would take its supply. It is not the law nor the act of the defendant alone which constitutes the nuisance. The selection of this stream by the relator renders the act unlawful which before was not. Perhaps such a thing may be done when it is absolutely necessary. The power of the legislature in this regard is very broad. But I do not think the legislature can, under the undefined and undefinable power called the "police power," take private property for public use without compensation, when such property can be condemned and paid for.

I have called attention to the fact that the law is not uniform in its operation, not only because it does not afford the same protection to rural and urban populations, but because it authorizes private persons in charge of a public use to select certain riparian owners, and, if the construction contended for by appellant be correct, take without compensation, for the pecuniary advantage of private speculators, a valuable portion of their property. Conceding that the plant of defendant and its mode of conducting its work is lawful and proper as against inferior riparian owners, the relator had no right, under the law, to take water for the purpose of selling it to the inhabitants of Eureka, without first removing the causes of pollution. This it could do, so far as defendant's mill is concerned, by condemning and paying for it. It cannot in this proceeding, nor could the legislature in the exercise of the police power authorize it to, take the property without compensation. As was said by the supreme court of Massachusetts: "The law will not allow rights of property to be invaded under the guise of a police regulation for the preservation of the health or protection against a threatened nuisance, and when it appears that such is not the real object and purpose of the legislation the courts will interfere to protect the rights of citizens." Watertown v. Mayo, 109 Mass. 315. If this law, therefore, has any force as applied to this case, its sole effect must be to render criminal the specific acts mentioned in the statute. These were already unlawful, for they constitute nuisances. To declare them criminal is not to limit riparian rights.

The court found also that a considerable number of people reside upon the borders of the stream below the mill of defendant, who use the waters of said stream. They are inferior riparian owners, and the attorney general may present their grievances in this case.

The court found: "That during the greater part of the year defendant keeps in its dam large quantities of redwood, spruce, and pine logs. That a liquid containing some coloring matter is discharged by the redwood logs into the water, which to some extent discolors the water of said stream, and gives it a darkish appearance, and in a slight degree this discoloration remains in the water to the intake of the Ricks Water Company; but the quantity of liquid that escapes from said logs is comparatively small, and it does not render the waters of said stream offensive or repulsive to the senses, or greatly discolor, deteriorate, defile, or contaminate them, and it does not injure or essentially impair them for domestic and drinking purposes." That the logs are not covered with foul organic matter or other substance which contaminates the water That prior to the erection of defendant's dam the waters of Elk river had a darkish appearance, owing to the falling of leaves into the stream, to juices from the roots of trees and fallen timber, and the condition of the water now in respect to color is very much as it has been for many years back.

It was also found that sawdust is not put into the stream nor allowed to decay on its banks, so that water percolating through it discolors or pollutes the stream; that all necessary precautions are taken to prevent the sawdust from getting into the river; that the same is burned upon the banks; and that the little that unavoidably gets into the river does not materially affect or discolor the waters of the stream. Upon the facts, so found, I do not think we can interfere with the decree in behalf of lower riparian owners. So far as they have appeared in the case,—which is only as witnesses,—they seem to be entirely satisfied with existing conditions. Apparently all—or nearly all—depend upon the lumbering industry for their means of subsistence, and most of them upon the business conducted by the defendant. It would be rather hard for them to have the industry suppressed by a proceeding in their behalf by the attorney general. I must confess that, to my mind, whether the impounding of logs in the river and the consequent discoloration and pollution of the water is not a nuisance of which lower riparian owners may complain, is a close question. But, under the circumstances of this case, I do not think the decree should be disturbed. The judgment and order are affirmed.

We concur: HENSHAW, J.; McFARLAND, J.

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(107 Cal. 348)

## LASSING v. JAMES. (No. 15,637.)[1]

(Supreme Court of California. May 28, 1895.)

MISTAKE IN WRITTEN CONTRACT — PAROL EVIDENCE—SALE—PASSING OF TITLE—REMEDIES OF VENDOR.

1. Parol evidence is admissible to show that a contract for hay and pasture for cattle was prepared by their owner; that it provided for payment for all hay used by the cattle at a certain price; that the owner of the hay and pasture refused to sign it, insisting that all the hay should be taken, or none; that the owner of the cattle then erased from the contract the provision as to paying for the hay used, and added thereto a provision for taking all the hay, but, by an oversight, a provision of general similar import to the one erased was still retained in another part of the contract.

2. Civ. Code, §§ 1640, 1649, 1654, relating to the construction and interpretation of contracts, contemplate the introduction of parol evidence when a contract is ambiguous or uncertain, or fails to express the real intention of the parties through fraud, mistake, or accident.

3. Under Civ. Code, § 1140, providing that the title to personal property passes to the buyer when the parties agree upon a present transfer, and the thing itself is identified, a contract for the sale of all the hay in certain stacks passes the title when the hay is identified and the price per ton fixed, though the weight is to be ascertained at a future time.

4. When the title to the property sold has passed, the vendor may, on the vendee's refusal to comply with the contract, sue for the price due, and need not sell the property and bring an action for the resulting loss.

In bank. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Action by J. F. Lassing against J. G. James on a contract to pasture and feed cattle. From a judgment for plaintiff and an order denying a motion for a new trial, defendant appeals. Affirmed.

W. C. Graves, for appellant. Edward P. Cole and T. C. Law, for respondent.

GAROUTTE, J. The plaintiff, Lassing, was a farmer, and the owner of several fields of growing alfalfa. He was also the owner of nine stacks of hay, amounting to about 2,700 tons, which hay was situated in these various fields. Defendant, James, was the owner of a large number of cattle, and was desirous of securing both pasturage and hay upon which to feed them. Thereupon a written agreement was entered into between these two parties, which, among other things, contained the following covenants: "That the said party of the first part (Lassing), in consideration of the covenants, promises, and agreements on the part of the said party of the second part (James), hereinafter contained, hereby covenants, promises, and agrees to and with the said party of the second part that the said party of the first part will take onto his inclosed alfalfa fields cattle aggregating about 800 to 1,200 head, to be pastured at 90 cents per head per month. If any cattle should remain on said pasture any fractional part of any month, pasturage shall only be paid proportionately, and, when the pasturage becomes exhausted as not to fatten said steers, and some hay is fed, then the price is to be on the pasturage as the quantity of hay is fed, allowing 28 pounds of hay for a full 24 hours' feed for each head; for instance, if 14 pounds of hay is fed per day, then 45 cents per month per head is to be paid, and pro rata more or less in that proportion, as the case may be, until the cattle are entirely confined to the feeding pens, and $5 per ton is to be paid for each and every ton of hay fed between this day and April 1, 1890. And the first party agrees to fence off around each bunch of stacks a sufficient number of large feeding pens, and sufficiently strong to hold the cattle without fear of them getting away; also, to furnish a good, comfortable, dry house for the use of the men engaged in feeding and caring for said stock; also, to furnish a good supply of water troughs in each pen, with pipes, etc., from the tanks, wells, and pumps, to be equipped and furnished in good order, and sufficient to plentifully water all of said cattle at all times, and, if it is found necessary to save hay while feeding, feeding racks are to be made around the fence. Cattle may be taken out and others put in at any time. And the said party of the second part, in consideration of the said covenants, promises, and agreements on the part of the said party of the first part hereinafter contained, covenant, promise, and agree to and with the party of the first part that the said party of the second part will, on turning cattle on said alfalfa fields, pay $2,500 as the first payment on the hay, and at the end of each and every month pay the amount of all the pasturage used during the months just past. On or before November 1, 1889, both of the parties hereto is to cut off ten feet from the end of an average stack, and weigh it, and average the balance by that, and, as soon as the amount is found, one-half of all the money it comes to is to be paid, and seventy-five days thereafter one-half of the balance due is to be paid, and at the end of the time all is to be paid." In pursuance of the aforesaid agreement, James placed his cattle upon the fields of Lassing, where they remained about six weeks, when he removed them therefrom, and declined to be further bound by the terms of the contract. This action was brought by Lassing to recover the value of the hay at $5 per ton, and also the price of the pasturage as agreed upon. The plaintiff credited defendant with the payment of $2,500, made at the time the contract was entered into, and also allowed him the further sum of $3,423, paid to plaintiff by an insurance company for a loss of a portion of the hay by fire, plaintiff having taken out a policy thereon after James removed his cattle from the premises. In addition to the denials of the answer, defendant set out a cross complaint, claiming damages to the amount of about $6,000 for injury to the cattle by reason of plaintiff's breach of agreement in the manner in which he cared for them. The cross complaint was held to be unsupported in the evidence by the trial court, and judgment went for plaintiff. This is an appeal from such judgment and from the order denying a motion for a new trial.

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[1] Rehearing denied.

There is no question raised by appellant, James, as to the amount allowed by the court for pasturage of the cattle, but the chief bone of contention appears to be as to the amount of hay that James really purchased; and that brings us to a construction of the agreement itself. It is contended, upon the one side, that James was only to pay for the hay used in feeding his cattle; while it is insisted, upon the other, that James bought the entire nine stacks of hay, and that his liability to pay therefor was incurred whether or not the hay was actually fed to the cattle. Upon the face of the contract there seems to be some inconsistency as to its provisions in this regard. In one part it is provided that "five dollars per ton is to be paid for each and every ton of hay fed between this date and April 1, 1890"; while the last clause provides in terms for the measuring of the entire nine stacks of hay for the purpose of determining the number of tons therein, and further provides for partial payments therefor, and the respective times when such payments are to be made, and also fixes the date of final payment of the balance due. The contract is inartificially drawn, and from all points indicates the handiwork of a layman. At the same time the inconsistency or repugnancy present in the two portions of the contract cited is more seeming than real. These two provisions are certainly not directly conflicting. James, as indicated by the first clause quoted, agreed to pay for all the hay used prior to April 1, 1890. The second clause quoted is simply broader, and reaches further, for by that clause he agrees to pay for all the hay in the nine stacks. Section 1858 of the Code of Civil Procedure, in speaking as to the interpretation of contracts, provides that: "Where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all,"—and by virtue of this canon of construction we avoid a seeming contradiction in these two provisions, and allow them both to stand. There are also provisions of the Civil Code which, when applied to the facts here presented, overthrow appellant's position as to the true construction of this contract. Section 1649 provides: "If the terms of a promise are in any respect ambiguous or uncertain, it must be interpreted in the sense in which the promisor believed at the time of making it that the promisee understood it." If James' promises of payment, when taken together, are ambiguous and uncertain, then, under the oral evidence of Lassing, there is no question but that both parties understood that James was buying all the hay at $5 per ton. Lassing not only believed such to be the contract, but James, the promisor, believed Lassing, the promisee, so understood it. These conditions are conclusively shown by Lassing's testimony, and James, when upon the witness stand, in no way offered contradictory evidence. Section 1654 of the Civil Code, provides: "In cases of uncertainty not removed by the preceding rules, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist. The promisor is presumed to be such party. * * *" James is the promisor, and, by virtue of this section of the Code, he is presumed to be the party who caused the uncertainty; but, beyond this, he was the party who actually caused it, for he prepared the contract, and therefore it should be interpreted most strongly against him. Again, section 1640 provides: "When through fraud, mistake or accident, a written contract fails to express the real intention of the parties, such intention is to be regarded, and the erroneous parts of the writing disregarded." We think the provisions of this section may be properly invoked in behalf of respondent's contention. James prepared the written contract in San Francisco, and brought it to Lassing at his home for him to sign. At that time the contract did not contain the provision providing for the measurement of the hay, and the partial payments therefor according to the number of tons found to be in the stacks, but it contained a provision providing for the payment of all the hay used, at the rate of $5 per ton. The contract thus presented to Lassing he refused to sign, insisting that James should take all the hay, or none. Thereupon James, in compliance with Lassing's demands, erased from the contract as presented the provision as to paying for the hay used, and added thereto the provision as to taking all the hay. It now appears that a provision of general similar import to the one erased still remained in another portion of the contract; but the circumstances all show that it was an oversight upon the part of both parties in not also striking that provision from the contract, and it is evident that it was omitted to be done purely through mistake. It was not intended to be left there, and, tested by section 1640, should be disregarded in the interpretation thereof.

The facts and circumstances surrounding the making of this contract appear in the record by the uncontradicted evidence of the respondent, Lassing. Appellant, in his reply brief, strenuously attacks the rulings of the court in admitting this evidence. It is claimed that such parol evidence was inadmissible as tending to contradict, add to, and vary the terms of the written contract. But we are clear to the contrary. The contract has not been changed by Lassing's evidence. Nothing has been added thereto. No term has been nullified or even modified. The sections of the Code we have quoted relating to the construction and interpretation of contracts contemplate the introduction of parol evidence. For it is only upon the introduction of such evidence that it can be ascertained whether or not the principles of law embodied in those sections are pertinent and applicable to the facts of any particular case. We conclude that appellant agreed to take all the hay situated in the nine stacks. The clause of the contract as to the measurement of the hay and the payment therefor is as follows: "On or before November 1, 1889, both of the parties hereto is to cut off ten feet from the end of an average stack, and weigh it, and average the balance by that, and, as soon as the amount is found, one-half of all the money it comes to is to be paid, and seventy-five days thereafter one-half of the balance due is to be paid, and at the end of the time all is to be paid." Appellant contends that this clause, standing alone, is simply an executory agreement for the sale and purchase of all the hay in the nine stacks, and that, consequently, the title to the hay has never passed to James. It is insisted that the contract was executory in this, that the hay was never measured and the amount ascertained, as provided in the contract, and that the measurement and determination as to the amount were conditions precedent to the passing of the title. We are clear that the agreement to ascertain the number of tons of hay at some future time by weight and measurement in no way affected the question as to the present passing of the title. All the hay in the nine stacks was purchased, at the rate of $5 per ton. The number of tons was immaterial as bearing upon the question of a valid transfer. The final determination as to the number of tons was only material as fixing the amount of money to be paid. The subsequent measurement and ascertainment of the exact number of tons could in no way furnish any grounds for the rejection or repudiation of the sale by either party. The hay was identified and the price per ton agreed upon at the date of the contract, and these only were the essentials necessary to constitute a valid sale, for the sale was made regardless of the amount of the hay, and thus necessarily became complete and perfect when the contract was entered into and part payment made thereunder. In Blackwood v. Packing Co., 76 Cal. 212, 18 Pac. 248, a case involving the principle here discussed, this court said: "Some of the American cases are not in accord with the rule laid down by Mr. Benjamin in this, that, if the goods are identified, it does not matter that weighing or measuring is necessary to ascertain the price or the quantity, and this seems to be the law in California, for the Civil Code contains the following: 'Sec. 1140. The title to personal property sold or exchanged passes to the buyer whenever the parties agree upon a present transfer, and the thing itself is identified, whether it is separated from other things or not.'" After James repudiated the contract, removed his cattle from the fields, and left the hay in the stacks, appellant contends that it was the duty of Lassing to sell the hay to the best advantage possible, and, if it failed to bring $5 per ton, then the right accrued to recover from James the difference. In a case like the present, where the title to personal property has passed, there is no obligation resting upon the vendor to resell. In many cases he would have no right to resell, and possibly would be guilty of an act of conversion if he exercised any such dominion over the property; but upon the facts of this case, under any principle of law which appellant might advance, Lassing had the right to choose his remedy, as between suing for the entire purchase price or selling the property and bringing an action for the difference in case the sale resulted in a loss. Hunter v. Wetsell, 84 N. Y. 555; Dustan v. McAndrew, 44 N. Y. 72; Van Horn v. Rucker, 84 Am. Dec. 53.

It is insisted that Lassing so materially failed to carry out the covenants of the contract upon his part to be performed that James was justified in repudiating the contract and withdrawing from under its provisions. Of course, such conduct upon the part of James could only be justified upon the principle that the covenants to be performed by the respective parties were entirely mutual and dependent upon each other. And, in view of what we have already said as to the purchase of the hay, possibly James' only remedy for a breach of the contract would be an action of damages in the nature of a recoupment; but we do not deem it necessary to enter into a discussion as to the mutuality and dependency of these respective covenants, for we think no material and substantial breach of the contract was ever committed by Lassing. By its terms he was to do various things, and in pursuance of his agreement it is conceded that he performed all of the things to be done by him, and at considerable labor and expense, except in a single respect. The contract, after requiring Lassing to furnish a plentiful supply of water for the cattle, continues: "And, if it is necessary to save hay while feeding, feeding racks are to be made around the fence." It is now claimed that Lassing failed to live up to his contract in this regard, and the alleged breach of this provision of the contract is relied upon to furnish material sufficient to demand a reversal of the judgment. Upon this issue the court made the following finding of fact: "That it was never found necessary on the 18th day of October, 1889, or at any time, to furnish feeding racks around the fence to save hay while feeding the cattle of defendant, nor was any necessity for feeding racks ever known to plaintiff, nor did plaintiff wholly or at all omit, fail, neglect, or refuse to furnish the same, nor was defendant compelled to, nor did he, remove any of his cattle from plaintiff's land or premises because of the failure of plaintiff to build said racks, nor did defendant, nor was he compelled to, remove any of his cattle by any act of plaintiff, nor did defendant suffer any loss, injury, or damage in any sum of money by any act of plaintiff, or by any absence of feeding racks, or at all." As to its indefiniteness, the foregoing covenant of the contract stands fully at par with the other provisions, but, conceding to it all the force and effect that appellant claims, and that the provision not only demanded that Lassing should furnish feeding racks when necessary, but that a mistake in judgment upon his part as to the time when that necessity arose would furnish grounds for a repudiation of the contract upon the part of James, however innocent Lassing might be in making such mistake, still the finding of fact which we have quoted stands as a bar to a favorable conclusion to appellant upon this contention. The finding in effect declares: (1) It was never necessary to furnish the feeding racks; (2) that appellant did not remove his cattle from plaintiff's lands because of the failure to furnish said feeding racks; (3) that appellant suffered no loss or damage by reason of the absence of such racks. This finding of fact, as we look upon it, in each of its particular branches is fatal to appellant's claims, if supported by the evidence; for, aside from that portion of the finding declaring in effect that racks were not necessary, it is found from the evidence that James deserted the premises and removed his cattle therefrom for other causes, —causes in no way attributable to Lassing, and for which he was in no way responsible. If this portion of the finding be true, then James cannot now rely upon a breach of the contract as a ground for repudiation which in his mind at the time in no way formed an element entering into the attempted repudiation or rescission upon his part. Again, it is found that he suffered no loss or damage as to his cattle by reason of the failure of Lassing to furnish the racks. If this be so, James was not excused in law from carrying out all the covenants upon his part to be performed. If, in fact, he suffered no injury or damage by a breach of the contract, such breach was harmless, and gave him no cause of complaint. Certainly no action of damages could be based thereon by him; neither would it be such a substantial default as to afford grounds for a rescission or repudiation. While upon some of these questions there may be said to be a substantial conflict in the evidence, yet we think every branch of this finding of fact has substantial support in the evidence found in the record. It will be observed that feeding racks were to be furnished when it became necessary "to save hay." Hence, it is evident that a breach of this provision could only result in damage to James for a loss of hay. Yet he makes no claim in his complaint for a loss of that character, but attempts to recoup in damages for a loss of weight in the cattle by a lack of sufficient pasturage and hay. As to damages claimed in the nature of recoupment, it would almost seem conclusive against the claim to such that there is nothing whatever in the contract requiring Lassing to furnish sufficient feed to keep the stock in prime condition. When the contract was made, the feed was upon the ground, both pasturage and hay, and it was James' feed, regardless of quality or quantity, and was to be fed by him at such times and quantities as he saw fit. There is some claim that James subsequently, by parol, made Lassing his agent to take charge of the cattle and care for them. Conceding as much, a neglect of duty by Lassing under such contract, and damages resulting therefrom, would be a matter entirely foreign to any question of feeding racks. In addition to and beyond all this, the evidence fully supports the finding that the lack of feeding racks in no way was the cause of damage and loss to James, conceding such damage and loss to have occurred. Again, the finding of fact to the effect that the absence of feeding racks was not the cause of the removal of the cattle by James finds ample support in the evidence. Owing to the warm, copious, and unexpected rains of the months of September and October, the fields had become soft and miry, which fact interfered largely with the welfare of the cattle, and furnished a strong argument for James' action in removing them. And, as an additional cause for their removal, and probably the controlling one, these same warm rains had caused a growth of grass upon James' own land fully sufficient for all his needs and purposes.

Conceding that an error of judgment upon Lassing's part as to the date when he was required to furnish the racks is fatal to his case, still, under the evidence, the finding of the court to this point has support. A mistake of judgment as to this particular time, entailing upon him the severe penalties here claimed, should not be held against him unless clearly apparent from the evidence. We think his conduct and acts in this regard should be liberally interpreted in his favor; and, so interpreted, we conclude the breach, if one occurred, was not a substantial one, but purely technical. Weeks before the cattle were removed Lassing had made arrangements with a dealer to have the lumber upon the ground to build the racks upon 24 hours' notice. He had fed the hay for two days only when James came upon the ground and ordered an immediate removal of the cattle. Under the written contract, it is clearly contemplated that James should feed the hay, and the inference naturally arises that Lassing would be notified when racks were required, but, under a subsequent parol agreement, Lassing was hired to feed the hay, and, as stated, he had only fed it two days when James came upon the ground and ordered an immediate removal of the cattle. It thus appears to have been left to Lassing alone to determine when hay should be fed, and for this reason the novel conditions arise that, if Lassing had decided not to feed hay during these few days, then the feeding racks would not have been required, and no breach would have occurred. Lassing states that he placed the hay upon the high and gravelly ground; that he did not think the time had arrived for the racks to be used; that neither James nor any of his men had requested or suggested to him to make and place them; that, immediately prior to the removal of the cattle, James neither demanded that he furnish the racks, nor notified him that he was removing the cattle for the reason that they were not furnished, and that he could and would have furnished them within a very few days if James had so requested. Upon such a state of facts we think this portion of the finding of the court should be upheld.

For the foregoing reasons we conclude the judgment and order should be affirmed, and it is so ordered.

We concur: HARRISON, J.; VAN FLEET, J.; McFARLAND, J.; TEMPLE, J.; HENSHAW, J.

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107 Cal. 236

## PEOPLE ex rel. SWEET v. WARD. (L. A. 21.)

(Supreme Court of California. May 7, 1895.)

VACANCY IN COUNTY OFFICE — DEATH OF PERSON ELECTED—POWERS OF COUNTY BOARD.

1. County Government Act 1891, § 60, provides that all elective county officers shall be chosen in November, 1892, and every two years thereafter, and shall take office on the first Monday after the first day of the next January, and that all such officers shall hold office until their successors are elected or appointed and qualified. Pol. Code, § 879, provides that every officer shall discharge the duties of his office until his successor has qualified. *Held*, that when one elected in November to succeed defendant as a county officer died in the next December, after he had qualified, there was a vacancy in the office after the first Monday after the first day in January, and not before.

2. A county board has no power to fill a vacancy which will certainly arise at a future time, when a different board is in control of the county affairs.

In bank. Appeal from superior court, San Diego county; E. S. Torrance, Judge.

The people of the state of California, at the relation of A. H. Sweet, against M. L. Ward, to determine the claims of relator and defendant to an office. From a judgment for relator, defendant appeals. Affirmed.

C. H. Rippey, J. A. Gibson, Works & Works, N. J. Pillsbury, R. K. Nichols, J. L. Copeland, and A. Haines, for appellant. J. W. Hughes and W. T. McNealy, for respondent.

HENSHAW, J. Appeal from the judgment. The facts, about which there is no controversy, are as follows: Ward, the appellant, was duly elected district attorney of San Diego county for the term commencing January 2, 1893. He qualified and entered upon the discharge of the duties of the office. At the general election in November, 1894, and during Ward's term and incumbency, William Darby was elected to succeed him, pursuant to section 60 of the county government act of 1891. Darby duly qualified upon November 24th, and on December 15th of the same year died. Section 60 of the county government act of 1891 provided that "all elective county officers * * * shall be elected at the general election to be held in November, 1892, and every two years thereafter * * * and shall take office at twelve o'clock meridian of the first Monday after the first day of January next succeeding their election. * * * All officers elected under the provisions of this act shall hold office until their successors are elected or appointed and qualified." Section 879 of the Political Code provides: "Every officer must continue to discharge the duties of his office, although his term has expired, until his successor has qualified." Such was the law when Ward was elected and when the questions in litigation arose. After Darby's death, and on the 2d day of January, 1895, the board of supervisors, as then constituted, appointed Ward to fill the vacancy caused by the death of Darby, and to be district attorney "for the term of office to be taken at 12 m. on the 7th day of January, 1895"; and, upon the day of his appointment, Ward qualified in due form as the appointee to succeed Darby. At 3 o'clock p. m. of January 7, 1895, the personnel of the board having changed by the outgoing of two old and the incoming of two new supervisors at noon of that day, the board, as then constituted, declared a vacancy to exist in the office of district attorney, and appointed the relator to fill the same during the term for which Darby had been elected; and Sweet in due course qualified. Sweet made demand upon Ward for the office upon January 10, 1895; and, upon Ward's refusal to surrender it, this action was brought to determine their conflicting claims. By appellant it is contended: First, that no vacancy in the office resulted from the death of Darby; second, that, if a vacancy did result, it occurred eo instanti upon the death of Darby, and it was then the right and duty of the board of supervisors to fill the vacancy, which they duly did by the appointment of himself. Under his first contention, he asserts a right to hold until his successor is elected or appointed and qualified. Under his second contention, the right is based upon the theory of a vacancy, and his appointment to serve out Darby's term.

1. It is not to be questioned but that if Darby had lived, and at noon of the 7th day of January, 1895, had demanded the office of Ward, he would have been entitled to enter it, and Ward's term would thus and then have ceased and determined. But was a demand by Darby necessary to determine Ward's tenure? The answer is found in the language of the statute. Ward, by section 60 of the act quoted, and by section 879 of the Political Code, was entitled to hold absolutely until noon of January 7th, and contingently after that date, if no successor had been elected or appointed and qualified. He had a fixed tenure and a contingent term. People v. Edwards, 93 Cal. 153, 28 Pac. 831. The election and qualification of Darby as Ward's successor (and not a demand by him for the office) ipso facto cut off Ward's contingent term, and limited him to the absolute period; that is, until noon of January 7th. State v. Bemenderfer, 96 Ind. 374; State v. Seay, 64 Mo. 89; Com. v. Hanley, 9 Pa. St. 513; Gosman v. State, 106 Ind. 206, 6 N. E. 349; People v. Supervisor of Barnett Tp., 100 Ill. 332; Mechem, Pub. Off. § 401; Throop, Pub. Off. § 329. The word "successor" is used in our statutes, as in the books, in the twofold sense of the one entitled to succeed, and the one who has in fact succeeded. It is here employed in the former acceptation. It is a general rule, founded upon necessity to prevent vexatious embarrassment in the public service, that an officer will not be considered out of office merely by the limitation of his term. In the absence of a statute authorizing or requiring him to hold until the qualification of his successor, a vacancy arises upon the expiration of his term; but, notwithstanding, the law, for the public convenience, empowers him to continue to occupy his office. But one so holding over acquires no right to a new, fixed, and definite term. He is a makeshift merely, locum tenens, temporarily filling a public office, which it is inexpedient to permit to stand without an incumbent. The legislature may provide that certain acts, happenings, or events shall create a vacancy in law, while its greatest wisdom cannot prevent the occurrence of vacancies in fact. The death of the incumbent creates a vacancy as a matter of course, and without any expression from the legislature upon the question. But, when the legislature declares that the office of a sheriff shall become vacant when he stands committed for 60 days for not paying over money received by him (Pol. Code, § 4186), such a vacancy may be described as a vacancy in law. So, here, the legislature having in effect provided that Ward's term upon the election and qualification of Darby came to an end at noon of January 7, 1895, a vacancy in law resulted when Darby's death prevented his succession. It is true the office would not be without an incumbent, since Ward, as locum tenens, could hold until the supervisors, by appropriate action, appointed to the vacancy; but, as has been said, Ward's incumbency gave him no right to a fixed and definite tenure. That such a vacancy did exist has before now been held by this court, under circumstances similar to but less strong than those of the present case, in People v. Taylor, 57 Cal. 622. The reasoning of the Taylor Case led to the conclusion that the officer elect, who had there failed to qualify, was an incumbent, under subdivision 9, § 996, of the Political Code. The incongruity of declaring a person an incumbent who has never taken possession or entered upon the discharge of the duties of an office, and who could not be chargeable with misfeasance or malfeasance, is apparent. But the learned justice who wrote the opinion in this case was constrained somewhat by the earlier decisions of the court, and by his own conviction afterwards expressed in Rosborough v. Boardman, 67 Cal. 116, 7 Pac. 261, that a vacancy could not exist unless it was one contemplated and declared by section 996 of the Political Code. The legitimate meaning of the word "incumbent" was therefore somewhat strained to meet the substantial ends of justice, the incongruity resulting from the failure of the legislature to discriminate in the use of descriptive terms. But giving full weight to People v. Taylor, and treating Darby as an incumbent, still, by its authority, the vacancy arose at the commencement of his term, and not during the term of Ward, his predecessor. But Darby was not, in the true meaning of the word, an "incumbent," and we need not predicate the existence of the vacancy upon section 996 of the Political Code.

As has been suggested, some of the earlier cases have held that to section 996, enumerating the causes of vacancy, is to be applied the doctrine of exclusion; but more lately the soundness of the rule has been questioned, and it may well be doubted. People v. Hammond, 66 Cal. 656, 6 Pac. 741. And that it cannot be applied in strictness is clear from the fact that the section does not recite all of the causes and events which the legislature itself has declared shall create vacancies. An instance of this is found in section 4186 of the Political Code, and to that may be added section 88 of the county government act of 1891, and the provisions for forfeiture of office declared in the act to promote purity of elections.

Finally, it may be said that the vacancy here arising is not one occurring during the term of an incumbent, since it did not arise during Ward's term, and Darby was never in strictness an incumbent; so that section 996 of the Political Code, which deals exclusively with vacancies during the terms of office of incumbents, is inapplicable. Miller v. Board, 25 Cal. 94. This vacancy is rather an hiatus. It is in the nature of an interregnum. It arose when, upon noon of January 7, 1895, Darby, by death, was not able to take his office. French v. County of Santa Clara, 69 Cal. 519, 11 Pac. 30; People v. Taylor, 57 Cal. 622. The expiration of Ward's term alone did not create this vacancy. It was the election and qualification of his successor, and the expiration of the term, which worked the result. It is another instance of a vacancy contemplated by statute, but not expressed in section 996.

2. The vacancy which occurred having arisen at noon of January 7th, it remains to be considered whether the action of the board of supervisors upon January 2d was legal or illegal; and, as this is determined, so will the claim of appellant stand or fall. The board, then, undertook to fill, not an existing vacancy, but one soon to exist; not, however, a contingent or possible vacancy, but one which, in the nature of things, was certain to arise, though at a future date, and at a time when, in legal contemplation and in fact, a different board would be in control of the county's affairs. Briefly, the act of the board was to make an appointment to take effect, and to fill a vacancy to arise, in the term of its successor. We are not, therefore, here concerned with the question of the power to appoint to fill an anticipated vacancy by the person or body which, as constituted, is authorized to fill the vacancy when it occurs, but solely with the question of an appointment made to fill a prospective vacancy, which will arise at a time when there has been a change in the appointing power. Upon the election and qualification of Darby, his right to the office for the term commencing at noon of January 7th vested immediately, and Ward's contingent right to an additional term was cut off. Upon the divestiture of that right by death, it existed in no one, and there was no revivor of Ward's contingent right to an extended term. The power of the board of supervisors in dealing with such matters is drawn from subdivision 21, § 25, of the county government act of 1891, and it is limited to the filling of vacancies. That power could properly be exercised only upon an existing vacancy. The board could by its action neither create a vacancy, nor by anticipation fill one, which was to arise in futuro, during the term of its successor. Mechem lays down the rule in the following language, and, so far as our investigations have extended, its soundness is not opposed by any dissenting voice: "The appointing power cannot forestall the rights and prerogatives of their own successors by appointing successors to offices expiring after their power to appoint has itself expired." Mechem, Pub. Off. § 133. This is the language of Ivy v. Lusk, 11 La. Ann. 486, while to like effect are the cases of Bownes v. Meehan, 45 N. J. Law, 189, and Haight v. Love, 39 N. J. Law, 14.

We conclude, therefore: First, that a vacancy arose in the office of district attorney by reason of the election, qualification, and death of Darby; second, that this vacancy existed at and after noon of the 7th day of January, 1895, and not before; third, that the attempt of the first board of supervisors to fill the vacancy upon January 2d was in excess of its power, and void; fourth, that the vacancy was properly filled by the existing board at 3 o'clock p. m. of January 7, 1895. Wherefore, it follows that the judgment appealed from is affirmed.

We concur: BEATTY, C. J.; TEMPLE, J.; McFARLAND, J.; VAN FLEET, J.; GAROUTTE, J.; HARRISON, J.

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107 Cal. 432

## SMITH v. LIVERPOOL & LONDON & GLOBE INS. CO. et al. (No. 15,707.)

(Supreme Court of California. June 4, 1895.)

MALICIOUS PROSECUTION—PROBABLE CAUSE—EVIDENCE—AGENCY—PROOF BY AGENT'S DECLARATIONS.

1. In an action for malicious prosecution, it is for the court to determine whether certain admitted or clearly proven facts constituted probable cause.

2. In an action for malicious prosecution for arson, it appeared that the estate of plaintiff's deceased wife, of which he was administrator, owned two vacant houses on the railroad line between O. and P., about two miles from P., where plaintiff's children lived, and that the buildings were insured; that the fire originated after dark Monday night, on the inside of the buildings, and that the persons discovering the fire found the outer doors locked, and smelled burning oil; that plaintiff worked at O., going to P. on Saturday evenings, and returning to O. on Sunday, but that at the time of the fire, he remained at P. over Monday, and had been seen peering about the buildings in a suspicious manner; that, shortly before the fire was discovered, a person well acquainted with plaintiff saw a person whom he thought to be plaintiff walking rapidly towards P.; that plaintiff was seen in a saloon that night looking warm and excited; that the property was mortgaged, plaintiff owing money besides on his own account and that there was nothing to indicate a motive on the part of any other person to burn the buildings; that the facts were communicated to the district attorney, who advised plaintiff's prosecution for arson, and himself

made out the complaint. *Held*, to show probable cause and absence of malice.

3. Declarations of an alleged agent are inadmissible to bind the principal unless the fact of agency be first established.

Department 1. Appeal from superior court, Contra Costa county; Joseph P. Jones, Judge.

Action by A. D. Smith against the Liverpool & London & Globe Insurance Company and others for malicious prosecution. From a judgment for plaintiff, defendants appeal. Reversed.

T. C. Van Ness and Van Ness & Redman, for appellants. Gibson & Wood and Welles Whitmore, for respondent.

VAN FLEET, J. This is an action for malicious prosecution, the complaint alleging that defendants, maliciously and without probable cause, procured plaintiff to be arrested and prosecuted upon a charge of arson before a justice of the peace; and, as a second count, charging that defendants in like manner, maliciously and without probable cause, procured and induced the district attorney of Contra Costa county to bring the same charge before the grand jury of said county with a view and purpose of having plaintiff indicted for said offense. Plaintiff had a verdict, and from the judgment entered thereon and an order denying their motion for a new trial defendants appeal. A number of errors are assigned as grounds for reversal.

1. It is urged that the evidence is wholly insufficient to sustain the verdict, in that (1) it does not tend to show that the prosecution of the plaintiff, either before the committing magistrate or the grand jury, was by or at the instigation or procurement of defendants, or any of them; and (2) that it does not appear that the prosecution, by whomsoever instigated, was either malicious or without probable cause.

We will first consider the second ground upon which this contention rests, since the first can be more conveniently disposed of in connection with another point. It appears without substantial conflict—in fact largely from the evidence adduced by plaintiff on his affirmative case—that the circumstances upon which the prosecution of plaintiff was based, both before the magistrate and the grand jury, were substantially these: The estate of plaintiff's deceased wife, of which plaintiff was the administrator, was the owner of two connecting houses in the town of Crockett, in Contra Costa county, a small village situate on the line of the railroad between Port Costa and Oakland, and about two miles distant from Port Costa, upon which there was insurance in the sum of $1,700 in the defendant companies. On the night of Monday, May 25, 1891, between 9 and 10 o'clock, the insured property was destroyed by fire, under circumstances strongly indicative that the fire was of incendiary origin. The buildings were and had been for some time vacant. The fire originated after dark on the inside of the houses, and, upon the arrival of persons who had observed the smoke, it was found that the outer doors were locked, and the escaping smoke was laden with a strong odor of burning oil or "dope." The plaintiff was a carpenter, and for some little time had been working in Oakland; but his children still remained in Port Costa, and plaintiff was in the habit of coming up to see them Saturday evenings, and returning to Oakland on Sunday. On this occasion he did not return Sunday, remaining instead in Port Costa over Monday. He had been seen on the day before the fire by Mr. Cavanaugh, the next-door neighbor, peering about the houses in what the latter considered a peculiar and suspicious manner. To such an extent, in fact, were the suspicions of Cavanaugh aroused that when the fire occurred, which also burned the residence of the latter, and the manner in which the fire started became known, he immediately suspected that plaintiff had set the houses on fire. About 20 minutes before the fire was discovered, a witness living in Crockett, who was well acquainted with plaintiff, saw a man at the east end of the town, on the county road, walking pretty fast towards Port Costa, whom he took at the time to be the plaintiff. Between half-past 9 and 10 o'clock, one Bartlett, living in Port Costa, whose wife had just called his attention to the fire, came out of his door, and met plaintiff on the street in Port Costa. He told plaintiff of the fire, and said: "I am going right down there. That is your building. Let us go right down." Plaintiff answered that it was not much use hurrying. On the way over, Bartlett hurried, but plaintiff lagged behind, and did not go all the way to the burning houses, but left Bartlett at the foot of some stairs leading up the side of the hill at the east end of the town, and the latter did not see him again that night. Another witness saw plaintiff in a saloon in Port Costa the night of the fire. He appeared warm and excited or scared, and was sweating. C. W. Rodgers, the sheriff of the county, asked plaintiff, two or three days after the fire, how it occurred. Plaintiff told him it started in some straw in an alleyway between the buildings. The sheriff asked him if he had any insurance, and he said "about $600 or $700." There was a matured and unpaid mortgage upon the property for some $350, and a demand against the estate for some $265, borrowed by the wife of plaintiff in her lifetime. Besides these amounts, plaintiff was owing money on his own account. The appraised value of the burned premises, as returned in the estate, was $1,800. There was nothing to indicate a motive on the part of any one other than plaintiff to burn the buildings; and, when the circumstances of the fire became known, not only the sheriff of the county, but a considerable number of the residents of Crockett and Port Costa, believed and expressed the opinion that plaintiff had fired the buildings; and the prosecuting witness so believed when he swore to the complaint. It further appeared that before the prosecution was commenced, all the circumstances of the case were fully and fairly laid before the district attorney of the county; that the district attorney advised that it was a proper case for a prosecution, and himself drafted a complaint against plaintiff charging him with arson, and directed the prosecuting witness to go before the justice, and swear to the complaint, and have plaintiff arrested; that, in pursuance of such advice, the complaint was sworn to and the prosecution of plaintiff had. It also appeared that, after the discharge of the plaintiff by the magistrate, the district attorney, of his own motion, took the matter before the grand jury for their investigation.

No principle is better established than that in actions for malicious prosecution the plaintiff must, in order to recover, establish not only malice, but want of probable cause. These two elements are essential, and they must concur or the action will not lie. Potter v. Seale, 8 Cal. 220; Anderson v. Coleman, 53 Cal. 188. "The primary question to be considered in this class of cases, as was said in Grant v. Moore, 29 Cal. 644, is the want of probable cause for the prosecution complained of, and this must be established before plaintiff can recover; and the burden of proof is upon the plaintiff." Jones v. Jones, 71 Cal. 91, 11 Pac. 817. Reasonable or probable cause has been defined to be: "A suspicion founded upon circumstances sufficiently strong to warrant a reasonable man in the belief that the charge is true." Potter v. Seale, supra, and cases there cited. In view of these principles, and applying them to the foregoing facts, we are at a loss to understand upon what theory the learned judge of the court below denied defendants' motion for a nonsuit. We cannot readily conceive of a state of facts better calculated to arouse in the mind of any reasonable man a strong suspicion of guilt than was furnished in this case. It cannot be doubted that if, upon these acts, the plaintiff had been tried and convicted of arson in the burning of the buildings destroyed, it would be impossible to say that there was not evidence to sustain such conviction. They not only disclose a case of probable cause, but, in our judgment, they wholly negative the idea of malice. See Jones v. Jones, supra. Upon such a state of facts, the plaintiff should not have been permitted to go to the jury. "Probable cause is a mixed question of law and fact. Whether the alleged circumstances existed or not is simply a question of fact; and, conceding their existence, whether or not they constituted probable cause is a question of law. Where the circumstances are admitted, or clearly proved by uncontradicted testimony, it is the province of the court to determine the question of probable cause, and the court may order a nonsuit." Potter v. Seale, supra.

2. The court admitted, over defendants' objection, evidence as to the declarations of one McCarthy, a detective, to the effect that he was in the employment of defendants for the purpose of working up the case against plaintiff, and having him prosecuted for burning the houses. This was clearly erroneous. No other evidence was offered by plaintiff aside from these declarations to establish McCarthy's employment by or agency for defendants in the premises, and the very purpose of introducing such declarations would seem to have been to prove such agency. The declarations were inadmissible for such purpose. It was incumbent upon the plaintiff to first establish the fact of agency before the declarations of the agent became admissible to bind his principal. Grisby v. Waterworks Co., 40 Cal. 396; Loan Soc. v. Gerichten, 64 Cal. 521, 2 Pac. 405. The defendants denied any responsibility for or connection with the prosecution of plaintiff, or that McCarthy was their agent or employé for any such purpose; and, inasmuch as the evidence of such declarations was the only evidence tending directly to connect defendants with the prosecution, its admission was prejudicial error.

3. The action of the court in giving certain instructions and refusing others requested is complained of. The questions involved in the instructions given and refused are covered by what has been said above on other features of the case; and wherein the court erred in these particulars is, we think, made sufficiently manifest without further or special consideration.

4. The objection that the damages are excessive need not be considered at this time, as the question may not arise upon another trial.

The judgment and order are reversed, and the cause remanded.

We concur: GAROUTTE, J.; HARRISON, J.

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107 Cal. 447

## PACIFIC FRUIT CO. v. COON. (No. 15,708.)

(Supreme Court of California. June 10, 1895.)

CORPORATE STOCK—ASSESSMENT—CANCELLATION.

1. A subscription for capital stock of a corporation cannot be canceled, except for fraud or mistake, without the consent of all the stockholders.

2. The issuance of a certificate of corporate stock is not a necessary preliminary to the ownership or assessability of such stock.

3. Though the cancellation of a subscription for corporate stock may be shown by circumstantial evidence, the mere recitals in the minutes of the stockholders' meetings that so many shares of stock were represented "out of 5,000 issued" is insufficient, when 10,000 shares were originally subscribed, and not enough was repre-

sented to constitute a lawful meeting, unless that alleged to have been canceled, or a large amount of other stock, had in fact been canceled.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; Eugene R. Garber, Judge.

Action by Pacific Fruit Company against F. H. Coon to recover an assessment on corporate stock. From a judgment for defendant, plaintiff appeals. Affirmed.

John H. Dickinson, for appellant. Estee & Miller, for respondent.

VANCLIEF, C. The plaintiff is a private corporation, organized in this state for commercial and manufacturing purposes, whose principal place of business "is San Francisco, California," and brought this action to recover from the defendant an assessment of five dollars per share on his stock (100 shares) in the corporation. The judgment of the court was in favor of the defendant, and the plaintiff appeals therefrom, and from an order denying his motion for a new trial. It is alleged in the complaint, among other things: "That on the 11th day of May, 1891, said corporation, plaintiff herein, in accordance with the laws of the state of California, levied an assessment upon the capital stock of said corporation, for the purpose of paying the indebtedness of said corporation, being assessment No. six (6), of five dollars ($5) upon each and every of the shares of the capital stock of said corporation. That said assessment, so as aforesaid levied, did not exceed ten per cent. of the amount of the capital stock named in the articles of incorporation." The answer of the defendant specifically denies each of these allegations. The court found that the whole capital stock named in the articles of incorporation is $250,000, divided into 10,000 shares, of the par value of $25 per share, and that all said shares were subscribed at the time of the organization of the corporation as follows: By N. K. Masten, 1,000 shares, $25,000; by W. C. Blackwood, 1,000 shares, $25,000; by W. W. Cozzens, 1,000 shares, $25,000; by Clifford Saville, 1,000 shares, $25,000; by A. W. Bryant, 1,000 shares, $25,000; by W. K. Masten, 5,000 shares, $125,000. This subscription is certified in the articles of incorporation, acknowledged on June 13, 1883, and is not disputed. The court further found that a part of said stock, not exceeding 1,705 shares, had been sold for assessments and purchased by the corporation prior to the levy of the assessment in question, leaving outstanding and subject to assessment, on May 11, 1891, not less than 8,295 shares; and further found that the total indebtedness of the corporation on May 11, 1891, did not exceed $15,000; that said assessment exceeded 10 per cent. of the whole capital stock named in the articles of incorporation, and greatly exceeded the indebtedness of the incorporation; and further found, as a conclusion from the foregoing facts, "that said pretended assessment was not levied in accordance with the laws of the state of California," and therefore was void.

The appellant contends that the finding that the number of shares of stock liable to assessment on May 11, 1891, was not less than 8,295 is not justified by the evidence. If this finding is justified by the evidence, the judgment and order should be affirmed, since an assessment of $5 per share on 8,295 shares amounts to $41,475, which exceeds 10 per cent. of the whole capital stock named in the articles of incorporation by $16,475, contrary to section 332 of the Civil Code, which provides: "No one assessment must exceed ten per cent. of the amount of the capital stock named in the articles of incorporation, except in the cases in this section otherwise provided for, as follows: (1) If the whole capital of a corporation has not been paid up, and the corporation is unable to meet its liabilities, or to satisfy the claims of its creditors, the assessment may be for the full amount unpaid upon the capital stock; or, if a less amount is sufficient, then it may be for such a percentage as will raise that amount." The second and third exceptions apply only to railroad and insurance corporations, and the first cannot be applied to the plaintiff corporation, for the reason that there is no evidence tending to prove that its subscribed capital stock had not been fully paid. Under the pleadings, the burden of proving a valid assessment was on the plaintiff. Besides, appellant claims nothing under any of these exceptions, except as a deduction from a misconstruction of the opinion of the court; his principal contention being that the subscription of W. K. Masten for 5,000 shares had been rescinded or canceled, and that 1,610 of the other 5,000 shares subscribed had been bought in by the corporation for delinquent assessments long before the levying of the assessment in question; so that only 3,390 of the shares originally subscribed remained outstanding and assessable at the date of the assessment in question, which it is claimed was levied upon only 3,390 shares. By conceding the purchase of 1,610 shares by the corporation, as claimed by appellant, the controversy under this head is reduced to the question whether or not the evidence, without substantial conflict, is sufficient to prove the alleged rescission of W. K. Masten's subscription for 5,000 shares. If not, the assessment greatly exceeded 10 per cent. on the capital stock named in the articles of incorporation, and for this reason alone the judgment and order should be affirmed. The only evidence offered for the purpose of proving the rescission or cancellation of W. K. Masten's subscription consisted of the "certificate book" and the "minute book." The first contained printed blank forms of certificates of stock attached to stubs from which the certificates, when filled up and issued, were detached, leaving the stubs showing the number and date of each certificate issued, the number of shares for which it was issued, and the name of the person to whom issued. The only matter found in this certificate book relating to the stock of W. K. Masten is set forth in the statement on motion for new trial, as follows: "Certificate No. 6, for 5,000 shares, dated August 4, 1883, by capital stock, in favor of N. K. Masten, Tr., is marked across the stub 'Not issued,' and across the face of the certificate 'Canceled,' the name of the president being obliterated." No doubt, the initial "N" in the name is a clerical error, whether it occurred in the original entry in the certificate book or in transcribing; otherwise the entry in the book does not relate to W. K. Masten's stock at all. N. K. Masten subscribed for only 1,000 shares, and not as "trustee." It will hardly be contended that the mere act of canceling an unissued certificate of stock effected a cancellation of the subscription for such stock. It surely tends to prove nothing more than that, for some reason satisfactory to the person or persons who canceled the certificate, it was thought unnecessary or improper to issue that certificate at that time, for it does not appear who filled the blanks, who wrote the word "Canceled," at what time, nor for what reason or purpose, nor is there any explanation of the matter in the evidence. There may have been various good reasons for canceling that particular certificate without any intention to cancel Masten's subscription. Conceding, however, that the certificate was canceled by order of the board of directors, with intent thereby to cancel Masten's subscription, yet the intended effect could not have followed without the unanimous consent of all the stockholders, of which there is no evidence. Indeed, there is no evidence that W. K. Masten, or any other stockholders, ever consented to a cancellation of his subscription. That a subscription for capital stock of a corporation cannot be rescinded or canceled, except for fraud or mistake, without the unanimous consent of all the stockholders, is too firmly settled to admit of controversy (Cook, Stock, Stockh. & Corp. Law [3d Ed.] §§ 166–169, inclusive, and notes to same); and it is quite as well settled that the issuance of a certificate of corporate stock is not a necessary preliminary to the ownership or assessability of such stock (Mitchell v. Beckman, 64 Cal. 121, 28 Pac. 110; Hotel Co. v. Callender, 94 Cal. 127, 29 Pac. 859).

W. H. Robinson, the only witness produced by the plaintiff, testified that he first became secretary of the plaintiff corporation in April, 1888 (about five years after its organization), and was secretary on May 11, 1891, when the assessment in question was levied; that the only means he had by which to estimate or determine the amount of assessable stock was the certificate book above described, which was the only book kept by the corporation containing any of the requisite contents of the "stock and transfer book" required by section 378 of the Civil Code; yet that he could and did correctly estimate the amount of the outstanding assessable stock on May 11, 1891, from the contents of the certificate book; and that he found the amount of such stock on May 11, 1891, to have been only 3,390 shares. That this was a gross error was made manifest to the court by the book itself, which was in evidence, and which contained no account of stock for which no certificate had been issued. The error in the estimate by the witness must have resulted from his assumption either that subscribed stock was not assessable until after a certificate therefor had been issued, or that the subscription for 5,000 shares by W. K. Masten had been canceled by the cancellation of the unissued certificate therefor, as above shown. In either case his error was an error in law which the court properly corrected, since he expressly based his estimate upon the book alone.

Counsel for appellant contends that the "minute book" contains circumstantial evidence of the cancellation of W. K. Masten's subscription. But W. K. Masten's stock is not mentioned in the minutes of any meeting of the stockholders or directors. It is claimed, however, that some of the resolutions of the board of directors were illegal unless W. K. Masten's subscription for 5,000 shares had been canceled. For example, the first two assessments were levied upon "five thousand shares of subscribed stock," when there must have been much more than that number of subscribed shares if Masten's subscription had not been canceled. But I think it quite apparent from the minutes that this and all other apparently illegal acts of the board of directors are to be accounted for on the ground that the directors understood that no stock was assessable for which a certificate had not been issued. But, however this may be, no act of the board of directors, legal or illegal, could have had the effect to cancel W. K. Masten's subscription. The only thing found in the minutes of the stockholders' meetings said to have any bearing on the question is that it is recited that so many shares of stock were represented "out of five thousand issued," when not enough stock was represented to constitute a lawful meeting, unless W. K. Masten's stock or a large amount of other stock had been canceled. This, too, is explainable on the ground that it was probably understood that stock not "issued" need not be represented. These recitals would have been more nearly in point for appellant if they had stated that so many shares out of 5,000 subscribed were represented. While it is true, as contended by counsel for appellant, that the cancellation or rescission of a subscription for corporate stock may be proved by circumstantial evidence, it seems unaccountable that not a stockholder or director was called as a witness to prove that any stockholder ever understood that W. K. Masten's subscription had been canceled. The only witness called by plaintiff was the last secretary, who was appointed in 1888, five years after the organization of the corporation, and who knew nothing of the transactions in question except what he learned from the books. Why was no former secretary called? The plaintiff proved, by the articles of incorporation, that W. K. Masten was an original subscriber for 5,000 shares, and as to that there is no dispute. It then devolved upon it to prove that Masten's subscription had been rescinded, and I think the court properly found that it failed to sustain the burden; and therefore the order and judgment should be affirmed.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order and judgment are affirmed.

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107 Cal. 386

## TOWN OF HAYWARDS v. PIMENTEL, Judge. (No. 15,812.)

(Supreme Court of California. June 1, 1895.)

JUDGMENT FOR LICENSE TAX — COLLATERAL ATTACK—SUFFICIENCY OF COMPLAINT—ISSUE OF EXECUTION—MANDAMUS.

1. A complaint showing that plaintiff had passed an ordinance imposing a license tax, and that defendant was liable for the tax and had failed to pay, is sufficient to sustain a judgment for the tax as against collateral attack, even though rendered by a court of limited jurisdiction.

2. Errors in a judgment for a license tax cannot be reviewed upon a motion to quash the execution under the judgment.

3. A recorder may be compelled by mandamus to issue an execution under a judgment rendered by him.

4. A hearing and a submission of an application for a writ of mandamus on the pleadings sufficiently complies with Code Civ. Proc. § 1088, which provides that the writ cannot be granted by default, but the case must be heard whether or not the adverse party appear.

Commissioners' decision. Department 2. Appeal from superior court, Alameda county; F. B. Ogden, Judge.

Application to the superior court by the town of Haywards for a writ of mandamus against Joseph Pimentel, judge of the recorder's court, to compel the defendant to issue an execution. From a judgment granting the writ, defendant appeals. Affirmed.

G. S. Langan and C. C. Hamilton, for appellant. D. M. Conner, for respondent.

BRITT, C. The respondent, the town of Haywards, in Alameda county, is a municipal corporation of the sixth class, and the appellant is the judge of the recorder's court of said town. That court is provided for in section 882 of the municipal corporation act of 1883. An ordinance of the town imposed a license tax upon persons engaged in certain classes of business. One Freeman carried on business within the purview of the ordinance, and refused to pay the tax Thereupon an action was commenced by the town of Haywards in said recorder's court against said Freeman for the recovery of the amount of such tax then due, together with certain incidental fees and damages. The complaint in such action was filed August 1, 1893; summons was issued, and regularly served. Freeman made default, and on August 12, 1893, after a hearing had and evidence taken upon the allegations of the complaint, judgment was entered by the appellant here, in said recorder's court, in favor of the town and against said Freeman, for the amount claimed and costs, making a total of $30.05. A writ of execution was issued for the enforcement of the judgment, but, before any levy thereunder, the defendant, said Freeman, moved the recorder's court to recall and quash said execution, "on the ground that the complaint in said action did not state facts sufficient to constitute a cause of action, and that the judgment therein entered was null and void." On September 11, 1893, such motion was sustained by the appellant here, and the town marshal, who held the writ, was ordered to return the same "without service, and to stay all further proceedings in the matter"; which order he obeyed. On September 22, 1893, the respondent, by its attorney, demanded of appellant that he issue another execution in that action, but he refused to do so. This proceeding was then instituted in the superior court to obtain a writ of mandate to compel compliance with such demand. Appellant, in response to the complaint or affidavit on which respondent founded its application for a mandamus, filed an answer wherein he set up the circumstances of said motion to quash the writ of execution, and that he had "fully heard all and singular the evidence and argument offered by the respective parties upon such motion in the said action, and as such recorder and as such recorder's court," after full consideration, determined said motion, and ordered that the writ of execution be quashed. He made no other defense. The superior court sustained a demurrer to the answer, and at the same time rendered judgment directing that the writ of mandate issue as prayed for.

The sole ground upon which the appellant justifies his course is that the complaint in the case of Town of Hayward v. Freeman did not state facts sufficient to constitute a cause of action. The defect in the complaint which, as argued by appellant, invalidated the subsequent judgment, was its omission to exhibit the provisions of the ordinance otherwise than by reference to its title and date of passage. The pleading in this regard was much like the complaint held bad in City of Sacramento v. National Gold Bank, 51 Cal. 504. Appellant does not question the validity of the ordinance, nor claim that the recorder's court had not jurisdiction either of the subject of the action or of the person of the defendant. Granting that the complaint was demurrable, and that the judgment founded upon it was for that reason erroneous, it by no means follows that it could be reviewed or its error corrected in the manner attempted by the appellant. The complaint does not by direct averment state a cause of action, but by recitals and necessary inference from them it does. It shows that the town of Haywards had passed an ordinance imposing a license tax; that defendant was liable for the tax, and had failed to pay. These facts, formally stated, would constitute a cause of action. After judgment, they are sufficient to sustain the same as against a collateral attack, even though the judgment be that of a court of inferior and limited jurisdiction. "An irregular or erroneous judgment will, as long as it remains in force, support an execution." 1 Freem. Ex'ns, § 73. "A motion to quash an execution is not an appropriate or admissible mode of bringing under review the errors or irregularities that may exist in the judgment upon which the execution is issued, unless the judgment be utterly void." Schultze v. State, 43 Md. 305. In this instance the judgment entered by the recorder was not void; being rendered by a court which had jurisdiction of the parties and of the defectively stated cause of action, it was valid and operative until appealed from or reversed. Aucker v. McCoy, 56 Cal. 526. Mandamus was the proper remedy. The fact that appellant, in excess of his lawful authority, directed a return of one execution unsatisfied, and that his order was complied with, does not relieve him from the obligation to issue another. Section 882 of the Municipal Corporation Act of 1883, and section 903 of the Code of Civil Procedure. The duty of the recorder to issue the execution is purely ministerial. He has no discretion in the matter, and the respondent is entitled to the writ to enforce performance of such duty. Avery v. Superior Court, 57 Cal. 247; Hamilton v. Tutt, 65 Cal. 57, 2 Pac. 878; Hogue v. Fanning, 73 Cal. 54, 14 Pac. 560.

"The writ cannot be granted by default. The case must be heard by the court, whether the adverse party appear or not." Code Civ. Proc. § 1088. Appellant contends that in virtue of this provision of the statute the court should have had some other or further hearing before allowing the mandamus against him. But the answer of the defendant stated nothing inconsistent with the allegations of the complaint or affidavit on which respondent prayed the issuance of the writ. It thus raised "only questions of law," and therefore the court was required to "proceed to hear or fix a day for hearing the argument of the case." Code Civ. Proc. § 1094. The section last quoted evidently contemplates that there may as well be a hearing and a submission of the cause on the pleadings of the parties in a proceeding for mandamus as in any other. In this case the order sustaining the demurrer to the answer recited that the matter had been previously "submitted to the court for consideration and decision." And the judgment recited that the "cause came on regularly for hearing on the 21st day of May, 1894, to which day the same had been duly and regularly continued, on the demurrer of said relator to the answer of said respondent." The demurrer was unnecessary, but was not an inappropriate means of raising an issue on the "questions of law" presented by the answer. And it sufficiently appears from the recitals referred to that there was a hearing and a submission, not merely of the demurrer, but of the cause on the pleadings. If this were not so, appellant should have shown the incorrectness of the recitals by a bill of exceptions, or otherwise; which he has not done. Such a hearing was a sufficient compliance with the requirements of said section 1088, Code Civ. Proc. It is true that the judgment further recites that the appellant did not appear on said 21st day of May, but, as the hearing of the cause was regularly continued to that day, he could not divest the court of the power to complete the same by absenting himself. The judgment should be affirmed.

We concur: VANCLIEF, C; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

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107 Cal. 428

## OAKLAND BANK OF SAVINGS v. SULLIVAN et al. (No. 15,687.)

(Supreme Court of California. June 4, 1895.)

STREET IMPROVEMENTS — PRIOR POSTING OF NOTICE—ENFORCEMENT OF LIEN—PROCEEDING BY CONTRACTOR—PLEADING AND EVIDENCE.

1. Under St. 1885, pp. 148, 149, requiring 15 days to expire "after the posting" of notice before the council can order street work to be done, the council may make such order after 15 days from the first posting of the notice.

2. A complaint by a contractor seeking to establish a lien for street improvements made under St. 1885, p. 147, alleged the delivery to the landowner of a warrant, assessment, and diagram, describing them sufficiently to show that they were made in conformity with the statute, and also alleged the making and return of an affidavit of demand and nonpayment. The act provides that such documents shall be "prima facie evidence of the regularity and correctness of the assessment" and "of the right of plaintiff to recover." *Held* that, the averments of the complaint not being denied, it was unnecessary to produce in evidence the documents described.

Commissioners' decision. Department 1. Appeal from superior court, Alameda county; F. W. Henshaw, Judge.

Action by Oakland Bank of Savings against Daniel T. Sullivan and others to foreclose a mortgage. Defendants Alameda Macadamizing Company and Bannister & Lewis filed cross complaints, claiming liens for street improvements. From a judgment for plaintiff and cross complainants, defendant Sullivan appeals. Affirmed.

D. T. Sullivan, in pro. per. John Yule, J. C. Martin, and J. B. Richardson, for respondents.

BRITT, C. The plaintiff, Oakland Bank of Savings, brought this action to foreclose a mortgage to it executed by defendant D. T. Sullivan on certain land in Alameda county. The Alameda Macadamizing Company, a corporation, and Bannister & Lewis, copartners, were joined as parties defendant with the mortgagor, because of their claim of interest in the mortgaged premises. Such premises abut upon both Broadway street and San Jose avenue in the city of Alameda. Said macadamizing company had performed work in the grading, paving, etc., of said San Jose avenue, and Bannister & Lewis had done similar work on Broadway street. Such improvements were made in virtue of contracts for that purpose entered into by said macadamizing company and Bannister & Lewis, respectively, with the superintendent of streets of said city, under the act to provide for work upon streets, etc. St. 1885, p. 147. Said macadamizing company filed a cross complaint, wherein it set up the proceedings taken, which, as claimed, established a lien in its favor on the land of Sullivan to secure payment of the sum assessed against the same for the improvement of said San Jose avenue, and prayed the enforcement of said lien. Similarly, Bannister & Lewis sought the enforcement of their lien for the work done on Broadway street. The court below rendered judgment directing that said contractors, as well as the plaintiff, be paid out of the proceeds of the sale of the premises. Defendant Sullivan appeals.

1. It is said that the board of trustees of the city (exercising the duties of the city council mentioned in the statute) passed its resolution ordering the improvement of San Jose avenue before it acquired jurisdiction so to do under the provision of section 3 of the act referred to (St. 1885, pp. 148, 149), and this is the only ground on which the judgment in favor of the macadamizing company is assailed. The facts appear to be that the resolution of intention to grade and otherwise improve said avenue was passed by the board on September 16th; that notices of the passage thereof were posted along the line of the contemplated work on September 20th, "and kept posted for fifteen days thereafter"; that a similar notice was published in a newspaper for a period of five days, commencing on said September 20th; and that on October 14th following the board passed its resolution ordering the work to be done. Appellant's point is that on October 14th, 15 days had not elapsed after the notices of the passage of the resolution of intention were posted; that because the notices were kept posted for 15 days from September 20th, and because the statute (section 3 of the act of 1885) requires the expiration of 15 days "after the posting" before the council could order the work to be done, therefore the resolution of October 14th was premature, and could not have been lawfully passed before October 20th. This argument is neither specious nor sound. The plain effect of the statute is that when a period of 15 days after the first posting of the notices (as well as 10 days after the full period of newspaper publication) had elapsed, the board then had jurisdiction to order the work; not that such period must have intervened after the notices were taken down, if they were taken down at all.

2. The record shows that at the trial the respondents Bannister & Lewis "offered testimony showing that they had performed the work stated in their cross complaint herein to have been done by them, and also offered in evidence the diagram of such work, and the assessment attached to such diagram, both made by the superintendent of streets of the city of Alameda, as alleged in their cross complaint; and further proved that the amount claimed by them in said cross complaint had not been paid, and then rested their case." Appellant then moved for judgment of nonsuit against Bannister & Lewis on various grounds of insufficiency of evidence, which motion was denied, and such denial is now assigned as error. The court did not err in refusing to grant such motion, though the evidence offered may have been insufficient to make out a case for the plaintiffs in that cross complaint had it been incumbent upon them to offer any proof at all. The act (St. 1885, p. 157) provides that the "warrant, assessment and diagram, with the affidavit of demand and nonpayment, shall be held prima facie evidence of the regularity and correctness of the assessment * * * and of the right of the plaintiff to recover in the action." Here the cross complaint of Bannister & Lewis averred the delivery to them of such warrant, assessment, and diagram, and exhibited the character of the same with sufficient particularity to show that they were made in conformity with sections 8 and 9 of the act. It also alleged the making and return by their agent of the affidavit of demand and nonpayment as required by the succeeding section 10. None of such averments were denied in appellant's answer. They were material allegations (Himmelmann v. Danos, 35 Cal. 441), and, being undenied, stand as established facts in the case. It was therefore unnecessary to produce in evidence the documents thus alleged and described, and the prima facie effect imputed to them by the statute operated to cast upon appellant the burden of proof. He might, if he could,

have disproved any statement of the cross complaint put in issue by him, but it seems he made no attempt to do so. We do not overlook the ruling in the case cited (35 Cal. 441) that the presumption declared by the statute is one of evidence, and not of pleading. The ruling is no doubt correct. And its effect is to require the statement in the complaint in cases of this character of the matters necessary to show the contractor's right to recover, laying the presumption out of sight. But it does not compel formal proof of matters which, being alleged, are admitted either expressly or impliedly. Such cases are subject to the general rules of procedure prescribed by the Code (Paving Co. v. Bolton, 97 Cal. 9, 31 Pac. 625), among which is that every material allegation of the complaint not controverted by the answer filed must, for the purposes of the action, be taken as true (Code Civ. Proc. § 462). See City of Stockton v. Dahl, 66 Cal. 377, 5 Pac. 682. The judgment should be affirmed.

We concur: VANCLIEF, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

5 Cal. Unrep. 41

## SPENCER v. DUNCAN. (No. 15,700.)

(Supreme Court of California. June 4, 1895.)

LIMITATION OF ACTIONS—DENIAL OF TRUST—SUFFICIENCY.

Where, in an action to compel defendant to account for money belonging to plaintiff, placed in his hands, and invested by him in a lot without authority, the evidence was that, when plaintiff went to defendant for a settlement, he began to talk about the lot, but, on plaintiff telling him she did not come to talk about the lot, but for a settlement, defendant began to talk about the imprisonment of his brother, whereupon plaintiff left his office, there was not shown a sufficient denial of the trust by defendant to put in operation the statute of limitations against plaintiff's claim.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

Action by John C. Spencer, administrator of Rebecca Spencer, deceased, against William L. Duncan, to compel defendant to account for money held by him in trust for decedent. Judgment was rendered for plaintiff, and from an order denying a motion for a new trial defendant appeals. Affirmed.

W. C. Burnett and Estee & Miller, for appellant. Geo. M. Spencer and Bull & Cleary, for respondent.

SEARLS, C. This is an action to compel the defendant to account for and pay to plaintiff funds alleged to be held by him in trust for the plaintiff, Rebecca Spencer, who departed this life during the pendency of the action, whereupon John C. Spencer, administrator of her estate, was substituted as plaintiff herein. Plaintiff had judgment for $1,071.85 and interest from May 1, 1870, amounting in the aggregate to $2,678.73 and costs. This appeal is from an order denying defendant's motion for a new trial. There is a separate appeal in the same case from the final judgment. The theory of Rebecca Spencer, the then plaintiff in the case, as delineated by testimony at the trial, was: That she was a school teacher at Calistoga, of the age of 69 years. About March 24, 1869, she had $2,200 in the Bank of California, which she drew with a view of taking it with her the next morning to Napa county, where she expected to loan it temporarily. Being dissuaded from carrying so much money with her, she went in the evening to the home of Dr. Lucky, an old friend, and also a teacher; and, the doctor being absent, she left $2,160 of the money with his wife, to be by the doctor deposited in a savings bank and the certificate to be sent to her at Calistoga, where she went early next morning. On or about April 20, 1869, she received a letter from Dr. Lucky, dated April 1, 1869, in which he informed her he had placed her money in the hands of William L. Duncan (his son-in-law), who would dispose of it so as to secure her 1¼ per cent. per month interest, and that the latter recommended her to purchase an interest in a homestead company, of which his brother, J. C. Duncan, was secretary, and recommended the purchase. The letter indicates that Duncan had already purchased the interest for her, and inclosed circulars, etc. By advice of friends, Miss Spencer came to San Francisco, interviewed Lucky, who extolled the investment as a fine one, etc., but she declined it, and told him all she wanted was her money. She interviewed Duncan about the first of 1870, told him she wanted no investment, but did want her money. About March, 1870, Miss Spencer received $1,088 of the money from Duncan, and he then agreed, according to her testimony, to hold the residue of the fund in trust for her, which she informed him she might want any day. This outline of plaintiff's testimony must serve in place of a fuller statement to convey an idea of the origin and condition of affairs between the parties.

The theory of defendant, Duncan, was that Dr. Lucky came to him, and said a friend of his wife had some money which she wished to invest, and would like to invest a part of it in a lot in this city; that he took the money, gave a demand note, for the amount ($2,160), with interest at 1¼ per cent. per month; bought a share in a homestead corporation, which, upon certain payments being made, called for a lot; that he made such payments from the funds in his hands, received a certificate for the lot, and delivered it to plaintiff with the residue of the money in his hands, etc., to all of which the said Rebecca Spencer assented. These were the theories around which the testimony clustered, and in support of which a number of witnesses testified. That there was a sharp conflict in the testimony, that some of the witnesses were either very forgetful or untruthful, is quite apparent from the record. The court below evidently believed that there was a deliberate attempt on the part of defendant and his family friends to absorb the funds of the plaintiff, and to foist upon her property in lieu thereof which she had not authorized them to purchase for her, and which she did not want; and that, relying on her inexperience, they wove around her a train of circumstances tending to render their course plausible, while on close scrutiny the fraudulent conduct of defendant in the premises was apparent. We say this must have been substantially the conclusion to which the court below arrived, and, without stopping to analyze the testimony, and showing therefrom the suspicious circumstances pointing with more or less directness to the result reached by the court, it is sufficient to say here that there is sufficient testimony to uphold the findings of the court if it believed the statements of plaintiff's witnesses rather than those of the defendant in conflict therewith.

Upon the question of the claim of plaintiff being barred by the statute of limitations there was also a substantial conflict in the evidence. It is well settled that in cases of trust the statute does not begin to run until the trustee, by word or act, denies the trust, and the beneficiary has notice of such denial. On the 23d day of October, 1888, defendant, in a letter to one Knox, an attorney, who had made a demand upon him, repudiated and denied the trust. This action was brought within two years next thereafter, viz. January 14, 1890. Plaintiff says that she called upon defendant for a settlement in 1874, and that defendant began to talk about the lot, to which she replied that she did not come to talk about the lot, but a settlement, and that defendant then spoke of his brother (J. C. Duncan) being in prison, "and seemed very much overcome, and I walked out of the office." She further adds that "he did not refuse to give me my money, but he turned the conversation by talking about his brother." Defendant testified that the money was demanded from him as early as 1874. If he was to be believed, the action is barred. The court below evidently disbelieved him. This being so, the court, under the previous rulings of this court, was justified in finding that the demand was not barred by the statute of limitations. Schroeder v. Jahns, 27 Cal. 274; Zuck v. Culp, 59 Cal. 143; Broder v. Conklin, 77 Cal. 331, 19 Pac. 513; Wood, Lim. § 413. The findings support the judgment, and the order appealed from should be affirmed.

We concur: BRITT, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

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107 Cal. 423

## SPENCER v. DUNCAN. (No. 15,226.)

(Supreme Court of California. June 4, 1895.)

JUDGMENT—FINDINGS — STATUTE OF LIMITATIONS —TRUSTS.

1. Where, in an action for money held in trust by defendant, the defense is the statute of limitation, a finding that the action was not barred by the statute is sufficient to support a judgment for plaintiff, though the date on which plaintiff demanded the money of defendant is not found.

2. Where, in an action to recover money held in trust by defendant, the court found as a fact that the money was so held, and as a conclusion of law that plaintiff was entitled to recover of defendant a certain sum, it was not error, because the conclusion of law was silent as to the trust, to enter judgment decreeing that defendant held in trust for plaintiff such sum, and that he account for the sum to plaintiff, and that plaintiff have judgment against defendant therefor.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

Action by Rebecca Spencer against William L. Duncan to compel defendant to account for money held by him in trust for plaintiff. Judgment was rendered for plaintiff, and defendant appeals. Affirmed.

W. C. Burnett and Estee & Miller, for appellant. Geo. M. Spencer and Bull & Cleary, for respondent.

SEARLS, C. This is an action to compel the defendant to account for and pay certain moneys alleged to have been received by him, and held in trust for the plaintiff. The cause was tried by the court, written findings filed establishing the trust relation, and finding that there was due to plaintiff the sum of $1,071.85, with interest at 7 per cent. per annum from May 1, 1870, for which sum judgment was entered in favor of plaintiff. Defendant appeals from the judgment and the cause comes up on the judgment roll.

Two errors are assigned by appellant:

1. That the findings do not fix the precise time when plaintiff made demand for return of the moneys, and, in the absence of such a finding, it cannot be ascertained whether the cause of action is barred by the statute of limitations or not; hence that the judgment is not supported by the findings. The complaint averred a demand upon defendant before suit brought, and the answer admitted such demand. So far, therefore, as a demand was a prerequisite to maintaining the action, it was not necessary to prove or find that a demand was made, it not being an issue in the case. The statute of limitations was pleaded, and became an issue in the case, and there was an express finding thereon against the defendant. That a demand

was made and the date thereof may have been evidence going to such issue, but it was not an ultimate fact to be found by the court, but may well have been an evidentiary fact going to establish the ultimate fact.

2. The second error assigned is to the effect that all of the judgment, save and except that portion awarding plaintiff $2,678.73 and costs, is outside of and beyond the findings, and hence that the judgment should be modified by eliminating the same therefrom. The portion of the judgment challenged is as follows: "Wherefore, by reason of the law and the findings aforesaid, it is ordered, adjudged, and decreed that W. L. Duncan, the defendant, holds in trust for Rebecca Spencer, the plaintiff, the sum of $2,678.73, and that said W. L. Duncan, the defendant, is hereby ordered, adjudged, and decreed to account to and turn over to said Rebecca Spencer, the plaintiff, the possession of said sum of money, to wit, twenty-six hundred seventy-eight and $^{73}/_{100}$ dollars, and that Rebecca Spencer, the plaintiff, have judgment therefor against the defendant, W. L. Duncan," etc. It is essential to a correct understanding of the point involved to say that the court found that the defendant, W. L. Duncan, admitted to plaintiff that he received the money from the hands of W. T. Lucky, in trust for and for the sole use and benefit of the plaintiff, and promised plaintiff that he would account for thereafter and pay over to her the said sum; that the parties then agreed that the defendant should then presently pay over to plaintiff a portion of said sum, and might retain in his hands the balance of said sum of $2,160 in trust for the plaintiff, etc. Following the facts as found by the court, and which are regarded as amply sufficient to support the judgment, is the conclusion of law, which is as follows: "The plaintiff is entitled to recover of the defendant the sum of one thousand and seventy-one dollars and eighty-five cents ($1,071.85), with interest thereon at the rate of seven per cent. per annum from the 1st day of the month of May, 1870, hitherto, together with the costs of this action, and judgment must be entered accordingly." The contention of appellant is that, under this conclusion of law, it was the duty of the clerk to have entered an ordinary money judgment in favor of plaintiff for the sum specified, and that when the judge of the court below went beyond the conclusion of law which he had framed as the measure of plaintiff's relief, and signed a decree adjudging that the defendant is a trustee of plaintiff, and decreeing him to account to and turn over to plaintiff the possession of said money, etc., he transcended his authority, etc.

Section 633 of the Code of Civil Procedure provides that, "in giving the decision, the facts found and the conclusions of law must be separately stated. Judgment upon the decision must be entered accordingly." It is fair to assume that the object of the legislature in adopting section 633 was two-fold: (1) To preclude the trial court from mingling together questions of fact and law arising in the case, in order that the facts, as presented in the findings, may contain all the essential attributes of a special verdict, to the end that the proper application of the legal principles to the case may be investigated independent of the facts; and (2) that the conclusions of law may serve as a directory to the clerk in entering judgment upon the facts as found. If there are any other objects contemplated by the statute in question, they are not readily discernible. The tenor of the decisions of this court is to the effect that the provision, so far as it applies to the "conclusions of law," is directory. It has been held that an erroneous "conclusion of law" constitutes no cause for reversal if the judgment was right. Helm v. Dumars, 3 Cal. 454; Bleven v. Freer, 10 Cal. 172; Haffley v. Maier, 13 Cal. 14. In the last-mentioned case Baldwin, J., said: "The judgment was right on the undisputed facts, though a wrong reason was given for it. But we do not reverse for what we regard as bad logic, but for what we consider bad law." Kidd v. Teeple, 22 Cal. 255, is to like effect. In Davis v. Baugh, 59 Cal. 576, a reversal was urged because "the findings and conclusions of the court are inconsistent with each other." McKinstry, J., in deciding the case, used the following language: "Where some of the conclusions of law in a decision are not properly drawn from the facts found, this is no ground for reversing the judgment, if the ultimate conclusion upon which the judgment rests is not erroneous in view of the facts found," etc. Hayne, at section 243 of his work on New Trials, after citing the above authorities, adds: "It follows from these decisions that the conclusions of law which are ordinarily appended to findings are unnecessary, and, if so, they had better be omitted. The only useful purpose which 'conclusions of law' serve is to inform the clerk as to what judgment is to be entered." In Miller v. Hicken, 92 Cal. 229, 28 Pac. 339, McFarland, J., says: "The evidence was sufficient to support the findings, and we see no want of a finding of a necessary or material fact. It is objected that the court did not find in terms that the defendants and intervener had not 'constructive' notice of plaintiff's mortgage, but that followed from the facts found, and it is immaterial that the court did not make an express 'conclusion of law' to that effect." In the present case every fact was found essential to support the decree in the form and to the extent of its adjudication, as it was signed and entered by the court. Under such circumstances, the omission in the "conclusion of law" to declare that a decree adjudging the defendant to be a trustee should be entered, when the facts as found clearly set forth his fiduciary relation, was of no moment. If, however, it be conceded that it was error not to find all the "conclusions of law" deducible from the facts as found, what follows? Simply that an error of omission occurred, which was corrected by the final decree. It is a well-settled principle that intermediate errors will not avail where the final conclusion is right. The same principle has been repeatedly expressed by this court when it has been said, in substance, that a judgment which is right will not be reversed because a wrong reason has been given for its rendition. The judgment appealed from should be affirmed.

We concur: BRITT, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

(107 Cal. 398)

## RICE et al. v. BOARD OF TRUSTEES OF TOWN OF HAYWARD et al.

(No. 15,762.)

(Supreme Court of California. June 4, 1895.)

TOWN TRUSTEES — AWARD OF CONTRACT — CONSTRUCTION OF SEWERS—REJECTION OF BIDS.

1. Under St. 1889, p. 399, § 1, providing that any town may as thereinafter provided incur indebtedness for an improvement requiring an expenditure greater than the amount allowed by the annual tax levy, the trustees of a town have power to provide for the construction of a sewer system; and therefore St. 1883, p. 93, forbidding the trustees to create a debt in excess of available money in the treasury, is not applicable.

2. The trustees of a town may reject a bid for public improvements put in by a town official, and one which was fraudulent; and in an action involving the propriety of such rejection they may give their reasons for so doing, though their minutes gave other reasons.

3. The act of the board in directing the town engineer to reject bids for public improvements unless accompanied by an offer to purchase bonds is not ground for attacking a contract actually made, it not appearing that the bids were influenced by that fact.

Department 1. Appeal from superior court, Alameda county; John Ellsworth, Judge.

Action by H. W. Rice and others against the board of trustees of the town of Hayward and others to have canceled a contract for municipal improvements. From a judgment for defendants, plaintiffs appeal. Affirmed.

C. C. Hamilton and G. S. Langan, for appellants. D. M. Conner and Parker & Eells, for respondents.

VAN FLEET, J. By this action the plaintiffs sought to have canceled and annulled a certain contract entered into between said defendant board and the defendant McMahon for the construction of a sewer system for the town of Hayward, and an injunction to restrain the execution and carrying out of the provisions of said contract. Judgment went for defendants, denying the relief sought, from which and an order refusing a new trial the plaintiffs appeal.

1. The objection that the action of the defendant board in letting the contract is void, as being in contravention of section 865 of "An act to provide for the organization, incorporation and government of municipal corporations" (St. 1883, p. 93), is without force. That section, it is true, forbids the board of trustees of a city or town to "create, audit, allow, or permit to accrue any debt or liability in excess of the available money in the treasury that may be legally appropriated for such purposes"; but that section has no application to the facts of this case. Here the authorities of the town were providing for a public improvement, requiring an expenditure in excess of the amount allowed for such improvement by the annual tax levy of the town, and the proceedings of the board were taken under and in pursuance of the act commonly known as the "Municipal Indebtedness Act." St. 1889, p. 399. That act is a general act, and makes provision for just such contingencies as that confronting the authorities of the town of Haywards in this instance. Its purpose is declared in the initial section, which provides: "Any city, town or municipal corporation, incorporated under the laws of this state, may, as hereinafter provided, incur indebtedness to pay the cost of any municipal improvement, or for any purpose whatever requiring an expenditure greater than the amount allowed for such improvement by the annual tax levy." The subsequent sections provide a method of procedure for accomplishing the purpose desired, with which the acts of the defendant board in this instance would seem to have been strictly in accord; and in the cases provided for therein the act is controlling. Wetmore v. City of Oakland, 99 Cal. 149, 33 Pac. 769.

2. Nor was there any such irregularity in the manner of letting or awarding the contract as to affect its validity. The board was justified in rejecting, or refusing to consider, the two bids which it threw out. The findings, which are fully supported by the evidence, show that the one bid was put in by a town official, who could not lawfully take the contract; and the other was clearly a collusive and fraudulent bid. It was not requisite for the board, in making a record of their action on rejecting these bids, to also make an entry of their reasons for so doing, and the fact that the minutes of the board contained a statement of what purported to be their reason in the premises did not preclude the latter from showing at the trial what in fact occasioned their act. The action of the court, therefore, in admitting evidence as to that fact, was not erroneous. Assuming, for the purposes of the argument, that the action of individual members of the board in directing the engineer to inform intending bidders that no bid for the

work would be received unaccompanied by a bid for the purchase of the bonds, can be regarded, as is contended by appellants, as the act of the board, and that the same was unauthorized and improper, as tending to restrict bidding to those able to take or desirous of taking the bonds, it, nevertheless, does not appear that any injury was worked thereby. There is no evidence that any one was deterred by that fact from bidding on the contract, or that any person would have bid without such condition who did not bid with it. Nor is there any evidence to show that the bids that were put in were any higher by reason of that supposed condition than they would have been without it. Under such circumstances, where no fraud or bad faith are shown and no injury appears to have accrued from the irregularity complained of, it will not be regarded as sufficient ground for relief in equity. Attorney General v. Detroit, 55 Mich. 181, 20 N. W. 894; Kelly v. City of Chicago, 62 Ill. 279.

There are no other points demanding special notice. From a review of the entire record, we are satisfied that there is no substantial ground for which the judgment or the order denying a new trial should be reversed. This conclusion renders it unnecessary to pass upon the motion to dismiss the appeal. The judgment and order appealed from are affirmed.

We concur: GAROUTTE, J.; McFARLAND, J.

(107 Cal. 410)

## LE BRETON et al. v. COOK et al. (No. 15,610.)[1]

(Supreme Court of California. June 4, 1895.)

CONSTRUCTION OF WILL—PARTIAL INTESTACY—DEVISE OF RESIDUE.

Where testatrix, after making certain bequests, gave the residue of the estate to trustees, and directed them to deliver her homestead and contents to her sister, to be used by her until her death, free of rent, and afterwards directed that all the residue of the estate should be held by the trustees, and kept invested until the sister's death if she should die before the lapse of 10 years after the death of testatrix, and, if not, then, at the end of such 10 years, to sell the residue remaining in their hands, and to distribute the proceeds among certain persons, testatrix did not die intestate as to the homestead and contents, but the same went to the trustees as part of the residue, subject to the right of the sister to occupy it during her life, and at the expiration of the 10 years the trustees had power to sell the same, subject to the sister's right to their use during her life.

In bank. Appeal from superior court, city and county of San Francisco; J. V. Coffey, Judge.

Action by E. J. Le Breton and others against Williametta H. Cook and others for the construction of a will. Judgment modified.

Metcalf & Metcalf and Morrison, Stratton & Foerster, for appellants. Garber, Boalt & Bishop and Carroll Cook, for respondents.

VAN FLEET, J. This is an action brought by the trustees under the will of Cynthia Hoff Shillaber, deceased, to obtain a construction of certain provisions of said will. The will, after making certain bequests of personal property, proceeds as follows: "Fourth. All of the residue of my estate, both real, personal, and mixed, after paying the expenses of administration, I do give, devise, and bequeath unto my said nephew Carroll Cook, and to his brother Wm. Hoff Cook, to be held by them in trust, however, for the following uses and purposes, viz.: (1) My homestead on Sixteenth street, corner of Hoff avenue, in San Francisco, California, together with the furniture therein contained and the statuary not hereinbefore disposed of, they are to deliver possession of to my sister Williametta H. Cook, and she is to be allowed to occupy and use the same until her death, free of rent. (2) The mortgage now held by me on the New York Hotel property, corner of Battery and Commercial streets, San Francisco, executed by my sister Frances H. Lowndes, is to be by said trustees fully canceled and released, and given to my said sister. (3) To pay out of the income of my estate to my true and faithful servants, Charles Payler and Clara Thompson, a sum of five hundred dollars each. (4) All of the residue of my said estate, real, personal, and mixed, is to be held by said trustees and kept invested, the income thereof, after paying all expenses, to be paid in equal proportions to my sisters, Williametta H. Cook and Frances H. Lowndes, until the death of my said sister Williametta H. Cook, or, in case she do not die until ten years have elapsed from and after the date of my death, then until the expiration of such ten years. (5) Upon the death of my said sister Williametta H. Cook, or in case she do not die until ten years have elapsed from and after the date of my death, then, at the expiration of such ten years, all of the residue of my said estate (then remaining in the hands of my said trustees) is to be by such trustees sold and converted into money, and such money, after paying all expenses, is to be disposed of as follows, viz.: Ten thousand dollars is to be paid to my nephews Wm. Hoff Cook and Carroll Cook, to be held by them in trust, the income thereof to be paid to my nephew Channing H. Cook during his lifetime, and upon his death the said principal sum to be paid to my nieces, share and share alike. The remainder of such money so realized from the sale of said property is to be divided and given in equal proportions to my nieces Kate C. Gould (wife of C. B. Gould), Leonide Sue Cook, Gertrude Lowndes, and Theodora Lowndes, except that the proportion going to my niece Kate C. Gould is to be sixteen thousand dollars less than to the remainder of my said nieces, as I have already given to her, through her husband, that amount; and, in case either of my said nieces should die before such distribution, then the proportion which would have gone to such deceased niece shall be given to her children (if she have any), if not, to her surviving sister; and, in case no sister be surviving, then to the brothers of such deceased niece, in equal proportions to each."

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[1] Rehearing denied.

The only question presented on this appeal is as to whether the will makes any disposition of the reversionary interest in the homestead, and the furniture and statuary therein, after the death of Williametta H. Cook, or whether, as to that interest, the deceased died intestate. The court below held that the will made no disposition of that interest, and that the decedent died intestate with respect thereto. The defendants Kate C. Gould and C. B. Gould appeal, and contend that that interest passed to the trustees appointed by the fourth paragraph of the will, and is by them to be disposed of as provided in the fifth subdivision of that paragraph. The case has been argued by counsel with much learning and research, and many cases have been cited and reviewed on each side. With regard to those cases, we may repeat what we said in Rosenberg v. Frank, 58 Cal. 387, 411: "The case before us is one of interpreting the meaning of a written document, and decided cases afford but little aid in arriving at a correct interpretation. We hazard nothing in saying that this is in accordance with the universal experience of gentlemen learned in the law, who have been frequently called on to employ their faculties in the solution of such questions. The good sense of what was said by Washington, J., in 1803, in Lambert's Lessee v. Paine, 3 Cranch, 131, will be generally acknowledged: 'Except for the establishment of general principles, very little aid can be procured from adjudged cases in the construction of wills. It seldom happens that two cases can be found precisely alike.'"

The general principles which must control in the determination of the question here presented are well settled. Constructions which lead to intestacy, total or partial, are not favored; and therefore such an interpretation should, if reasonably possible, be placed upon the provisions of the will as will prevent that result. Especially should this be done where the will evinces an intention on the part of the testator to dispose of his whole estate. A devise or bequest of the "residue" of the testator's property therefore passes all the property which he was entitled to devise or bequeath at the time of his death, not otherwise effectually devised or bequeathed by his will. Civ. Code, §§ 1332, 1333. Where, however, it is manifest from the context, or from the provisions of the will, that the testator used that word in some more restricted sense, it will be given the meaning in which it is clear that the testator used it. It is not sufficient, however, for the purpose of limiting the meaning of the word, to show that the testator did not foresee precisely how his will would operate, or what property in the contingencies which might happen would pass by the use of that word. If any particular property is prima facie within the meaning of the word, it will be held to pass by it, irrespective of the question as to whether or not the testator could be supposed to have had it actually in his contemplation when he framed the devise or bequest. Lastly, a word occurring more than once in a will is presumed to be used always in the same sense, unless a contrary intention appear from the context. As to these principles there is no substantial dispute between counsel, and we therefore need not refer to the many authorities sustaining them. The word "residue" occurs three times in the will in question. After bequeathing certain personal property by the third paragraph of the will, the testatrix, in the beginning of the fourth paragraph, devises and bequeaths to certain trustees, "all of the residue of my estate, both real, personal, and mixed." By the first subdivision of the fourth paragraph she directs the trustees to deliver to her sister Williametta H. Cook the possession of her homestead and the furniture and certain statuary therein, which "she is to be allowed to occupy and use until her death, free of rent." By the second and third subdivisions she directs the trustees to dispose of certain other property. By the fourth subdivision she provides: "All of the residue of my said estate, real, personal, and mixed, is to be held by said trustees and kept invested," and the income thereof to be disbursed in a certain manner. The fifth subdivision then provides: "Upon the death of my said sister Williametta H. Cook, or in case she do not die until ten years have elapsed from and after the date of my death, then, at the expiration of such ten years, all of the residue of my said estate (then remaining in the hands of my said trustees) is to be by such trustees sold and converted into money;" and the proceeds to be disposed of as there directed. Respondents concede that the word "residue," as first used, means all of the property of the testatrix not bequeathed by the third paragraph; but they contend that that word, as used in the fourth and fifth subdivisions of the fourth paragraph, does not include the "reversion" (if it may be so called) of the homestead, furniture, and statuary after the death of Williametta H. Cook. They argue that, as used in the fourth subdivision, it could not be intended to include that property, because the "residue" there mentioned is to be "held" by the trustees, and by them "kept invested," so as to derive income therefrom, which they say would be inconsistent with the "life estate" (so called) of Williametta H. Cook. But they contend that, whether this be so or not, that word as used in the fifth subdivision could not have been so intended, for it is there limited by the words "then remaining in the hands of my said trustees." They urge that Williametta H. Cook might live more than 10 years after the death of the testatrix; and that, as she is to occupy and use the homestead and furniture until her death, that property would not in that event be "in the hands" of the trustees at the expiration of the period of 10 years. And, finally, they say that this so-called "reversionary interest" particularly in the personal property, could not be sold by the trustees and converted into money. For these reasons, they contend that the will makes no disposition of this property beyond the life of Williametta H. Cook, and that at her death it will fall to the heirs at law of the testatrix. With this reasoning we are unable to agree. It is unquestionable, and it is not disputed, that the entire estate of the testatrix in the homestead, furniture, and statuary was devised and bequeathed to the trustees by the opening words in the fourth paragraph. It is therefore certain that the deceased did not die intestate as to that property. She did dispose of it by her will. Her entire estate therein vested in the trustees, and they hold the legal title. Civ. Code, § 863. The intention of the testatrix to dispose of her whole estate by her will is therefore clear; and, as it will not be presumed that she intended to devise any of it in trust without declaring any effectual trusts, such an interpretation must, if possible, be placed upon the remaining provisions as will include every estate in this property within the trusts created.

The first trust as to this property is contained in the direction of the trustees to deliver the possession of this property to Williametta H. Cook, and to permit her to occupy and use it until her death, free of rent. This provision does not create a "life estate" in the occupant, as has been assumed by counsel. The entire estate, as said above, remains in the trustees, and the beneficiary has a mere personal right of occupancy without rent. The condition of the property, and the estate of the trustees therein, during the life of the occupant, is precisely the same as would be the case as to any other piece of property which the trustees might be, from any cause, unable to rent. They would not be deriving income therefrom, but they would, nevertheless, "hold" it; and it therefore falls within the word "residue," as used in the fourth subdivision. The fact that they could not rent it during the life of the occupant does not conflict with the requirement that they are to "keep" the property embraced in that residue "invested." That direction must be construed in connection with the first subdivision, and with the teachings of ordinary experience, and merely means that they are to keep the property invested, and derive income therefrom so far as they are able. While it was possible that Williametta H. Cook might live more than 10 years, it was equally possible that she might live for a less period; and in that event it would unquestionably be the duty of the trustees to rent the property, and apply the income as directed in the fourth subdivision. We are therefore clearly of the opinion that the word "residue," as used in that subdivision, includes the property in question.

For like reasons, it is manifest that it is included in the meaning of that word as used in the fifth subdivision. Presumptively, of course, it is so intended, and we see no reason for restricting the meaning of the word as there used. As the whole estate in this property is vested in the trustees, it will be "remaining in their hands" at the expiration of the 10 years, whether Williametta H. Cook be then living or not. Nor is there any legal difficulty in their selling it and converting it into money. Even if Williametta H. Cook could be considered as having a "life estate," within the full meaning of that expression, and the trustees as holding merely a reversion, that reversion is legally the subject of sale. In this state future interests in property, whether real or personal, may be transferred to the same extent and in the same manner as present interests. Civ. Code, §§ 678, 680, 688, 690, 699. And see, also, the notes of the code commissioners to those sections. It would therefore be entirely practicable, in a legal sense, for the trustees to sell and convey this reversion, both as to the homestead and as to the personal property, and thus convert it into money. What they would do, indeed, would merely be to sell the property itself subject to the right of Williametta H. Cook to use and occupy it during her lifetime. The value of her interest, and therefore the value of the remaining interest, is ascertainable by well-known legal rules (McCampbell v. McCampbell, 5 Litt. 92); and no difficulty need then arise in making such a sale. Counsel for respondents are mistaken in supposing that such a sale would be invalid, even as to the personal property, for want of immediate delivery. Delivery is requisite only when a present interest is transferred, while the transfer of a future interest only entitles the transferee to the possession at a future period. Civ. Code, §§ 689, 690. The argument of respondents under this head, moreover, proves too much. They direct their attention solely to the contingency that Williametta H. Cook may be still living at the expiration of the 10 years. But, at the time the will was made, the other alternative was at least equally probable, and was presumably equally within the contemplation of the testatrix. By the fourth subdivision the trustees were directed to keep the property invested, which, as to real property, means rented. As the trustees were bound to rent on the most favorable terms obtainable, and as they could not know when Williametta H. Cook would die, they might well make leases which, though not extending beyond the 10 years, would extend beyond her life. If she should die before the expiration of 10 years, with those leases still outstanding, the trustees would be bound, under the fifth subdivision, to sell the property so leased at once. But in so doing they would be confronted with precisely the same difficulty as that which respondents now urge, for they would hold only a reversion in such property. There is, therefore, no reason for supposing that the testatrix, in the fifth subdivision, intended her language to be restricted or deprived of any of its full, legal, and ordinary meaning. As we said at the outset, it is immaterial whether or not she had the various contingencies that might occur clearly before her mind. If she had, the one contingency was as likely to occur as the other, and each presented the same difficulty. If she had not, she at least used language sufficient to provide for every possible contingency, and must be presumed to have done so intentionally.

Some other considerations have been advanced, though not very strenuously urged, by respondents; but, as what has been said in effect disposes of them, it is not necessary to discuss them separately. Nor is it necessary to refer specifically to the cases cited by them. We have given them a careful examination; and, while we are disposed to think that some of them go perhaps too far, we are of opinion that each of them is readily distinguishable from this case, and that our decision is entirely in accord with the principles laid down in them.

The second and tenth conclusions of law of the court below are contrary to the views herein expressed, as is also the second sentence of the twenty-fourth finding. That portion of that finding (which is to the effect that Williametta H. Cook has a life estate in said property, and that said Williametta and the defendants Frances H. Lowndes and Elizabeth H. Oulton have each an undivided one-third interest in the fee thereof, subject to said life estate) is, however, a mere conclusion of law, and should be so treated.

The judgment or decree appealed from is therefore modified by striking therefrom all that portion thereof which is in the following words, "The plaintiffs have fully performed all their duties as trustees in regard," and inserting in lieu thereof the word "as"; also by striking therefrom all that portion thereof which is in the following words, "And that their trust be, and the same hereby is, terminated as to said described property, and every part and parcel thereof," and the whole paragraph next following said words, which begins with the words, "It is further ordered," and ending with the words and figures, "September, 1888," and inserting in lieu thereof the following: "The plaintiffs have performed so much of their duties as trustees as relates to the delivery of the possession thereof to the defendant Williametta H. Cook. It is further ordered, adjudged, and decreed that the plaintiffs hold the said above-described two parcels or lots of land, and the personal property contained in said dwelling house, described in finding 27, upon the further trust to sell the same, and convert the same into money upon the death of the defendant Williametta H. Cook, or, in case she do not die until ten years have elapsed from and after the date of the death of said Cynthia Hoff Shillaber, then at the expiration of such ten years, and in the latter case to sell the same subject to the right of the said defendant Williametta H. Cook to occupy and use the same until her death, free of rent, and upon the further trust to apply the proceeds of such sale as directed by the fifth subdivision of the fourth paragraph of the will of the said Cynthia Hoff Shillaber, deceased, mentioned in finding 3." The said judgment or decree is further modified by striking therefrom all that portion thereof which is in the following words: "It is further ordered, adjudged, and decreed that the defendant Williametta H. Cook is the owner of a present interest to the extent of the undivided one-third of the fee of the property mentioned in finding of fact 27, and hereinabove particularly described, and that the defendants Elizabeth H. Oulton and Frances H. Lowndes are the owners of a vested future interest to the extent of an undivided one-third of the fee each of said property last above described, subject to the life estate of said defendant Williametta H. Cook therein." As so modified, the said judgment or decree is affirmed; the appellants to recover the costs of this appeal.

We concur: HENSHAW, J.; McFARLAND, J.; TEMPLE, J.; GAROUTTE, J.; HARRISON, J.

(107 Cal. 438)

## VAN PRAAG v. GALE. (No. 15,851.)[1]

(Supreme Court of California. June 6, 1895.)

ACTION FOR PERSONAL INJURIES — FALLING THROUGH TRAPDOOR IN SIDEWALK—CONTRIBUTORY NEGLIGENCE.

It appeared that plaintiff and defendant had occupied adjoining stores for a number of years, and that in front of defendant's store there was a trapdoor in the sidewalk for the use of defendant and his tenants, which was opened when ingress to the basement was necessary, and with the use of which plaintiff was familiar. On the day of the accident, about 9 a. m., plaintiff was called to the store on the other side of defendant's, and, when he passed defendant's store, the trapdoor was closed. On returning, he fell into the trapdoor, it having been opened to allow the ashman, whose cart was in front of defendant's door, to go into the basement. Plaintiff had seen the ashman drive up, but had not seen the trapdoor opened. *Held*, that whether plaintiff was negligent was for the jury.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; John Hunt, Judge.

Action by Samuel Van Praag against John Gale for damages for personal injuries. Judgment was rendered for plaintiff, and defendant appeals. Affirmed.

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[1] Rehearing denied.

A. B. Hunt, for appellant. Stafford & Stafford, for respondent.

SEARLS, C. This is an action to recover damages from the defendant, John Gale, for injuries sustained by the plaintiff in falling through an open trapdoor, constructed and maintained by defendant in the sidewalk, upon the west side of Polk street, between Bush and Sutter streets, city and county of San Francisco. Plaintiff had a verdict for $400, upon which judgment was entered in his favor. The appeal is by defendant from the judgment. At the close of the testimony on the part of the plaintiff, defendant moved for a nonsuit upon several grounds, the only important one of which is involved in the proposition that, if any injury was received by the plaintiff, it was due to his own want of ordinary care and prudence, and that his own negligence contributed directly to such injury. The motion for a nonsuit was overruled by the court, and such ruling constitutes the only assignment of error.

The evidence on the part of plaintiff tended to show that for 10 years prior to March 1, 1893, plaintiff had kept a cigar store on the west side of Polk street, between Sutter and Bush streets. Defendant, for say eight years, had owned a building consisting of two stores north of and adjoining plaintiff's cigar store. The store of defendant next to plaintiff was a candy store, and in front of it and close to the building defendant had had trapdoors placed in the sidewalk, say 4 feet wide by 4 feet 4½ inches in length, which opened on hinges from the center, and when open were turned back flat upon the sidewalk. A stairway led from the opening to the basement, which was used by the tenants of defendant's building. The iceman usually came in the morning at 7 o'clock, the ashman about 9 a. m., and the gasman at intervals, and these doors were opened to give them access to the basement. The sidewalk was 15 feet wide, of which 11 feet were clear of the trapdoors. Plaintiff was entirely familiar with the opening, had often been up and down the stairs, had seen it daily for years, and had spoken to defendant of the opening as being dangerous. The opening had no railing or protection around it, and was probably maintained in violation of a city ordinance of San Francisco. On the morning of March 1, 1893, about 9 o'clock a. m., plaintiff, being on the sidewalk in front of his store, was called by Mr. Weinshenk, who kept a jewelry store next north of the candy shop, and went to the jewelry store either over or past the trapdoors, which were closed, talked with the jeweler probably three to five minutes, during which interval the ashman came, and one of the trapdoors was opened to admit him to the basement; and the plaintiff, while returning south towards his store, thinking of what the jeweler had said to him, and perhaps looking at a paper with some figures upon it, fell into the opening, and was seriously injured. Plaintiff had seen the ashman drive up, but had not seen the trapdoor opened.

The question presented upon the motion for nonsuit was not whether there was some evidence of contributory negligence on the part of plaintiff, but rather was the evidence of such contributory negligence so plain and palpable as to be indisputable, and the inferences or conclusions to be drawn therefrom so plain that it was the duty of the court as a matter of law to pass upon the question and take it from the jury. As a general proposition, cases of negligence (to which those of contributory negligence form no exception) present a mixed question of law and fact, in which it devolves upon the court to say as matter of law what is or amounts to negligence, and upon the jury to say as matter of fact whether or not in the particular case the facts in proof warrant the imputation of negligence. The court furnishes the standard, the jury adjusts the facts, and pronounces them as up to or falling short of the requirements of the standard. Fernandez v. Railway Co., 52 Cal. 45; Clayards v. Dethick, 12 Q. B., 439; Whart. Neg. § 420. When, however, "the facts are clearly settled, and the course which common prudence dictates can be readily discerned, the court should decide the case as a matter of law." Shear. & R. Neg. § 26; Flemming v. Railroad Co., 49 Cal. 253; Deville v. Railroad Co., 50 Cal. 383. In Railroad Co. v. Van Steinburg, 17 Mich. 99, Judge Cooley said: "The case, however, must be a very clear one which would justify the court in taking upon itself this responsibility; for, when the judge decides that a want of due care is not shown, he necessarily fixes in his own mind the standard of ordinary prudence, and, measuring the plaintiff's conduct by that, turns him out of court upon his opinion of what a reasonably prudent man ought to have done under the circumstances. He thus makes his own opinion of what would be generally regarded as prudence a definite rule of law. It is quite possible that if the same question of prudence were submitted to a jury, collected from the different occupations of society, and perhaps better competent to judge of the common opinion, he might find them differing with him as to the ordinary standard of proper care. The next judge, trying a similar case, may also be of a different opinion, and, because the case is not clear, hold that to be a question of fact which the first has ruled to be one of law. Indeed, I think the cases are not so numerous as has been sometimes supposed in which a judge could feel at liberty to take the question of the plaintiff's negligence away from the jury. That contributory negligence is matter of law is plainly the exception, and not the rule."

The gist of the contention in the present case, although not expressed in so many words, seems to be that, as there is no conflict in the testimony, the facts are established, and it is the duty of the court to decide the issue as a question of law. But it by no means follows that the facts are admitted because there is no conflict in the testimony. Negligence is not ordinarily proven by direct and positive testimony, and is not so proven in this case. What the plaintiff did is established without dispute and beyond cavil. But whether from this conduct the deduction is inevitable that he did not exercise the precautions for his own safety which a reasonable man would have done under precisely the same circumstances is not so clear. That this is the ultimate fact to be determined must be conceded. It is only where the inference of negligence is irresistible that it becomes the duty of the court to decide upon it as matter of law; and, when the facts or the inference to be drawn from them are in any degree doubtful, the only proper rule is to submit the whole matter to the jury, under proper instructions. Fernandez v. Railway Co., 52 Cal., at page 51, and cases there cited. To some minds probably the conclusion would seem irresistible that he who, with eyes to see, in broad daylight, walks into an open trapdoor in the sidewalk, is lacking in that care and caution which characterizes the man of ordinary prudence. Others may well reason that plaintiff was entitled to a safe passage over a walk prepared by the public for the accommodation of all its citizens. That he was interested and absorbed in the business in hand was in line with observed facts among men of ordinary caution in similar cases. That he should, in aid of his mental process, refer to the figures which he had probably just jotted down, and in so doing fail to see that a passageway, which but a few minutes before he had found safe and free from obstruction, had been turned into a yawning chasm, only evinces a lapsus to which the most thoughtful and prudent men are subject. Bearing in mind that it is only in cases where there is no dispute as to the facts, and no room for difference of opinion as to the inferences and conclusions to be drawn from those facts, that the court is justified in taking the question from the jury (Beach, Contrib. Neg. § 449), and we are not surprised at the action of the court in denying the motion for a nonsuit. Stephenson v. Southern Pac. Co., 102 Cal. 143, 34 Pac. 618, and 36 Pac. 407, and cases there cited. The surrounding circumstances leave a conclusion, which would otherwise be inevitable, open to debate, and in this respect differentiates it from Hager v. Southern Pac. Co., 98 Cal. 310, 33 Pac. 119, and from Davis v. Railroad Co. (Cal.) 38 Pac. 647. Hager v. Southern Pac. Co., supra, comes within a class of cases which, by frequent recurrence, and by reason of the element of recklessness connected therewith, has given rise to a fixed standard by which the law, in the absence of extenuating circumstances, passes upon the question of contributory negligence. Beach, Contrib. Neg., at section 452, where, after discussing the rule requiring one who crosses a railroad track to be on his guard, and before attempting to cross to look attentively up and down the track, it is said: "But, as the law now stands, the standard is fixed. One must look up and down the track. Anything short of that is negligence." In Davis v. Railroad Co. there was a known and fixed object, viz. an iron or steel rail, adjacent to a street lamp, over which plaintiff fell. In the present case the object or danger was only occasionally presented, and was not usually existent as a menace, and it was proper in such a case to submit the question of plaintiff's negligence to a jury. The judgment appealed from should be affirmed.

We concur: VANCLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

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107 Cal. 446

## BROWN v. MERRILL et al. (No. 19,578.)

(Supreme Court of California. June 7, 1895.)

CORPORATION—LIABILITY OF STOCKHOLDERS.

A stockholder of a corporation may sue the other stockholders for their pro rata of a debt due him.

Department 1. Appeal from superior court, San Bernardino county; John L. Campbell, Judge.

Action by Joseph Brown against Southern California Motor Road Company, and Samuel Merrill and others, stockholders of the company, on a promissory note. Judgment was rendered for plaintiff, and defendant Merrill appeals. Affirmed.

John W. Craig, for appellant. Rolfe & Rolfe, for respondent.

GAROUTTE, J. This action is against the defendant Southern California Motor Road Company, a corporation, on a promissory note of the company, executed March 4, 1890, and against the other defendants as stockholders, for their respective proportions of the indebtedness on said note, under section 322 of the Civil Code. A several judgment was given against the defendant Merrill, the appellant, for $336.35, as his portion of said indebtedness, according to the amount of stock he held in the corporation.

Appellant claims that respondent cannot have the benefit of the statute of this state, imposing liability on stockholders for the corporation's debts, because he is a stockholder himself. This contention is based upon the authority of Bailey v. Bancker, 3 Hill, 188, and other cases to the same effect; but the reason for the rule declared in those cases is entirely wanting in this state, and it has no application here. In states where those decisions have been made, the relation of stockholders inter sese is that of partners, and it is thus apparent at a glance that no common-law action for money owing by the corporation would lie by a creditor stockholder against other stockholders. In jurisdictions where the above doctrine has been declared, stockholders are severally and jointly liable for the debts of the corporation, but in this state there is no such liability. Each stockholder has a several liability, and that liability is proportionate to the amount of his stock; and when he has paid his portion of any debt, or of all the debts of the corporation, he is freed from all liability, and has no cause of action against any stockholder for money so paid. In this state we see no reason why a creditor stockholder of a corporation may not sue other stockholders for their pro rata of the debt.

We see nothing in the other questions suggested by appellant's brief demanding discussion. The order and judgment are affirmed.

We concur: VAN FLEET, J.; McFARLAND, J.

107 Cal. 303

## MACKAY v. MACKAY et al. (No. 15,977.)

(Supreme Court of California. May 25, 1895.)

CONSTRUCTION OF WILL—INVESTMENT — PAYMENT OF INCOME—LEGACY FOR MAINTENANCE.

1. Where testator directed his executors to invest a certain sum, and pay the income thereof to a designated person during her life, an order of court requiring the payment to such person of any sum of money directly from the funds of the estate is erroneous.

2. Where testator directed his executors to invest a certain sum, and pay the income thereof, during her life, to his housekeeper, who was, at the time the will was made, and at testator's death, receiving support from him, a "legacy for maintenance" was created, within Civ. Code, § 1369, making such legacies bear interest from testator's death.

Department 1. Appeal from superior court, city and county of San Francisco; J. V. Coffey, Judge.

Action by Harriet Schenck Mackay against Duncan C. Mackay and Robert G. Mackay, executors of the will of Patrick N. Mackay, deceased, to enforce a trust created by the will. From a decree for plaintiff, defendants appeal. Reversed.

Oliver P. Evans, for appellants. Knight & Heggerty and Gaston Straus, for respondent.

VAN FLEET, J. The deceased, Patrick N. Mackay, died resident of the city and county of San Francisco, on the 21st of April, 1893, leaving a last will, wherein appellants were named as executors thereof. Subsequently said will was duly admitted to probate in the superior court of said city and county, and letters testamentary therein were issued to appellants. Among other things, the will provided: "Third. I bequeath to my said executors, in trust, the sum of fifteen thousand dollars, which I direct them to invest in such security as they may deem advisable, and to pay the income thereof to Hattie Schenck, housekeeper, presently residing at No. 1625 Polk street, in the city and county of San Francisco, state of California, during her life." In August, 1894, the respondent filed a petition in the superior court, setting up in substance, among other matters not necessary to recite, the fact of decedent's death, and the admission of his will to probate; setting out the provision of the will above quoted, and stating that she was the same person referred to in said provision as Hattie Schenck; that notice to creditors had been published, and that more than a year had elapsed since its first publication; and that an inventory and appraisement of the estate had been returned, showing the value of said estate to be upwards of $300,000. She further alleged that at the time of the death of deceased, and for many years prior thereto, respondent was wholly dependent upon deceased for support and maintenance, and was entirely supported and maintained by him, and that since the death of deceased she has been without means of support, but dependent upon charity; that the executors of deceased had not paid her, "nor has she ever received any part of said legacy, or income thereof, or any interest thereon, or anything whatsoever, from the said executors or said estate in any manner." And, after alleging that the executors entertain a feeling of enmity and malice towards her, and "that they have attempted, endeavored, acted, managed, and conducted the administration of said estate so as, and with the design, purpose, and intent, to keep petitioner out of, and deprive her from receiving or having in any manner any part of, the legacy, income, or interest" provided for in said will, and that by reason of their said feeling and conduct they are not fit or proper persons to administer said trust, she prays "that the said executors may be compelled to hand and pay over unto the said petitioner, Harriet Schenck Mackay, all the moneys whatsoever due in and by virtue of said legacy, together with the legal interest thereon accrued, dating from the death of said deceased up to and including the time of the granting of the relief herein demanded; also that the trust fund hereinbefore mentioned may be taken from the care, custody, control, and management of the said executors, and that a proper and fit person be appointed as trustee to receive, take, hold, invest, manage, and control said legacy for the uses provided in said last will and testament; and that this court make such order or orders and grant such other and further relief as to it may seem just and equitable." The appellants having answered said petition, a hearing was had, at which evidence was admitted tending to show that respondent was the person named in said bequest; that she had been supported by deceased for some 14 years consecutively next preceding his death, and that she had no present means of support other than that to be derived from the income provided for in said bequest. Evidence was also admitted of certain oral declarations made by deceased at the time of giving directions for the drawing of his will, to the effect that he wished to make provision for the investment of such sum as would bring an income of $60 per month, such income to be paid to the respondent during her life. The court made an order wherein, after reciting the facts found, and its conclusion that said bequest constituted a legacy for the maintenance of respondent, and an annuity to be paid to her from the time of testator's death, it directed: "That the executors of the will of said deceased pay over and deliver out of the funds of said estate unto said petitioner, Harriet Schenck Mackay, she being the same person named in said will as Hattie Schenck, the sum of $960.00, the said sum being hereby adjudged and decreed to be the amount due and accrued and payable under and upon said legacy, at the rate of $80.00 per month, from the 21st day of April, 1893, the date of the death of said Patrick N. Mackay, to the 21st day of April, 1894; and also that said executors pay over and deliver unto said Harriet Schenck Mackay, out of the funds of said estate, the sum of $60.00 on the 21st day of each and every month, commencing with the 21st day of September, 1894, and continuing until the said sum of $15,000.00 provided in said will shall have been invested and bear an income as directed in said will, and that then said income shall be paid over and delivered by said executors each month to said Harriet Schenck Mackay. It is further ordered that the said sum of $960.00 and said $60.00 per month be paid forthwith out of any money now on hand belonging to said estate, as far as the same can be now paid by said executors; and that such amount thereof as cannot be now paid be paid out of any money hereafter coming into the hands of said executors and belonging to the said estate, after the payment of the legal expenses of administration." From this order the appeal is prosecuted.

1. We are of opinion the order was unwarranted. The legacy in question is, by its terms, made to the executors named, in trust for the purposes therein expressed. It is not a legacy payable direct to respondent, and under no circumstances is she entitled to receive any part of the principal sum bequeathed. That sum is to be received and held by the trustees, and they are the only parties to whom the probate court can order it, or any part of it, to be paid. Such an order would constitute a distribution (partial or final). The right of the respondent is merely that of the beneficiary of the trust, and is confined, by the terms of the will, to the receipt of the income to be derived from an investment of the trust fund. This investment is directed to be made by the trustees, and, until the fund is distributed to the latter, and an investment of it made, there can be no "income" to be paid to the respondent. The only right of the respondent, in the probate court, is, therefore, the right to move the court to make distribution of the fund to the trustees. This distribution the court could grant at any time the circumstances of the estate would warrant it, without awaiting final distribution of the general estate. The petition in this case is not a petition for a distribution of the fund to the trustees named in the will. It seeks rather to have the fund turned over to some other person to be named by the court as trustee,—a power the existence of which in the probate court may well be doubted. But, even if the petition were sufficient in form, the court had no power to make the order complained of. That order distributes nothing to the trustees, but gives to respondent directly something to which she is not entitled under the terms of the will. The will, as we have seen, gives her nothing directly from the estate, much less is she to receive anything from the general assets of the estate. All that she is entitled to is payment by the trustees of the income of the specific fund after distribution of such fund to them. The court, therefore, could have no power to do more than to distribute to the trustees named the fund in question. It was not authorized to order the payment to respondent of any sum whatever from the funds of the estate, as is the effect of the order appealed from.

2. As it results from the foregoing that the order of the court below must be reversed, and as the petition is, in our judgment, susceptible of amendment so as to entitle the respondent to proper relief in the premises, we will notice one other point which will be involved in the future disposition of the matter in controversy,—whether or not the legacy bears interest from the date of testator's death. The testator's intention in the clause of the will containing the legacy in question must be ascertained "from the words of the will, taking into view the circumstances under which it was made, exclusive of his oral declarations." Civ. Code, § 1318. The only evidence as to the circumstances under which the will was made, outside of the testator's oral declarations, is to the effect that respondent had been supported by the testator for 14 years next before his death. The fact that she is now without means is immaterial. The will does not create an annuity, because it is not "a bequest of certain specified sums periodically." Civ. Code, § 1357. It is merely a bequest of a specified sum in gross, the income of which (an uncertain quantity) is to be paid to another person. Construing the words of the will, however, in connection with the circumstance that respondent had been supported by the testator

for a long period, and was in receipt of such support at the time of the making of the will, we are of opinion that the provision in question created a "legacy for maintenance." It does not seem to be necessary, under section 1369 of the Civil Code,[1] that the legacy should be made directly to the person to be maintained thereby. If made in trust to one "for" the maintenance of another, it would seem to fall within that section, and, if so, would bear interest from the death of the testator. In this view it will be the duty of the court, in distributing the fund to the trustees, also to distribute to them such interest as shall have accrued upon it at the date of such distribution. A fair construction of sections 1368 and 1369 would also seem to require that this interest, when distributed to the trustees, should be deemed to be in lieu of the income specified in the legacy, up to the date of the distribution, and should therefore be paid by them to the respondent as income accrued at that date.

3. A motion was made to dismiss the appeal herein on the ground that the appeal was taken before the order appealed from had been entered at length in the minutes of the court. It is only necessary to say that we think it sufficiently appears from the record that the order had been so entered. The motion to dismiss the appeal is denied. The order appealed from is reversed, and the cause remanded, with directions to the court below to permit the parties to amend their pleadings as they may be advised, and thereupon to take such further proceedings as are not inconsistent with this opinion.

We concur: GAROUTTE, J.; HARRISON, J.

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[1] The section reads: "Legacies bear interest from the time when they are due and payable, except that legacies for maintenance or to the testator's widow bear interest from the testator's decease."

(107 Cal. 464)

## SKINNER v. CITY OF SANTA ROSA.

(No. 16,003.)[1]

(Supreme Court of California. June 22, 1895.)

ISSUE OF CITY BONDS — VALIDITY — COMPLIANCE WITH NOTICE.

To raise money by the issue of bonds, for the purpose of building waterworks, respondent city passed an ordinance calling a special election, and describing the proposed bonds as "payable in gold coin or lawful money of the United States," with interest at 4 per cent., payable "annually," and the notice of election, which contained a description of the bonds as given in the ordinance, stated that such bonds, and the interest thereon, should be payable annually at the office of the city treasurer; and, after the election was had, another ordinance was passed, reciting all previous proceedings, and prescribing the form of bonds in conformity to the particulars stated in the notice of election. Being unable to sell the bonds, the latter ordinance was rescinded, and Ordinance 156 adopted, making the bonds payable at a New York bank, "in gold coin of the United States * * * of the present standard of weight and fineness," with interest at 4 per cent., "payable semiannually, in like gold coin." *Held*, that the bonds proposed to be issued under Ordinance 156 would be declared invalid, when questioned before their delivery to a purchaser, as conforming neither to the ordinance of submission, nor to the notice of election, nor to the act of March 19, 1889, as amended by St. 1893, p. 61, § 6, providing that such bonds "shall be payable in gold coin or lawful money of the United States."

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[1] Rehearing denied.

In bank. Appeal from superior court, Sonoma county; E. D. Ham, Judge.

Appeal by W. G. Skinner, a taxpayer, from a judgment affirming the validity of certain bonds proposed to be issued by the city of Santa Rosa. Reversed.

Rogers & Paterson, A. B. Ware, and C. S. Farquar, for appellant. J. W. Goodwin and W. F. Cowan, for respondent.

PER CURIAM. The controversy herein was submitted to the superior court upon an agreed case, under the provisions of section 1138 of the Code of Civil Procedure. The city of Santa Rosa, desiring to construct a system of waterworks, the estimated cost of which is stated at $165,000, proposed to raise that sum by the sale of the bonds of the city, to be issued under the provisions of the act of 1889 authorizing the incurring of indebtedness for the construction of waterworks and other improvements. St. 1889, p. 399, as amended by St. 1891, p. 94, and St. 1893, p. 61. The several ordinances required by the statute were duly passed and published, the notice of election given, and the election held, at which more than two-thirds of the electors voting thereat voted in favor of the issuance of the bonds. Ordinance 148, calling said special election, described the bonds proposed to be issued as serials payable in gold coin or lawful money of the United States in the manner following: "One-fortieth part of the whole amount of said indebtedness so incurred, together with annual interest at the rate of four per cent. per annum on all unpaid sums thereof, shall be payable each and every year on a day in each year, and and at a place to be fixed by the common council of said city, until the whole amount of said indebtedness shall have been paid." The notice of election contained the foregoing description of the bonds proposed to be issued, and in addition declared as follows: "Each bond shall have attached thereto a separate coupon for the interest for every year that such bond has to run, and each of said coupons shall be made therein payable, and shall be payable, at the office of the city treasurer of said city of Santa Rosa, on the first Monday of December of the year for the interest whereof it is given. Each of said bonds shall therein be made payable, and shall be payable, at the office of the city treasurer in the city of Santa Rosa on the first Monday in December of each year." The notice of election also stated the precise amount of the annual tax to be levied to pay the annual interest, and the series of bonds falling due each year, thus: "First year, $10,725; second year, $10,560;" and so on down to the "fortieth year, $4,290,—the aggregate tax levy for the forty years being $300,300." On June 6, 1893, after the result of the election was ascertained, the city council adopted Ordinance No. 149, which recited all the previous proceedings and prescribed the form of the bonds, in exact conformity to all the particulars stated in the notice of election. The agreed statement then recites the steps taken to sell said bonds, and adds: "That neither said legislative body, nor said city, nor any of the officers, received any bids for said bonds in answer to the notice so published; that said legislative body used strenuous efforts to sell such bonds, but was unable to find any purchaser therefor." The statement then recites that, in view of the great needs of the city for a system of waterworks, the city council, on November 17, 1894, passed Ordinance No. 156 rescinding Ordinance 149, and changing the form of the bonds so as to make them payable at the Chemical National Bank in the city of New York "in gold coin of the United States of America of the present standard of weight and fineness," with interest at the rate of 4 per cent. per annum, "payable semi-annually in like gold coin." The bonds in this new form were executed, and on December 1, 1894, Robert Effey (a party to this agreed case) bid for said bonds their face value in United States gold coin, and the city council, having accepted his bid, were about to deliver the bonds to him, when W. G. Skinner, describing himself as a taxpayer of said city, served upon the city council and each of the officers of said city a protest against the sale of said bonds to Effey, in which he notified them that he would use every lawful means to resist the collection of any tax levied for their payment, and that he would apply to the court for an injunction to restrain the collection of a tax levied on October 5, 1894, of 25 cents on each $100 to pay the principal and interest due on said bonds for the year 1894 and the interest due June 1, 1895. The city council thereupon passed a resolution directing the city attorney to take immediate steps to unite with such officers and persons as were interested in submitting an agreed case, "so as to obtain as soon as possible the judicial determination of said question, case, and controversy in and by the supreme court of this state."

The foregoing outline of the statement, as originally prepared, contains all of it that is material. It closed with the statement that "the foregoing is a full, true, and correct statement and case, containing all the facts upon which the controversy depends," and signed by counsel for the respective parties, and followed by the affidavit of Skinner to the effect that the controversy is real, and the proceedings in good faith.

The contention on Skinner's part, as appears in the agreed case, is: (1) That the city council have no power to issue the bonds in the form prescribed by Ordinance 156. (2) That the city council had no power to levy the tax of 25 cents per $100 on October 5, 1894, the bonds then authorized under Ordinance 149 not having been sold. (3) That Ordinance 153, authorizing the city marshal to collect delinquent taxes by sale of the property, is invalid because in conflict with the city charter which makes it the duty of the city attorney to collect them by suit, the marshal having advertised his property for sale on December 17th. Certain amendments were afterwards made to the statement, viz.: That the said tax levy of 25 cents, together with other city taxes levied for the current year, do not exceed 1 per cent. of the assessed valuation, and are less than the limit fixed by law; that Skinner had tendered all other taxes; that there had been a sufficient amount of said 25-cent tax voluntarily paid into the city treasury to meet the semiannual interest accruing prior to the next annual tax levy; and "that at the time of the levy of said twenty-five cent tax an offer to purchase for the face value thereof, in United States gold coin, said bonds to be issued under Ordinance No. 149, had been presented to said common council, which offer was thereafter withdrawn." Judgment was rendered that bonds issued under Ordinance 156 would be valid, and also affirming the validity of said 25-cent tax, and from this judgment said Skinner appeals.

The question, "Are the bonds which the city council intended to issue valid in the form proposed?" must be answered in the negative.

No question is made as to the regularity of the proceedings up to and including Ordinance No. 149, nor that bonds issued under that ordinance and in the form therein prescribed would have been valid, but the bonds proposed to be issued under Ordinance 156 do not conform to the ordinance calling the election, nor to important particulars specified in the notice of election, and in one of these particulars they do not conform to the statute under which it is proposed to issue them.

The ordinance calling an election and the notice of election each provided that the bonds to be issued, if the qualified voters should authorize their issue, should bear interest at the rate of 4 per cent. per annum, and the principal and interest should be payable "in gold coin or lawful money of the United States," and the notice of election specified, in addition, that the bonds, as well as the interest, should be payable at the city treasury. The statute under which said bonds were proposed to be issued is the act approved March 19, 1889 (St. 1889, p. 399), and the amendments thereof hereafter noticed. By section 2 of said act, as amended in 1891 (St. 1891, p. 94), it is provided, among other things, as follows: "The ordinance calling such special election shall recite the objects and purposes for which the indebtedness is proposed to be incurred, the estimated cost of the proposed public improvement, and that the bonds of the municipality shall issue for the payment of the cost of such improvement, as in such ordinance set forth, if the proposition be accepted by the qualified voters as hereinafter provided." Section 3 of said act (St. 1889, p. 400) provides for the publication of said ordinance calling such election, and that after such publication there shall be published, not less than two weeks, "a notice of such special election, the purpose for which the indebtedness is to be incurred, the number and character of the bonds to be issued, the rate of interest to be paid, and the amount of the tax levy to be made for the payment thereof." By section 6 of said act, as amended March 1, 1893 (St. 1893, p. 61), it is provided, among other things, that such bonds "shall be payable in gold coin or lawful money of the United States." Section 7 (St. 1889, p. 401) provides: "The legislative branch of any city, town or municipal corporation issuing bonds under the authority of this act shall have the right to determine the rate of interest such bonds shall bear; provided, that in no case shall it exceed seven per cent. per annum, and to name the date and place where such bonds and interest shall be paid; provided, that the place of payment shall be either at the office of the treasurer of the municipality, or at some designated bank in San Francisco, Chicago, New York or Boston. * * *"

From this review of the statute it will be seen that the rate of interest the bonds shall bear, and the amount of the tax levy to be made for the payment thereof, are expressly required to be stated in the "notice of election," while the place of payment and the kind of money in which they are to be paid are not. The ordinance calling the election and the notice of election fixed the rate of interest at 4 per cent., payable annually, while Ordinance 156, under which the bonds in controversy are proposed to be issued, fixes the rate at 4 per cent., payable semiannually. It is contended by respondents, if we correctly understand them, that as section 7 of the act above cited leaves the determination of the rate of interest to the common council, and as by section 6 it is provided that interest may be payable annually or semiannually, making the interest payable semiannually instead of annually is a "mere matter of detail, to be arranged between the buyer and the city, and, being confided to the discretion of the council, it was not within their domain to limit or circumscribe that discretion in any way, but that it was their duty to use their best judgment when they were called upon to act." That the payment of interest semiannually increases the rate is obvious. If it did not, purchasers would not be likely to insist upon it. It therefore becomes part of the rate, and, while the council are authorized to fix the rate, the rate of interest, as well as the main question of incurring the indebtedness for the purposes specified, is required to be submitted to the voters. The maximum rate authorized by the statute is the legal rate of interest allowed in this state, which is now 7 per cent. Putting an extreme case, it will not be contended that if the proposition submitted to the voters at such election specified the rate to be paid at 2 per cent., the common council might, in their discretion, issue bonds bearing 7 per cent. But if the common council can depart at all from the rate of interest submitted to the voters, no limit, save the rate fixed by the statute, can define their power. Counsel for respondent cite the case of Yesler v. City of Seattle, 1 Wash. St. 308, 25 Pac. 1014, and quote four or five pages therefrom. In that case the ordinance of submission fixed the rate of interest at 5 per cent. So far as the rate of interest is concerned, that case is not in point, inasmuch as the statute there did not require the rate to be stated in the ordinance of submission or notice of election. In that case, however, other particulars not required to be stated in the ordinance of submission were specified, and some of them were conditions not named in the statute. As to these particulars, which were not required to be submitted to the voters, the case supports respondent's contention, and is in point so far as the place of payment is concerned. The argument upon which that decision rests is that the legislature delegated to the common council, the municipal legislature, with the assent of its constituents, the power to contract the indebtedness, "it being the sole judge of the proper method, whether by bonds or warrants or open account, confidence being reposed in the wisdom and honor of its members that they will act for the best interest of the community. Nor does the law permit the council of a city to delegate to the popular vote the determination of any matter before it, unless the right to so delegate it has been expressly conferred or enjoined by statute. * * * Therefore we conclude that the council could lawfully submit to vote only those matters directed to be submitted by its superior authority,—the legislature." We cannot assent to the conclusion reached by the learned justice who wrote the opinion, nor to the argument by which it is reached. The opinion concedes that under the constitution and laws of the state no indebtedness can be incurred beyond a certain limit, without authority expressed at an election duly held for that purpose; so that the real question to be determined is, has that assent been given? It is quite true that in that case, as in this, particulars were inserted in the submission which the statute did not require to be submitted; but these particulars having been submitted, the vote authorizing the indebtedness to be incurred imports the particulars named as the conditions upon which that assent has been given, and hence no one can say that, without these favorable conditions, the result of the election would have authorized the indebtedness to be incurred. The rate of interest, the place of payment, the kind of money in which payment must be made, would influence any business man in determining whether he should incur a personal debt, and must do so when he is called upon as a voter to determine whether he will favor his municipality's incurring a debt, for the payment of which, in common with others, his property is liable to taxation. He might readily consent, upon very favorable terms being offered or proposed, and strenuously oppose it if the terms were unfavorable or were uncertain. If the terms and conditions submitted to the electors may be departed from, and such election held to authorize the issuance of bonds under other terms and conditions, a door will be opened authorizing the common council to submit a proposition so favorable as to secure beyond question a favorable vote, and then change the conditions as to rate of interest and otherwise, even without any fraudulent purpose or intent, so that, if again submitted, an overwhelming defeat would result. The logical inference from the case above cited is, however, that, as to all matters required to be submitted, such submission measures the authority of the common council. The case of Moore v. City of Walla Walla (C. C., D. Wash.) 60 Fed. 961, so far as the above questions are concerned, follows the decisions of the state court, which are of binding force in the federal court, and is therefore not an independent authority, and lends no weight to Yesler v. City of Seattle, supra, which it cites. What has been said applies as well to the place of payment and the exact statement of the amount to be levied each year of the 40 years, as to the interest, so far as its influence upon the vote is concerned.

Upon the question as to the change made in the kind of money in which the bonds and the interest thereon are to be paid, it should be observed that, prior to the amendment of March 1, 1893 (St. 1893, p. 61), the statute was silent as to the kind of money in which payment should be made, but that amendment requires that the bonds and interest "shall be payable in gold coin or lawful money of the United States." Several cases are cited by counsel for respondents to the effect that a grant of power to a municipal corporation to issue bonds, without limitation as to the kind of money in which they shall be payable, confers authority to make them payable "in gold coin of the United States, of the present standard weight and fineness." Judson v. City of Bessemer, 87 Ala. 240, 6 South. 267; Trustees v. Moody, 62 Ala. 389; Moore v. City of Walla Walla, 60 Fed. 961. Prior to the amendment of 1893, above stated, the power to make the bonds payable "in gold coin of the present standard of weight and fineness," or in any other kind of coin or currency, could not be controverted. There was no restriction. The power to determine that question was as ample as that of a natural person to stipulate in what his personal obligation should be paid. The amendment must therefore have been intended to restrict that power, and this was done by expressly stating the kind of money in which alone they "shall be" made payable. Whether the increased value of the bonds caused by the stipulation that they shall be paid in gold coin of the present standard of weight and fineness would equal or exceed any probable appreciation of gold, cannot control the express provision of the statute in that regard.

But it is contended that if the act gave the council no power to make the bonds payable in gold coin of the present weight and fineness, that clause would be void, and that in such case it would be the duty of the treasurer in paying the bonds to pay them in the kind of money required by the statute, and cites the case of Enfield v. Jordan, 119 U. S. 680, 7 Sup. Ct. 358. That case, however, related to the place of payment. The court said: "The objection that the bonds are illegally made payable at a bank in Chicago does not invalidate them. The agreement to pay at the place is void, but the balance of the coupons and bonds are not rendered invalid for that reason. In paying the interest the treasurer should not obey that agreement in the bond, but pay it at the treasury of the city." But this does not, nor do any of the cases cited by counsel, meet the question here presented as it is presented. The question in that case, as in the cases cited from the supreme court of Illinois, arose between holders of municipal bonds and the municipality that had issued them and received the value of them. Two of these cases related to the place of payment, and two involved bonds purporting to bear a rate of interest greater than that authorized by the statute, and in these cases it was held that the holder could recover the authorized rate, and no more. The question whether the bonds, if issued, would be void in the hands of a holder for value, is not the test or measure of the right of a taxpayer of the city to enjoin the issue of them. It may well be that the purchaser is bound to know whether the rate of interest specified in the bond is within the limit fixed by the statute; but the rate being within the statutory limit, it does not follow that he may not rely upon the recitals in the bond as to the regularity of the proceedings by the municipality in fixing the rate specified, or that such recitals will not, in favor of the bondholder for value, bind the corporation. The distinction between the question now under consideration and that which would arise in an action by a bona fide holder of one of these bonds is noticed by the supreme court of the United States in the leading case of Commissioners v. Aspinwall, 21 How. 539, where, after quoting the recitals of the bond showing that it was issued by authority, it was said: "The purchaser was not bound to look further for evidence of a compliance with the conditions to the grant of the power;" and afterwards further said: "We do not say that the decision of the board would be conclusive in a direct proceeding to inquire into the facts previous to the execution of the power, and before the rights and interests of third parties had attached; but after the authority has been executed, the stock subscribed, and the bonds issued and in the hands of innocent holders, it would be too late, even in a direct proceeding, to call it in question." Commissioners v. Aspinwall, supra, has been cited and followed in a very large number of cases in that and other courts, and, as applied to the facts of that case, has not been doubted. In a later case, Town of Colomo v. Eaves, 92 U. S. 484, the rule was more cautiously stated, thus: "Where legislative authority has been given to a municipality, or to its officers, to subscribe to the stock of a railroad company, and to issue municipal bonds in payment, but only on some precedent condition, such as a popular vote favoring the subscription, and where it may be gathered from the legislative enactment that the officers of the municipality were invested with power to decide whether the condition has been complied with, their recital that it has been made in the bonds issued by them and held by a bona fide purchaser, is conclusive of the fact, and binding upon the municipality, for the recital is itself a decision of the fact by the appointed tribunal."

Respondents' argument that the bonds would be valid, at least to the extent of 4 per cent. annual interest, payable "in gold coin or lawful money of the United States," at the office of the city treasurer, is a virtual concession that the bonds in the form prescribed in Ordinance 156 are not authorized by the proceedings, and if that be true, they should not be issued; while, if they would be valid in the hands of a bona fide holder so that he could compel payment in gold coin of the present standard of weight and fineness, with interest in like coin payable semiannually, in the city of New York, a burden would be imposed upon the taxpayers to which they have not assented, and they should not be allowed to issue. Counsel refer to the case of the controversy between Derby and the city of Modesto (Cal., 38 Pac. 900). In that case the bonds had been sold, the purchase money paid into the treasury, and the controversy arose more than a year afterwards. One point then urged by the taxpayer was that the bonds provided for the payment of semiannual interest. In reply to this contention it was said: "The statute provides that the trustees shall have the right to determine the rate of interest such bonds shall bear, provided that in no case shall it exceed seven per centum per annum. The time at which the interest is to be paid, whether annually or semiannually, affects the rate of interest, and is within the power conferred upon the board by the statute, and the rate being within the statutory limit, the bonds are valid as against this objection." The facts should have been more fully stated upon that point. The ordinance of submission and the notice of election both provided for semiannual interest, precisely as stated in the bonds, but the statute at that time was silent as to the payment of interest semiannually, and the contention was that in providing for semiannual interest the statute had not been followed. In the case at bar, where the question arises before the bonds have been delivered, we hold that the city has no power to issue them in a form which does not substantially comply with the terms stated in the ordinance of submission and notice of election, and with the statute under which the proceedings were had.

It becomes unnecessary to discuss the remaining questions, brought up by the record. For the reasons given in the foregoing opinion, it is ordered that so much of the judgment appealed from as affirms the validity of the bonds proposed to be issued under said Ordinance 156 be reversed, and cause remanded, with directions to enter a judgment enjoining the sale and delivery thereof.

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5 Cal. Unrep. 45

CHRISTENSEN v. JESSEN. (No. 15,442.)

(Supreme Court of California. June 4, 1895.)

FRAUDULENT REPRESENTATIONS — LIMITATIONS — EVIDENCE—WAIVER OF DEFECTS IN PLEADING.

1. Judgment will not be reversed because of a defective allegation which did not mislead the opposite party, and which was not objected to by demurrer, and under which evidence was admitted without objection.

2. Code Civ. Proc. § 338, subd. 4, limiting to three years "an action for relief on the ground of fraud or mistake," applies to an action at law, as well as in equity.

3. Defendant having induced plaintiff to consent to an assignment of a lease by representations that the assignment provided for an annual rent of $800 to be paid plaintiff, it is unnecessary, in an action for fraudulent representations, that plaintiff prove that $800 could have been obtained, but if no more than $500, the amount actually provided for in the assignment, could have been obtained, this was a matter of defense.

Commissioners' decision. Department 1. Appeal from superior court, Alameda county; F. W. Henshaw, Judge.

Action by Anna Christensen, as executrix of P. J. Christensen, against H. P. Jessen. Judgment for plaintiff. Defendant appeals. Affirmed.

John J. Roche, for appellant. Joseph Hutchinson, for respondent.

HAYNES, C. This action was commenced August 29, 1891, by Peter J. Christensen against H. P. Jessen, to recover damages alleged to have been sustained by the plaintiff by reason of fraudulent misrepresentations made to him by defendant. All the issues, except that arising upon defendant's plea of the statute of limitations, were submitted to a jury, which found a verdict in favor of the plaintiff for $2,000 damages; and, the court having found for the plaintiff upon the plea of the statute of limitations, judgment was entered upon the verdict, and defendant appeals therefrom, and from an order denying his motion for a new trial. Appellant concedes that the evidence was conflicting, and that the verdict of the jury upon the facts must be accepted, leaving only questions of law to be considered. Peter J. Christensen died since the trial, and his executrix has been duly substituted; but, for convenience, he will be referred to as plaintiff and respondent in this opinion, as though still in life.

Plaintiff was the owner of a salt claim in Alameda county. In October, 1883, he executed to defendant a lease of the same for the term of five years, commencing January 1, 1884, at an annual rent of $500, with the privilege of a renewal for five years more on the same terms; but the lease prohibited the defendant from letting or underletting the whole or any part of the premises without the written consent of the plaintiff. The defendant also owned a salt claim adjoining that of plaintiff, and was the lessee of another claim owned by Peter Mattison. In the early part of 1887 the Union Pacific Salt Company, the American Salt Company, B. F. Barton, E. M. Block, John A. Plummer, and Charles A. Plummer formed a combination or company for the purpose of controlling all the salt claims in that locality, and, among them, those controlled by defendant. The combination made defendant a satisfactory offer for his own and the Mattison claim, but that offer was conditioned upon securing plaintiff's claim also, to accomplish which plaintiff's written consent was necessary, and the company also desired to have the option of a second renewal of the lease from plaintiff for the term of five years. On March 10, 1887, the defendant called on plaintiff, and informed him that the company wanted to secure his (plaintiff's) salt claim, but that he (defendant) had no right to lease it. There was then about two years of the original term of five years of defendant's lease unexpired, and plaintiff said, "If the company takes it, I want $800, and you can have the benefit of the two years," to which the defendant replied, "All right." Defendant then called on Mr. Plummer, a member of the company, and informed him of plaintiff's terms, and he said he would present it to the other parties. Defendant, however, did not wait to know whether the terms proposed would be accepted, but went to San Francisco, where his lease was, and had the following consent indorsed upon it: "I hereby consent that said Hans P. Jessen may underlet or assign this lease to the Union Pacific Salt Co., American Salt Co., B. F. Barton, E. M. Block, John A. Plummer, and Charles A. Plummer. It is further agreed that said Jessen, or his assigns, shall have the privilege of renewing this lease at the expiration of the first renewal thereof. If such first renewal should be made, the second renewal to be for the term ending on the 18th day of March, 1897." The defendant, on his way to Oakland, read the indorsement, and, as he testified, concluded plaintiff "would not stand that," and called upon an attorney in Oakland, and had the following added to the indorsement above quoted: "The annual rent for the term commencing at the second renewal to be eight hundred dollars." The defendant took the lease, with the said indorsement of consent upon it, to the plaintiff, who tried to read it, but was unable to do so, so as to understand it, whereupon the defendant read it to him, and plaintiff asked, "After the two years, then, I can go and collect my $800 from the company?" and defendant replied, "Yes, that is what it says," and plaintiff signed it. Under the instructions of the court, to which no exceptions were taken, the verdict of the jury is conclusive as to the relations of these parties, and the right of the plaintiff to rely upon the representations made to him by defendant, and hence the evidence upon that point need not be stated. For the two years remaining of the original term, defendant collected the rent, and paid plaintiff annually $500; plaintiff supposing that defendant received $800, and retained $300, according to the said proposition. In January, 1889, the original term having expired, and the first renewal begun, defendant told plaintiff he could go and collect his rent from the company, and then further told him: "There is a misunderstanding in the lease. It only says $500." Plaintiff asked whether he had not collected $800, and he said, "No, I let him have mine for the same I had it," and added: "I think you will get your $800 from Barton, he and his clerk read the lease over several times, and they understand it the same way; and I think, if they pay you once, they will keep on paying you." On applying for his rent the company gave him a check for $800, but on May 23d he received a letter from the company informing him that they had overpaid him $300; that until January, 1894, the rent would be $500, and after that date $800. Plaintiff then saw the defendant, who claimed that "Plummer done it," and, relying upon his representation that it was a "mistake," commenced an action to reform the indorsement upon that ground. That cause came on for trial on August 19, 1891; and Jessen, being called as a witness by the plaintiff, then first disclosed the manner in which said indorsement was prepared, as hereinbefore recited. Plaintiff was thereupon nonsuited in that action, and 10 days later commenced this action to recover damages for the fraud.

Appellant contends that his demurrer to the complaint should have been sustained. The grounds alleged were that facts sufficient to constitute a cause of action were not stated, and that the cause of action was barred by the statute of limitations, specifying subdivision 4, § 338, and subdivision 1, § 339, Code Civ. Proc. He insists that the complaint is fatally defective in not negativing a discovery of the facts constituting the fraud more than three years before commencing the action. The averments of the complaint objected to are as follows: "That plaintiff did not discover the said fraud perpetrated upon him by defendant until, to wit, on or about the 18th day of August, 1891; that, long prior to the last-named date, plaintiff discovered the true effect and meaning of said indorsement, but, until the last-named date, supposed the same to have been the result of mistake." Plaintiff's allegation above quoted is not as full and specific as it should have been, but no objection upon that ground was taken by demurrer, nor was any objection made to the admission of evidence upon the ground that said allegation was insufficient, or in any respect uncertain or defective. The evidence being sufficient, and having been received without objection, the judgment should not be reversed because of a defective allegation which did not mislead the defendant, and which was treated upon the trial as sufficient. This rule is constantly adhered to in this court, and is applied to cases of this character, as well as to others. See Sukeforth v. Lord, 87 Cal. 399, 25 Pac. 497, and cases there cited.

The answer of defendant contained pleas of the statutes of limitation, which, upon the trial, were submitted to the court, and found in favor of the plaintiff; and in so finding, it is contended, the court erred. It is argued that plaintiff's cause of action falls under subdivision 1 of section 339, Code Civ. Proc., which limits an action upon a contract, obligation, or liability not founded upon an instrument of writing to two years, and that it does not fall under subdivision 4 of section 338, limiting actions to three years, which subdivision is as follows: "(4) An Action for Relief on the Ground of Fraud or Mistake. The cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake." His argument is that the "relief" to which reference is made in the section last above cited is "equitable relief," and that this is an action at law for damages, and, in support of that proposition, cites Piller v. Railroad Co., 52 Cal. 42. That was an action against a railroad company for personal injuries received in a collision. The statement there made was that "the first clause of subdivision 1 of section 339 is applicable to all actions at law, not specifically mentioned in other portions of the statute. We say actions at law advisedly, since section 343 fixes the time within which certain bills in equity may be filed." Counsel's argument concedes that an action at law will lie for fraud, and, if so, it is one of these cases "specifically mentioned in other portions of the statute." The section of the Code in question applies to any and all actions permitted by the Code for the purpose of obtaining relief upon the ground of fraud or mistake, whether such action be legal or equitable. The Code expressly uses the word "relief" to designate the object of all civil actions. Section 426, Code Civ. Proc., provides: "The complaint must contain: * * * (3) A demand of the relief which the plaintiff claims. If the recovery of money or damages be demanded, the amount thereof must be stated." Appellant further distinguishes between "knowledge of the fraud," and "knowledge of the facts constituting the fraud," and insists that plaintiff had such knowledge of the facts as charged him with a knowledge of the fraud more than three years before the commencement of the action. The fact that a fraud was perpetrated on the plaintiff by the defendant in March, 1887, is not controverted on this appeal, the jury having so found upon conflicting testimony. It is clear, then, that the knowledge of the facts constituting the fraud came to the plaintiff after the date of the transaction of March 12, 1887; and we see nothing in the evidence which tended to call plaintiff's attention to the transaction, or to disclose the fraud, or to put him upon inquiry, until January, 1889, when defendant told him he could go and get his rent from the company, adding that there was "a misunderstanding in the lease," but he thought they would pay him his $800. It will be remembered that plaintiff's proposition was that he would consent to the subletting if the company would pay $800 per annum, the defendant to have the benefit of the $300 increase of rent for the two years the lease had to run before the first renewal, and that the defendant collected the rent and paid the plaintiff his $500 per annum until January, 1889, which was the beginning of the first renewal, and the beginning of the increased rent to the plaintiff, when he was told there was a mistake, that "Plummer did it." He was paid $800, however, and was not informed by the company until May, 1889, that he was overpaid. His discovery of the fact that the lease did not provide for an increase of rent was not made before January, 1889, and this action was commenced in August, 1891, and it was not until 10 days before the commencement of this action that he learned that, instead of a mistake made by Plummer, it was a fraud perpetrated by the defendant. But if it be conceded that he was put upon inquiry, and should have discovered the facts constituting the fraud in January or May, 1889, this action was commenced less than three years thereafter, and was not barred by the statute. Appellant's contention that, if defendant misread the indorsement to plaintiff, the latter was negligent in not reading it himself, or procuring some one else to read it, is not an open question here, either upon the law or the facts.

It is not necessary to determine whether the court erred in permitting the plaintiff to testify as to the rental paid by the company for other salt claims in the same neighborhood, and the quantity of salt produced by each; for, if it be conceded that defendant's objection should have been sustained, the judgment should not be reversed upon that ground, since the only object of the testimony was to show that the company would have paid the increased rent, and John A. Plummer, one of the assignees of the lease, and one of defendant's witnesses, testified upon cross-examination that he would have consented to pay $800, "but it was a matter of indifference." Not only so, but, plaintiff's consent to the assignment of the lease having been obtained by defendant upon the representation that the company had agreed to pay $800 per annum, the allegation of value in the complaint was unnecessary; and if, as a matter of fact, no more than the original rent of $500 could have been obtained, it was matter of defense to be alleged and proved by the defendant, if, indeed, he were not estopped by his representation from making such allegation and proof. The judgment and order appealed from should be affirmed.

We concur: BELCHER, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

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(107 Cal. 455)

## FLYNN v. HITE. (No. 15,805.)[1]

(Supreme Court of California. June 14, 1895.)

ACTION FOR DAMAGES—JUDGMENT IN EJECTMENT AS BAR—ESTOPPEL.

1. In an action for damages against the owner of property for failure to put plaintiff in possession under a lease, a judgment for defendant in ejectment by him against plaintiff and another, in which plaintiff pleaded that he was entitled to possession, and in which his lease if introduced in evidence, and shown to have been valid, would have been a good defense, is conclusive against plaintiff.

2. One in possession under a valid lease from the owner is not estopped from defending his possession thereunder because he obtained possession from a former tenant after the term of the latter had expired.

Commisioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; Charles W. Slack, Judge.

Action by John Flynn against John R. Hite. Judgment for plaintiff. Defendant appeals. Reversed.

F. J. Castelhun and Lloyd & Wood, for appellant. H. W. Hutton, C. R. Holladay, and Wm. A. Stuart, for respondent.

HAYNES, C. Flynn brought this action against Hite to recover damages, laid at $7,500, for defendant's failure to put him in possession of certain premises situate in the city and county of San Francisco, under an alleged lease made by one Coe, as the agent of defendant, on August 11, 1890, for the term of three years from September 1, 1890, at a monthly rental of $40. At the time this alleged lease was made, one William Cunniff was, and for many years had been, in possession of the property described in the lease, as the tenant of defendant, paying therefor a monthly rent, and during his tenancy had made certain improvements thereon. Hite, the defendant in this action, afterwards commenced proceedings against Cunniff to obtain restitution of said premises; and in November, 1890, it was adjudged in that action that said Cunniff was rightly in possession as tenant of Hite, and that his term would not expire until May 1, 1891. Flynn, the plaintiff in this action, just before the expiration of Cunniff's term, purchased the improvements from Cunniff, and the latter surrendered possession to Flynn on May 1, 1891, but arranged with Flynn that he should occupy certain rooms upon the premises for a month without rent. On May 23, 1891, Hite commenced an action of ejectment against Cunniff and Flynn to recover possession of the same premises; and in that action findings and judgment were made and entered in favor of Hite on December 10, 1891, and, under that judgment, Cunniff and Flynn were ejected from the premises. The present action was commenced in February, 1892, was tried by a jury, and resulted in a verdict for the plaintiff for $7,500 damages. A motion for a new trial was made, and by the court denied, upon condition that plaintiff would remit all in excess of $3,960 and costs; and, that being done, the judgment was modified accordingly. This appeal is from the judgment and the order denying a new trial.

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[1] Rehearing denied.

Defendant's answer, among other things, alleged that Coe had no authority to make the lease, and also pleaded the judgment in the ejectment suit against Flynn and Cunniff in bar of the action. The first of these defenses need not be considered, as the judgment must be reversed upon another ground. The defendant, in support of his said plea in bar, offered in evidence the judgment roll in the said ejectment suit; and plaintiff's objection thereto, that it was immaterial and irrelevant, was sustained by the court, to which ruling defendant duly excepted, and specified the same as error. Respondent contends that the ejectment case was decided upon estoppel; that the lease was not and could not have been pleaded by Flynn, but that the case was decided upon Cunniff's title or right of possession, and that, therefore, Flynn is not bound by the judgment except so far as his possession was based upon Cunniff's title; that, as Cunniff was estopped from denying his landlord's right to recover possession, so was Flynn; and that Flynn could not plead his lease until he had surrendered possession. The pleadings and findings in that case, however, show that the learned counsel are mistaken. Flynn, in his answer, denied that he wrongfully or unlawfully withheld the possession, etc., and for a further answer alleged "that at the time of the commencement of this action, and prior thereto, and now, he was and is possessed, and was and is entitled to the possession, of the premises in said amended complaint described." Cunniff answered separately, and alleged that by the findings and judgment of the court in the action against him as a tenant rendered in November, 1890, he was entitled to the possession until May 1, 1891; that, on the day last mentioned, he surrendered the possession to Flynn, "pursuant to the directions of the plaintiff herein, and under a certain indenture of lease dated August 11, 1890, made, executed, and delivered, as defendant is informed and believes, by plaintiff to said Flynn, of and for said premises, for the period of three years from the date aforesaid; and that ever since May 1, 1891, he has had no control of or interest in said premises whatsoever, but that said John Flynn has been, and still is, in possession thereof." The court found, among other things not necessary to be noticed, as follows: "That on the 30th day of April, 1891, said Cunniff, in consideration of the purchase by the defendant, John Flynn, of the improvements upon the said premises of and from said Cunniff, and of being allowed to remain in possession of the house upon said premises rent free for one month by the said Flynn, delivered the possession of the said premises to the said Flynn. That said Cunniff did not surrender the possession of said premises to the defendant, Flynn, on the 1st day of May, 1891, or at any other time at the request of the plaintiff, or under an indenture of lease made and executed by the plaintiff to said Flynn."

If Flynn held a valid lease from Hite at the time the ejectment suit was brought, there could be no question as to his right of possession under it. The term specified in the lease had not expired. He had pleaded a right of possession in himself, and, though he did not mention the lease, he could have put it in evidence under his plea, and, if the lease was valid, must have succeeded in the action. It is therefore immaterial for the purposes of the present case whether he offered the lease in evidence or not, or whether, as a matter of fact, he relied upon it to establish his right of possession, since he put his title in issue, and had the opportunity of doing so. But, were it otherwise, it is not only clear from the judgment roll offered in evidence that the lease was in issue in the ejectment suit, but the record in this case clearly shows that it was in issue, and was relied upon in that case, and that he did not claim to have acquired any right of possession from Cunniff. All that he pretends ever to have bought from Cunniff was certain improvements placed upon the property by Cunniff, and that he bought them for the purpose of getting possession under the lease here in question. In his testimony in chief in this case he testified: "They told me that the best way to get possession from Cunniff was to go and buy him out. He wouldn't sell until his term was up." Upon cross-examination he was examined as to his testimony upon the former trial, and admitted that upon the trial of the ejectment case he testified that he bought Cunniff's building on the 1st day of May, 1891; that since that time he had been in possession of the property "under this lease." The judgment roll above mentioned was excluded, when first offered, upon the ground that said judgment had not been pleaded. Whether the court erred in then excluding it, it is not necessary to consider; but before it was again offered, the answer had been amended in that regard, and the evidence above mentioned as having been given upon the trial of the ejectment suit had been heard.

Counsel for respondent assume that the ejectment case went off upon the point that Flynn entered under Cunniff, and, as Cunniff had no title or right to the possession after the expiration of his term, he could confer no right of possession upon Flynn; that, claiming under Cunniff, Flynn was estopped to deny Hite's title and right of possession,—and cite Standley v. Stephens, 66 Cal. 541, 6 Pac. 420, and other like cases, in support of their contention. These cases have no application here. It is quite true that if Flynn entered under Cunniff, knowing that Cunniff was a tenant, he could not thereby acquire a right of possession adverse to the landlord, or dispute his title, without first surrendering possession; but Cunniff's term having expired, if Flynn had a valid lease from Hite, his possession under the lease could not be adverse, nor could it be necessary that he should surrender a possession held under it in order that he might be put back under the same lease. Being in possession under a valid lease, he was not estopped from defending his possession under it, for the sufficient reason that, if the lease was valid, Hite was estopped from denying his right to possession under a lease expressly conferring such right. If it be conceded that Flynn did not offer his alleged lease in evidence, that fact would not affect the conclusiveness of the judgment, as, under the issues in that case, its validity might properly have been determined. Gray v. Dougherty, 25 Cal. 266, 272; Freem. Judgm. (4th Ed.) §§ 249, 260. The judgment in that case being conclusive, it is not perceived how the plaintiff is entitled to damages for not being permitted to occupy premises which it had been solemnly adjudged he had no lawful right to occupy.

Many other errors are specified by appellant, but as plaintiff's right of action could not exist unless he had a right of possession under the lease, and that right having been adjudicated in the former action, it is immaterial whether the court erred in other particulars or not. For the error in excluding said judgment roll when offered in evidence the second time, the judgment and order appealed from should be reversed.

We concur: BELCHER, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed.

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5 Cal. Unrep. 56

## Ex parte WINTHROP. (Crim. No. 56.)

(Supreme Court of California. June 20, 1895.)

HABEAS CORPUS—COMMITMENT FOR MURDER—EVIDENCE.

A person committed on a charge of murder will not be discharged on habeas corpus where the evidence points to him, and induces a belief that he may be guilty.

O. W. Winthrop was committed on a charge of murder, and applies for writ of habeas corpus. Writ denied.

W. H. Allen and C. W. Kyle, for petitioner. John F. Dare, for the People.

BEATTY, C. J. The prisoner is in custody of the sheriff of San Francisco under an order holding him to answer on a charge of murder, and asks to be released upon the ground that he was committed without reasonable or probable cause. With his return to the writ of habeas corpus the sheriff has submitted a transcript of the evidence adduced at the examination of the prisoner before the committing magistrate, which I have carefully considered. The result is that, while I do not deem it very satisfactory or convincing, I still cannot say that it is legally insufficient to justify the order holding the prisoner to answer. To sustain such an order, it is not necessary that the evidence should be so convincing as to justify a verdict against the suspected party, but it is sufficient if it points to him, and induces a belief that he may have committed the offense charged. It is unnecessary, and would perhaps be improper, to review the evidence in detail; and I content myself with saying that while the conduct and bearing of the prisoner at and subsequent to the time when he was first seen in company with Mrs. Mathews at the cemetery have been those of an innocent and humane man, and while the evidence as to the insurance on her life in his favor, as trustee for her little daughter, is totally insufficient to show any motive for causing her death, there is yet some testimony which, if true, tends to prove that he gave her the strychnine which undoubtedly caused her death. Some of this testimony was perhaps incompetent, but it was admitted without objection, and it is not clear that its competency might not have been shown if the objection had been made. On the whole, I feel obliged to remand the prisoner. So ordered.

(107 Cal. 461)

## PEOPLE v. GRESS. (Crim. No. 17.)

(Supreme Court of California. June 21, 1895.)

HOMICIDE—EVIDENCE—DECLARATIONS OF DECEASED.

1. On a trial for murder the declarations of the deceased to third persons prior to the killing as to the designs of the prisoner against deceased's wife are inadmissible against the prisoner.

2. On a trial for murder, self-defense being the only issue, the evidence of deceased's wife that the prisoner tried to induce her to leave her husband is inadmissible.

In bank. Appeal from superior court, Tuolumne county; G. W. Nicol, Judge.

Alfred Gress was convicted of murder, and appeals. Reversed.

F. W. Street, for appellant. W. F. Fitzgerald, Atty. Gen., for the People.

**VAN FLEET, J.** Defendant was convicted of having murdered one Louis Assalena, and was sentenced to imprisonment for life. He appeals from the judgment and an order denying him a new trial. One Kane, a witness called by the state, was permitted, against the objection of defendant, to testify that on the evening of the day preceding the one on which the homicide was committed the witness saw Assalena, the deceased, at La Grange, just before the latter left for Sonora, where the killing took place, and that Assalena then stated that he had discovered that the defendant had been writing to his (Assalena's) wife, and was trying to get his wife and child to run away with him, defendant. And another witness for the prosecution, one Watt, was permitted to state that on the same evening, at La Grange, Assalena told him, "I am in trouble. I have a family in Sonora, and a few months ago I took a young man in as partner with me, and here lately I have discovered that he is about to get away with my wife and child, and I want to get to Sonora as quick as possible. I want to save my boy, and that's my hurry for coming here." This evidence was clearly hearsay, and was wholly inadmissible upon any possible theory of the case, or upon any principle or rule of evidence known to the law. It was no less hearsay because the declarations were those of the deceased, since proof of such declarations is only admissible when made in extremis,—dying declarations, having reference to the circumstances of the death, or when they constitute a part of the res gestae. People v. Carkhuff, 24 Cal. 642. In this case they were neither. The mortal blow had not been struck, nor were they in any manner connected with the rencontre which resulted in Assalena's death. Obviously, the admission of this evidence was highly prejudicial to the defendant, since its inevitable tendency would be to greatly inflame and prejudice the minds of the jury against him. People v. Carlton, 57 Cal. 84; People v. Irwin, 77 Cal. 494, 20 Pac. 56.

It was also error to admit the evidence of Mrs. Assalena as to the defendant's efforts to induce the witness to leave her husband. Under the circumstances of this case, the evidence was not pertinent to any issue before the jury. Were the case one of circumstantial evidence, and the fact in doubt as to whether defendant did the killing, such evidence might be admissible upon the question of motive (Pierson v. People, 79 N. Y. 424); but here the killing was admitted, and the only issue was whether it was in necessary self-defense. In such a case evidence of this character serves no competent purpose, while its effect was necessarily prejudicial to defendant's case. These errors necessitate a reversal. Judgment and order reversed, and cause remanded for a new trial.

We concur: GAROUTTE, J.; McFARLAND, J.; HENSHAW, J.

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(5 Cal. Unrep. 51)

## SOUTHERN PAC. R. CO. v. ALLEN. (No. 15,714.)[1]

(Supreme Court of California. June 6, 1895.)

CONTRACT TO CONVEY LAND—MUTUALITY—RIGHTS OF PARTIES—AS OF WHAT TIME DETERMINED—CHANGE OF CIRCUMSTANCES BEFORE DECREE.

1. A contract for the conveyance of land within a certain time, if the vendor within that time obtain title thereto by patent from the government, for an agreed price,—money paid on the purchase price to be repaid to the vendee, without interest, if the vendor fail to obtain a patent,—is not void for lack of mutuality or consideration.

2. Plaintiff agreed to convey to defendant certain lands, within five years, if he obtained, within that time, title by patent from the government, for one-fifth cash, and the balance secured by mortgage, with interest. If plaintiff failed to obtain title, he was to repay the money paid by defendant, without interest. Pending suit by plaintiff for the interest due on the mortgage, the five years expired without his having obtained patent. *Held*, that judgment must be rendered determining the rights of the parties as of the time of the expiration of the contract period, and not as of the time of the commencement of the action.

Department 2. Appeal from superior court, city and county of San Francisco; J. M. Seawell, Judge.

Action by the Southern Pacific Railroad Company against Darwin C. Allen for the purchase price of land. From a judgment for plaintiff, defendant appeals. Modified.

Robert Harrison, for appellant. Joseph D. Redding, for respondent.

HENSHAW, J. Appeal from the judgment. The action is to compel the payment of moneys alleged to be due under contracts for the purchase of lands, and, in default of payment, to foreclose defendant's rights under the contracts, and for general relief. The contracts are many, but they are alike in terms, and one will serve as a type of all. Plaintiff agreed to sell, and defendant to buy, a certain piece of land. At the date of the contract, defendant paid one-fifth of the purchase price, and one year's interest upon the unpaid portion, and agreed to pay the same interest annually in advance until the completion of the purchase, or the termination of the contract. The time of payment for the unpaid part of the purchase price was "on or before the 1st day of February, 1893"; that is to say, within five years from the execution of the contract. Upon performance by defendant of the conditions of his contract he was entitled—First, to take and hold possession of the land; and, second, to receive a deed for the same, upon demand, and after payment of the remaining four-fifths of the purchase price, which deed plaintiff agreed to make "after the receipt of a patent therefor from the United States." The contract proceeds: "It is further agreed between the parties hereto that the party of the first part claims all the tracts hereinbefore described, as part of a grant of lands to it by the congress of the United States; that patent has not yet issued to it for said tracts; that it will use ordinary diligence to procure patents for them; that, in consequence of circumstances beyond its control, it sometimes fails to obtain patent for lands that seem to be legally a portion of its said grant, therefore nothing in this instrument shall be considered a guaranty or assurance that that patent or title will be procured; that, in case it be finally determined that patent shall not issue to said party of the first part for all or any of the tracts herein described, it will, upon demand, repay, without interest, to the party of the second part, all moneys that may have been paid to it by him on account of any such tracts as it shall fail to procure patent for, the amount of repayment to be calculated at the rate and price per acre fixed at this date for such tracts by said party of the first part, as per schedule on page 3 hereof; that, said lands being unpatented, the party of the first part does not guaranty the possession of them to the party of the second part, and will not be responsible to him for damages or cost in case of his failure to obtain and keep such possession." This action was brought upon default of defendant in paying the second, third, and fourth years' installments of interest. It was commenced before the expiration of the five-years limitation, but was brought to trial and decided after the lapse of that period. Defendant, by answer, denied title in plaintiff, and, by cross complaint, alleged false representations by plaintiff of its title, injury to himself therefrom, and concluded with an offer of rescission, and demand for a return of the moneys paid by him. The findings are against the answer and cross complaint, and the decree requires defendant to pay within six months the amount found due as unpaid interest, or be debarred and foreclosed of all right and interest in and to the lands, and in and under the contracts.

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[1] Rehearing granted.

The court found plaintiff to be the owner, in fee, of the lands, and much nice argument is advanced for and against the finding. But, under our interpretation of the contract, it is a matter irrelevant. Plaintiff was to convey, not the title it had, nor the title in fee found by a court, but the title evidenced by and under the patent of the United States, and defendant was not to be called upon to consummate the purchase until this muniment of title had issued. The contracts were not void ab initio, for lack of mutuality or consideration. The averments of false representations as to title having been negatived by the findings, the transaction between the parties amounted to this: Plaintiff claimed title to government lands, which claim had not been perfected by the issuance of a patent. The sources of knowledge as to the nature and probable validity of the claim were open to defendant, and he did not, therefore, contract blindly. Under such circumstances, defendant agreed to buy these lands at any time within five years, should defendant's claim ripen into a perfect title by the issuance of a patent. Plaintiff agreed, as the consideration flowing from it —First, to convey to defendant, and thus to forego its right to contract with or sell to any one else; second, to yield in the meantime to defendant such possession, use, and enjoyment of the lands as would otherwise belong to it. Defendant, to secure these advantages to himself, paid one-fifth of the purchase price, and agreed to pay interest upon the remainder of it. If, at any time within five years, plaintiff's title was perfected, defendant had the right to compel a conveyance of it to himself. If, at the expiration of five years, the result had not been reached, defendant was entitled to repayment of his moneys, without interest, while plaintiff, for foregoing its right to make other contracts, and for yielding to defendant its right to the occupancy and enjoyment of the lands, was to be compensated by the use, without payment of interest, of the defendant's moneys held by it. It is true, these terms are not explicitly declared in the contract, as here set forth, but they fairly state the expressed agreement of the parties. Plaintiff, then, being entitled to the use of the moneys annually to be paid as interest, could enforce the collection of them by this action, after persistent refusal to pay, or have defendant foreclosed of his rights under the contract, for violation of its conditions. Keller v. Lewis, 53 Cal. 118; Fairchild v. Mullan, 90 Cal. 194, 27 Pac. 201; Hansbrough v. Peck, 5 Wall. 506. Plaintiff is not asking a rescission. To the contrary, it is demanding that defendant be compelled to perform the conditions of his contract, and that upon his refusal to do so the rights of the parties under the contract be determined in accordance with equity. Hansbrough v. Peck, supra. The decree gave the defendant the alternative of paying within six months, or suffering foreclosure. It is urged against it that, since the five years had expired, and plaintiff had not obtained a patent, to compel defendant to pay the delinquent interest would be the requirement of a vain thing, since defendant would be entitled to its immediate return, and that, therefore, the court should not have so decreed, but, to the contrary, should have ordered repaid by plaintiff the moneys of defendant in its hands. The pleadings sufficiently disclose the dates, by which it appeared that the action was tried and determined after the time limited by the contract for its completion. Plaintiff, having failed to secure its patent within that time, was entitled, as has been said—First, to the use of the one-fifth part of the purchase price without payment of interest therefor; and, second, in like manner, to the use of the annual installments of interest as they fell due. Though the decree of the court would have been consonant with equity, had it been rendered before the five years had expired, it failed to do complete justice under the changed situation brought about by the lapse of that time. While a decree in equity generally operates upon the parties and subject-matter as they stood at the commencement of the proceedings, it only does so to subserve the ends of justice. When, as here, a radical change in the status has been brought about by the passing of time, under the very terms of the agreement, and knowledge of this change is, as here, judicially before the court, or is brought in by appropriate pleading, its decree should be addressed to the rights existing, not at the commencement, but at the time of the determination, of the action. The court should therefore decree to plaintiff, in lieu of the use of the interest payments of which it was deprived by the default of defendant, 7 per cent. interest upon each of these amounts from the date upon which they, respectively, fell due, until the date of the decree; should decree the return by plaintiff to defendant of any excess of the moneys of defendant in its hands over the amount found due, or render a judgment in favor of plaintiff for any deficiency, and, upon a compliance with this judgment, terminate the contractual relations of the parties, as provided by their agreement. Let the judgment and decree be modified accordingly.

We concur: TEMPLE, J.; McFARLAND, J.

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107 Cal. 477

## PEOPLE v. LEE. (Cr. 14.)

(Supreme Court of California. June 22, 1895.)

DEMURRER TO INDICTMENT—RIGHT OF APPEAL BY PEOPLE—INTERFERENCE WITH ELECTION—SCOPE OF STATUTE.

1. An appeal lies by the people from an order of court, made of its own motion, sustaining a demurrer to an indictment, and directing a submission of the cause to another grand jury.

2. Where a penal statute enumerates several distinct acts, the commission of each or any of which constitutes the crime, it is not sufficient to charge defendant with being guilty of the crime, without further charging the commission of the particular act or acts on which such crime is based.

3. Under section 23 of the act to promote the purity of elections (St. 1893, p. 24), which enumerates several separate and distinct acts as constituting the crime of preventing an election or canvass "from being fairly had and lawfully conducted," an indictment charging defendant with willfully and unlawfully acting as election clerk is sufficient, though such act is not one of those enumerated in the statute as constituting the offense.

In bank. Appeal from superior court, city and county of San Francisco; George H. Bahrs, Judge.

George Lee was indicted for unlawfully acting as election clerk, and from an order sustaining a demurrer to the indictment, and directing the submission of the cause to another grand jury, the people appeal. Reversed.

Atty. Gen. Fitzgerald, for appellant.

Carroll Cook, for respondent.

HENSHAW, J. Appeal by the people from the order sustaining a demurrer to the indictment, and directing the submission of the cause to another grand jury. A motion to dismiss the appeal is made by the respondent, and this motion first invites consideration. Respondent contends that the court having directed the submission of the matter to another grand jury, in the belief that the defect found in the indictment was curable (Pen. Code, § 1008), the right of the people to appeal is thereby cut off. The authority relied upon is the case of People v. Wooster, 16 Cal. 435. But the case of People v. Wooster is radically dissimilar from the case at bar, as will become patent when it is noted that in the former case the district attorney took no exception to the ruling of the court sustaining the demurrer, while in the case at bar he did. Pen. Code, § 1172. In the Wooster Case the district attorney moved for and obtained an order submitting the cause to another grand jury; in the present case he asked for no such order, and excepted to the one made by the court of its own motion. In People v. Wooster the court said: "The failure to except and the taking of the order must be considered an acquiescence in the judgment and a waiver of a right of appeal." The circumstances above set forth clearly indicate the absence of waiver, and the inapplicability of the decision. But aside from this, we hold that the right of the people to appeal cannot be lost by an order of the court, made of its own volition, directing a submission to another grand jury. The right of appeal is guarantied to the people by section 1238 of the Penal Code, and it is an important right. Where the district attorney admits the defect in his pleading, he will avail himself of the opportunity offered by the order for resubmission, and decline to appeal. But in those cases where he is satisfied with the form of the indictment, or where the facts will not permit another and different one to be framed, he has the right, representing the people, to stand upon its sufficiency, and have the matter determined by the appellate court. If, by its order to submit the cause anew, the trial court could deprive him of this right, it must result that he would be compelled to come again into court with the same form of indictment, which would again be overthrown, to the end that the defendant would never be tried, and the people, with the right of appeal secured to them, would never be permitted to have this court pass upon a pleading which was believed to be legally sufficient. The motion to dismiss is therefore denied.

The indictment is founded upon section 23 of the "Act to promote the purity of elections," etc. St. 1893, p. 24. The section declares that "every person who carries away or destroys, or attempts to carry away or destroy, any poll list, or ballots or ballot-box for the purpose of breaking up or invalidating such election, or willfully detains, mutilates, or destroys any election returns, or in any manner so interferes with the officers holding such election, or conducting such canvass, or with the voters lawfully exercising their rights of voting at such election, as to prevent such election or canvass from being fairly had and lawfully conducted, is punishable," etc. After the usual jurisdictional and necessary averments the indictment charged "that after said election had been had in said precinct, and while the votes were being counted and canvassed therein, one George Lee willfully, unlawfully, and feloniously interfered with the regular election officers of said precinct, then and there conducting the canvassing of the lawful votes cast in said precinct, by then and there willfully and unlawfully acting as a clerk in tallying the said votes cast in said precinct, he, the said George Lee, not then and there being an officer nor clerk of the election board of said precinct, either appointed or qualified, as provided by law, and then and there willfully prevented the canvass of the said vote in said precinct from being fairly had and lawfully conducted, contrary to the form, force, and effect of the statute," etc. Defendant demurred upon the grounds that the facts charged did not constitute a public offense, and also under subdivision 2, § 1004, Pen. Code,—a demurrer, in effect, for insufficiency and uncertainty. By appellant it is claimed that the language "then and there willfully prevented," etc., charges the defendant in the terms of the statute, and makes the indictment sufficient; that what precedes it may be treated as surplusage, and ignored. But this solution, while lacking nothing of ease, fails of complete satisfactoriness. Criminal proceedings, it is true, have been much simplified by the Codes, and many offenses may now be charged in the strict language of the statute. Nevertheless, there are certain fundamental principles which have neither been abrogated nor modified. A defendant is still entitled to be apprised with reasonable certainty of the nature and particulars of the crime charged against him, that he may prepare his defense, and, upon acquittal, plead his jeopardy against further prosecution. Where, as under some of our statutes, several separate, different, and distinct acts are enumerated, the commission of each or any of which constitutes the crime, it is not sufficient to charge the defendant with being guilty of the crime, without further charging the commission of the particular act or acts upon which the crime is based. A person, for example, charged with vagrancy, is of right entitled to know whether he is called upon to meet the charge as being a common drunkard, or as being a dissolute associate of known thieves, or being a healthy beggar,—in short, as belonging to what class, or as having done what act, to lay him liable as a "vagrom man." So here the statute enumerates different acts, each one constituting a specific offense, though the same crime, and the defendant, to make his defense, is entitled to know what wrong it is charged he has committed. Thus the averment of the specific act here set forth becomes material, and is not surplusage. But is it legally sufficient? In other words, is the act, which it is charged defendant committted, in violation of the statute? It will be noted that it is not one of those specially described as forbidden, nor is it an act made criminal by any other statute, so that if it be a crime it becomes such under this statute itself, because it is an act which in some manner interferes with the officers so "as to prevent such election or canvass from being fairly had and lawfully conducted." The circumstance that the act complained of is not one of those named and prohibited does not render its commission less a crime, if it belongs to the class or kind of acts made penal by the statute. While all crimes in this state are statutory, it is still within the power of the legislature to embrace all acts of the same general character in one class, and to punish the performance of any of them, without more specific designation, as a crime. Indeed, as to some offenses, description, except in general terms, is impracticable, if not impossible, and the legislature has exercised its undoubted power by grouping them in classes. Thus the man who operates a powder mill in a populous city maintains a public nuisance, as does he who so places electric wires as to endanger life or property; but it would tax the acumen of the wisest body of lawmakers to describe with particularity every act the doing of which, in our complicated civilization, would constitute a nuisance. And the legislature has not attempted to do so, but by general language has declared that anything which is injurious to health, indecent or offensive to the senses, or an obstruction to the free use of property, etc., is a public nuisance. Pen. Code, § 370. So, here, it would be impossible to enumerate the many ways and means which the ingenuity of men might devise to defeat the orderly or lawful conduct of an election; and without undertaking the task, the legislature has seen fit to make offenses of them all. It is merely for the court to say whether or not the act charged, like the act charged to constitute a nuisance, comes within the class.

Of the sufficiency of the act complained of in the case at bar we entertain no doubt. The law guaranties not only the orderly but the legal conduct of elections. An election legally conducted is carried on by officers duly appointed and under oath for the proper performance of their duties. One who willfully and feloniously usurps the functions of an elective officer, whether he does so by force or guile, is, in either case, interfering with the legal conduct of that election, and is amenable to the law for his conduct.

The judgment is reversed, with directions to the court to overrule defendant's demurrer.

We concur: BEATTY, C. J.; VAN FLEET, J.; GAROUTTE, J.; McFARLAND, J.

## PEOPLE v. HOUSTON. (Cr. 13.)

(Supreme Court of California. June 22, 1895.)

In bank. Appeal from superior court, city and county of San Francisco; George N. Bahrs, Judge.

Albert Houston was indicted for unlawfully acting as election inspector, and from an order sustaining a demurrer to the indictment, and directing the submission of the cause to another grand jury, the people appeal. Reversed.

Atty. Gen. Fitzgerald, for the People. Carroll Cook, for respondent.

PER CURIAM. This case is in all essential features identical with the case of People v. Lee (Cr. 14, decided June 22, 1895) 40 Pac. 754. Here the defendant is charged with having unlawfully acted as inspector, while Lee was accused of having acted as clerk. Upon the authority of People v. Lee, the motion to dismiss is denied, and the judgment is reversed, with directions to the court to overrule defendant's demurrer.

107 Cal. 524

## CITY OF SAN BERNARDINO v. SOUTHERN PAC. CO. (No. 19,576.)

(Supreme Court of California. June 27, 1895.)

LICENSE OF CARRIER—INTERSTATE COMMERCE.

A city situated on a branch line, and not the main line, of a foreign railway corporation engaged in business involving interstate commerce, cannot impose on the company a license tax on the privilege of engaging in the business of a common carrier within its limits.

Department 1. Appeal from superior court, San Bernardino county; George E. Otis, Judge.

Action by the City of San Bernardino against the Southern Pacific Company, a corporation. There was a judgment for defendant, and plaintiff appeals. Affirmed.

Rolfe & Rolfe and H. C. Rolfe, for appellant. Bicknell & Trask (Wm. F. Herrin, of counsel), for respondent.

GAROUTTE, J. This is an action by the city of San Bernardino, a municipal corporation of the fifth class, to recover of the Southern Pacific Company, a corporation organized under the laws of the state of Kentucky, the sum of $100 as license tax for carrying on the business of common carrier, under the provisions of a city ordinance imposing a license tax of $5 a month on any person or company carrying on such business in said city. The answer alleges that the defendant is engaged in interstate commerce in operating a railroad for the carriage of freight and passengers and United States mail from New Orleans, in the state of Louisiana, through the state of California, to Portland, in Oregon, and as part of said system operates a line of railroad to said city of San Bernardino, and that the sum sought to be recovered from defendant is a license tax for the privilege of engaging in interstate commerce, and its assessment and attempted enforcement and collection is a violation of article 1, § 8, pts. 3 and 7 of the constitution of the United States. The case was tried on an agreed statement of facts, and judgment went for defendant in the court below, and plaintiff appeals.

In the agreed statement of facts we find the following: "That the defendant is now, and at all the times stated in plaintiff's complaint herein was, a railroad corporation organized under the laws of the state of Kentucky, and engaged in operating, as lessee of the Southern Pacific Railroad Company, a continuous line of steam railroad, for the carriage of freight, passengers, and United States mails, for hire as common carriers, from the city of New Orleans, in the state of Louisiana, through the states of Louisiana and Texas, the territories of New Mexico and Arizona, and the states of California and Oregon, to the city of Portland, in the state of Oregon, and that as a part of its said transcontinental line of railroad, and connecting with its main line thereof, near Colton, in the county of San Bernardino, state of California, it operates a line of steam railroad to and into the city of San Bernardino, in said county and state, for the carriage of freight, passengers, and United States mails to and from points on its said main line of railroad outside the state of California; also between points in the state of California; and that it does now, and at all times mentioned in said complaint did, under contracts with the government of the United States, regularly carry over its said line of railroad the mails of the United States to and from said city of San Bernardino, and to and from points outside of the state of California, and has at all times mentioned in the complaint herein maintained an office at said city of San Bernardino for the carrying on of its said business."

A license tax, which is a tax on the privilege of doing business involving interstate commerce, is void, and cannot be enforced. This doctrine cannot be questioned. In Lyng v. Michigan, 135 U. S. 161, 10 Sup. Ct. 725, the court said: "We have repeatedly held that no state has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, for the reason that taxation is a burden on that commerce, and amounts to a regulation of it, which solely belongs to congress." See, also, Crutcher v. Kentucky, 141 U. S. 47, 11 Sup. Ct. 851.

It would appear from appellant's brief that this proposition of law is not controverted, but its application to the facts of this case is denied, upon the ground, as it is claimed, that the line of railroad operated by the defendant in the city of San Bernardino is not its main trunk line, but is only a branch thereof. In other words, it is conceded that a similar license tax to the one here involved would not be a valid tax, and could not be collected, in any city located upon the main trunk line of road between New Orleans and Portland, Or., not even in the city of Colton, which is situated at the point of junction of the main and branch lines, and in the same county as the plaintiff itself. Under the agreed statement of facts, there is no sound foundation upon which to rest the application of a different principle of law in these two classes of cities. It is stipulated that this branch line is "a part of its said transcontinental line of railroad," and in the face of the existence of such fact we do not perceive any force in plaintiff's contention that this particular part of the railroad is no part of its main trunk line. But the stipulation of facts even goes beyond this broad statement, and declares that the line of road operating in the city of San Bernardino carries passengers, freight, and United States mails to and from points on its said main line of railroad, outside of the state of California; also between points in the state of California, and likewise conveys the United States mails to and from such points. Carrying passengers and freight from San Bernardino to a thousand places on the line of the road in other states, and likewise from those points to San Bernardino, is conducting an interstate commerce business pure and simple, and by the stipulation this is the business the defendant is carrying on in the city of San Bernardino. The question of power in the city to create such an ordinance is not to be tested by the fact as to whether or not the city is located upon any particular line of railroad, be it trunk or branch line, but rather by the character of the business in which the defendant is engaged in the city passing the ordinance. In dealing with this question, we do not concern ourselves as to the character of the franchise under which either the trunk line or the branch line of defendant is doing business. The character of defendant's business, and not the character of its franchise, points the judgment. Again, as far as plaintiff is concerned, it is the terminus of the transcontinental line; but we think the question of direct line and termini wholly immaterial.

If this question is to be determined by the character of the business done, and we are clear that by such rule the rights of defendant are to be measured, then plaintiff stands upon common ground with every other city situated in the state of California upon the main line proper, for in those cities the defendant conducts and carries on the same kind and character of business as is conducted and carried on in the city of San Bernardino. While defendant does business in the city of San Bernardino in carrying freight and passengers to and from other points in the state of California upon the trunk line, the same conditions are present as to every other city located upon the trunk line, and such circumstance, if controlling, would give them all power to levy the tax here assailed.

There is no attempt by the ordinance here under discussion to levy this tax upon the local business of the defendant, even if the power to take such course existed, but by its terms it includes both local and interstate business. The ordinance covers its entire business as common carriers, regardless of its nature, and therefore, of necessity, operates as a burden upon interstate commerce, if its business is of that character. As a condition attached to the conduct of its business in the city of San Bernardino, it is required by this ordinance to pay a tax to the city. In that city its business is not confined within the state lines of California. It is therefore engaged in interstate commerce, and, being so engaged, no statute or municipal law can burden or handicap its business, for the regulation thereof rests solely in the hands of congress. For the foregoing reasons the judgment is affirmed.

We concur: VAN FLEET, J.; HARRISON, J.

(107 Cal. 535)

## HENRY v. BARTON et al., Board of Trustees.
(No. 19,477.)

(Supreme Court of California. June 27, 1895.)

LIQUOR LICENSES—DISCRIMINATION.

The trustees of a city, in the absence of express legislative authority, are vested with no discretion as to the granting of liquor licenses, but must issue a license to any one complying with the requirements.

Department 1. Appeal from superior court, San Bernardino county; George Otis, Judge.

Petition for a writ of mandamus by Charles H. Henry against H. M. Barton and others, constituting the board of trustees of the city of San Bernardino, a municipal corporation. There was a judgment for plaintiff, and defendants appeal. Affirmed.

Rolfe & Rolfe, for appellants. E. E. Rowell, for respondent.

GAROUTTE, J. Respondent in the trial court secured a judgment of mandate against Barton and others, trustees of the city of San Bernardino, requiring them, as such trustees, to issue to him a retail liquor license. This is an appeal prosecuted from such judgment. It is provided by ordinance of that city that "for every saloon, bar, or place where spirituous, vinous, etc., liquors are sold or given away in less quantities than one quart, a license tax of fifty dollars a month is imposed." It is further provided that any person desirous of engaging in such business must make written application to the board of trustees for a license therefor, and such application must be accompanied with a bond, with two sureties, in the sum of $2,000, conditioned that the applicant shall keep a quiet and orderly house, etc. The application contemplated by the ordinance was made, accompanied by a good and sufficient bond. This is conceded by the trustees, but they denied the application, upon the ground "that in the exercise of their best judgment and discretion in said matter, and under and in pursuance of an honest belief on the part of the members of said board that the welfare and good order of said city and the inhabitants thereof required that the granting of such license be refused." No evidence was taken in the case, and consequently we know nothing of the specific facts or grounds upon which this action of the trustees was based; but, as we look at the case, the grounds, whatever they may have been, are wholly immaterial. This action of the trustees cannot be successfully maintained. The ordinances of the city of San Bernardino, as they now stand, entitle every man who complies with their provisions to a retail liquor license, and this respondent complied with these provisions. Trustees of cities have no power except that given them by express provision of law, and we find no power in any of these ordinances vesting in them discretion as to the granting or denying an application for a liquor license. In the absence of some express legislative enactment granting such right, there is no principle of law that will allow the trustees of any city to say that a liquor license shall be granted to A., and the same right denied to B. For the foregoing reasons, the judgment is affirmed.

We concur: VAN FLEET, J.; HARRISON, J.

(107 Cal. 487)

## EATON v. JONES. (No. 19,516.)[1]

(Supreme Court of California. June 24, 1895.)

NEW TRIAL—ERROR IN JUDGMENT—MODIFICATION —NOTICE.

1. Where, in an action to quiet title, the judgment for defendant included, by mistake, property which the court did not intend to include therein, the court could grant a new trial unless defendant consented to a correction

2. When a judgment for defendant, in an action to quiet title, included, by mistake, property which should not have been included, and defendant filed a refusal to modify the judgment, in compliance with an order of the court granting a new trial unless defendant consented to such modification, there was no necessity to give defendant further notice before setting aside the judgment and granting a new trial.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Action by Frederick Eaton against Doria Jones to quiet title. There was judgment for defendant. From an order granting a new trial unless defendant consented to a modification of the judgment, and an order setting aside the judgment and granting a new trial, defendant appeals. Orders affirmed.

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[1] Rehearing denied.

Chapman & Hendrick, for appellant. C. McFarland, for respondent.

SEARLS, C. This is an action to quiet the title of plaintiff to a parcel of land lying and being in the city of Los Angeles, bounded and described as follows: "Commencing at a granite stone monument set at the intersection of the produced center line of Rouland street and the western boundary of the city of Los Angeles, said center line being the present northern boundary of said Rouland street in the Wiesendanger city tract, and running thence along said west city boundary N. 0° 26′ W. 37.72 feet to a stake in the southwest corner of the John Jones property; thence along a board fence S. 61° 55′ 913.88 feet; thence S. 27° 47′ W. 43.5 feet; thence N. 61° 15′ 30″ W. 896 feet, to the place of beginning." Defendant answered, denying the title and possession of the plaintiff to the land, or to any portion thereof, and set up title to the land in herself. The cause was tried by the court without a jury, and written findings filed, to the effect that plaintiff is not the owner of the land, and that defendant claims an interest therein adverse to the plaintiff, which claim is not without right. Judgment was entered thereon accordingly. Plaintiff moved upon a statement for a new trial. Upon the argument and submission of the motion for a new trial, the court made an order as follows: "The motion for a new trial is argued and submitted, and the court now orders that the motion for a new trial be granted, unless within ten days after plaintiff furnishes defendant with a description of the property, so as to include only the property to the fence as it now stands on the south boundary of defendant's property, the defendant's counsel to have the judgment given herein so modified as to make the line of said fence the south boundary of defendant. And in case such consent be given, then the motion for a new trial be denied." This order was made April 16, 1894. The record shows that within 10 days counsel for defendant were furnished with the description called for by the order, for the purpose of a modification of the judgment, and that counsel for said defendant refused in writing to consent thereto or to concur in the proposed modification of the judgment, which descriptions and refusal were filed with the clerk of the court. Thereafter, and on the 1st day of May, 1894, without further notice to the defendant or her attorneys, and in their absence, the court entered an order reciting that at the hearing of the motion for a new trial it appeared that the judgment for defendant "included property which the court had not intended to be included therein"; that the court had thereupon ordered, etc. (reciting the provisions of the former order); "that the plaintiff had served the description of the property as called for, and that the defendant not only having failed within said time (ten days) to consent to such modification of the judgment, but having also refused in writing to consent thereto." Wherefore it was adjudged that the judgment be vacated and set aside, and that a new trial be granted. The statement of a few leading facts from the record will tend to an understanding of the question involved in the motion for a new trial, as well as the reasons for granting such motion. In 1853 a tract of land upon the westerly border of the city of Los Angeles was surveyed in 35-acre lots, which is known as the "Hancock Survey." Defendant is the owner of lot 4 in such survey. Plaintiff is the owner of the northerly part of lot 5 in such survey, which lies south of and adjoins lot 4 of the defendant. A street 60 feet in width has been laid out, running in an easterly and westerly direction through the tract, and between the lots of plaintiff and defendant. This street is laid out entirely upon the southern tier of lots, of which defendant's lot No. 5 is one, and no part of it is upon the northern tier, of which defendant's lot No. 4 is one. The street is known as "Rouland Street," and the easterly portion of it has been opened to the public, but it has not been opened as far west as the lots of plaintiff and defendant, although the center line of such street has been produced, surveyed, and marked by monuments upon the ground. Defendant or her grantors, say 15 to 20 years before the commencement of this action, had fenced lot 4 or a portion thereof, and on the south side and adjoining lot 5 the fence did not coincide with what would be the northerly side of the survey of Rouland street, being say 13½ feet northerly therefrom at the easterly end, and 3¼ feet at the westerly end, viz. at the westerly boundary of the city. Treating this fence as the southerly boundary of lot No. 4, owned by defendant, and as the northerly boundary of lot No. 5, owned in part by plaintiff, the description in some of the conveyances under which plaintiff deraigned his title to land in lot No. 5 had described the fence as the northerly line of lot No. 5. This narrow strip of land between the northerly boundary of Rouland street, as projected, and defendant's fence was really the subject-matter of the dispute. Defendant had moved her fence from its original position to the northerly line of the projected Rouland street, and plaintiff brought this action. In his complaint he commenced his description at the monument on the center line of Rouland street, and ran around the northerly half of that projected street, as well as the land up to the old fence, thus including a portion of the street in the land the title to which he sought to quiet. Defendant denied the title of plaintiff to any portion of the land described in his complaint, and averred title in herself. At the trial, counsel for defendant did not claim that she owned any land in lot 5, but stated as follows: "We will stipulate we do not claim anything in lot five, block B, Hancock's survey." The evidence showed, without contradiction, that all of the projected Rouland street was on lot 5, and hence was not in dispute; yet the court in its findings found that plaintiff was not the owner of the land described in his complaint, and gave judgment accordingly.

As to so much of that land thus described in the complaint as includes the produced Rouland street, which is a part of lot 5, the finding is not supported by any evidence, and is in direct conflict with the evidence and admission of defendant as shown by the record. That this was a mistake is quite apparent; and when, on the motion for a new trial, the court discovered the error, it very properly called upon defendant to consent to its correction with the alternative of granting a new trial upon a refusal. This action was, as we think, clearly within the discretion of the court, and had the motion for a new trial been under such circumstances denied, it would have been good cause for reversal.

There was no necessity for further notice, or a further hearing, upon the filing of the refusal of defendant to modify the judgment so as to make it conform to the fence on the south boundary of defendant's lot. The result of such refusal was clearly indicated in the first order appealed from, and the second order was the natural sequence of such refusal. The orders appealed from, and each of them, should be affirmed.

We concur: HAYNES, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the orders appealed from, and each of them, are affirmed.

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(107 Cal. 530)

## GEARY v. BOARD OF SUP'RS OF SAN DIEGO COUNTY. (No. 19,462.)

(Supreme Court of California. June 27, 1895.)

LAYING OUT PRIVATE WAY—BOND—INSUFFICIENCY—AMENDMENT.

1. Under Pol. Code, § 2683, providing that a bond must accompany the petition for the opening of a private road, a bond reciting that whereas W. and others have petitioned for the laying out of a road, when in fact the petition was not signed by W., is fatally defective, and therefore the board of supervisors acquires no jurisdiction in the proceedings.

2. Nor does the board acquire jurisdiction where the bond fails to contain the condition that the bondsmen pay to the person over whose lands the road is sought to be opened his costs in contesting the opening of the road (Pol. Code, § 2692), in case the petition be not granted.

3. Where, in proceedings for the opening of a private road, the bond filed with the petition was fatally defective, and the board of supervisors therefore acquired no jurisdiction of the proceeding, previous acts of the board cannot be validated by amending the bond at a very late stage in the proceedings.

Department 1. Appeal from superior court, San Diego county; George Puterbaugh, Judge.

Petition by Catherine Geary against the board of supervisors of the county of San Diego. There was a judgment for defendant, and petitioner appeals. Reversed.

W. T. McNealy, for appellant. M. L. Ward and Cassius Carter, for respondent.

GAROUTTE, J. The proceedings upon which this action is based were commenced before the board of supervisors of San Diego county for the purpose of creating a private road. By a writ of review these proceedings were brought before the superior court, and there held to be valid. This appeal is taken from such adjudication.

1. It appears, both by the petition and the order of the board of supervisors laying out the road, that the proceedings were inaugurated for the benefit of one J. F. Wilson, in order that he might secure a way of access to his farm. Wilson is not one of the signers to the petition for the road, and it is insisted that, under section 2692 of the Political Code, one party, at least, who is directly benefited by the laying out of the road must sign the petition. Such a course certainly would be the better practice, and it is somewhat anomalous that Wilson, the party directly interested, did not indicate his assent to the proceedings by attaching his name to the petition; but we think the proceeding is void for other reasons, and therefore do not find it necessary to give a construction to section 2692 of the Political Code in this regard.

2. As is said in Hill v. Supervisors, 95 Cal. 242, 30 Pac. 385, the mode prescribed by the statute for the laying out of roads is to some extent the measure of the power of the board of supervisors. The board cannot take a step until a petition is filed, which petition in form must be in substantial compliance with the requirements of the statute. But, even when the petition is filed, something more must be done before the board can act. A bond must be filed. Section 2683, Pol. Code, declares that a bond must accompany the petition, and it is only when the petition and bond are presented to the board of supervisors that power is vested in it to take affirmative action. A bond in substantial compliance with the statute is as necessary to vest the board with jurisdiction to act as is a petition in substantial compliance with the statute. At the time the petition was presented, a bond in the amount of $50 accompanied it, which recited: "The condition of this obligation is such that, whereas James F. Wilson and others have petitioned the board of supervisors of San Diego county, state of California, for a private highway, the probable cost of viewing, laying out," etc. By its face the bond appears to be given upon a petition for a private road by James F. Wilson and others, and in no way refers to the petition upon which the proceedings in this

case were inaugurated. Wilson is not a signer to the petition here involved, and such reference being the only mark of identification found in the bond, we must assume that the bond was intended to accompany some other petition. We think it wholly void as a bond to support the petition in this case, and in no degree assisted the board of supervisors in securing jurisdiction of the proceeding.

3. Again, as a bond supporting any petition for a private road, it was fatally defective. There was no condition in the bond, as provided in section 2692, supra, viz.: "The bondsmen will pay to the person over whose land said road is sought to be opened his necessary costs and disbursements in contesting the opening of such road in case the petition be not granted and the road finally not opened." The foregoing is a necessary and essential condition of every bond accompanying a petition for the laying out of a private road. At a very late stage in the progress of the proceedings the defect in the bond in this regard was attempted to be cured by filing an amended bond. We think nothing was gained by such a course. If a valid bond was necessary to give the board jurisdiction to act at all, we do not see how an amended bond could validate previous acts of the board done without jurisdiction. We do not see how a fatally defective bond could be cured by an amendment at this stage of the proceedings, any more than a fatally defective petition could be cured at that time. For the foregoing reasons we think the proceedings of the board in laying out this road were had without jurisdiction, and therefore void. The judgment is reversed, and the cause remanded.

We concur: VAN FLEET, J.; HARRISON, J

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(5 Cal. Unrep. 57)

## CURTISS v. BACHMAN et al. (No. 15,769.)[1]

(Supreme Court of California. June 20, 1895.)

ACTION ON INJUNCTION BOND—SUFFICIENCY OF COMPLAINT.

A complaint on an injunction bond conditioned that plaintiff will pay to the parties enjoined such damages as they may sustain by reason of the injunction, which fails to allege that plaintiff in the injunction suit has not paid the damages, does not state a cause of action.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; J. F. Sullivan, Judge.

Action by Gilbert L. Curtiss against N. S. Bachman and others on an injunction bond. Judgment was rendered for defendants, and plaintiff appeals. Affirmed.

Chas. F. Hanlon, for appellant. W. B. Sharp, for respondents.

BELCHER, C. One Nettie Gilman commenced an action in the superior court of the city and county of San Francisco against Gilbert L. Curtiss, the plaintiff in this action, and obtained a temporary injunction restraining him from doing certain acts during the pendency of said action. By an order of the court the plaintiff was required to file an undertaking in the sum of $5,000 to secure the payment of such damages as the defendant might sustain by reason of the injunction, if the court should finally decide that the plaintiff was not entitled thereto; and such an undertaking was executed by the defendants in this action, and filed. That action resulted in a judgment in favor of the defendant therein, and thereupon he brought this action upon the said undertaking to recover the damages alleged to have been sustained by him by reason of the injunction. The undertaking, after setting out the preliminary facts, proceeds as follows: "Now, therefore, we, the undersigned, residents of the city and county of San Francisco, state of California, in consideration of the premises and of the issuing of said injunction, do jointly and severally undertake in the sum of five thousand ($5,000) dollars, and promise to the effect that in case said injunction shall issue and remain in force and effect the said plaintiff will pay to the said parties enjoined such damages, not exceeding the sum of five thousand ($5,000) dollars, as such parties may by reason of the said injunction sustain, if the said superior court finally decide that the said plaintiff was not entitled thereto." The complaint, among other things, alleges: "(7) That the plaintiff, Gilbert L. Curtiss, has been injured and damaged by reason of the issuance of said injunction in the sum of five thousand dollars. (8) That, prior to the commencement of this action, plaintiff demanded of the defendants, and each of them, to pay the said amount of said bond, and the damages sustained thereunder, to wit, the sum of five thousand dollars; but to pay the same, or any part thereof, the defendants, and each of them, refused, and have ever since refused, and still refuse." The defendants demurred to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action, and their demurrer was overruled. They then answered, denying, among other things, that the plaintiff had been "either injured or damaged by reason of the issuance or continuance of said injunction in the sum of five thousand dollars, or in any sum whatever." The case was tried, and the court found that the plaintiff had not been injured or damaged by reason of the issuance or continuance of the injunction, in any sum whatever, and, as a conclusion of law, that the defendants were entitled to a judgment against the plaintiff for their costs. Judgment was accordingly entered that the plaintiff take nothing by his action, and that the defendants recover their costs, from which, and from an order denying his motion for a new trial, the plaintiff appeals.

The judgment and order should be affirmed, for the reason that the complaint fails to allege any breach of the undertaking sued on.

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[1] Rehearing granted.

The condition of the undertaking was that "the said plaintiff will pay" such damages, etc. There is no allegation in the complaint that the plaintiff had not paid, or had failed or refused or neglected to pay, the damages. Nor is there any allegation from which such nonpayment can be implied. But an allegation of nonpayment by the plaintiff was necessary, and without it the complaint was fatally defective. Morgan v. Menzies, 60 Cal. 341; Richards v. Insurance Co., 80 Cal. 505, 22 Pac. 939; Grant v. Sheerin, 84 Cal. 197, 23 Pac. 1094; Curtiss v. Bachman, 84 Cal. 216, 24 Pac. 379; Barney v. Vigoreaux, 92 Cal. 631, 28 Pac. 678. As the complaint failed to state a cause of action, it is unnecessary to consider the case upon its merits, but if it should be so considered, it is doubtful if there could be a reversal on any of the grounds urged. The judgment and order should be affirmed.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

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107 Cal. 504

## BERRY v. WOODBURN. (No. 18,374.)

(Supreme Court of California. June 27, 1895.)

SPECIFIC PERFORMANCE—CONTRACT TO CONVEY INTEREST IN MINE—MINING PARTNERSHIP.

1. Defendant contracted to pay plaintiff "big wages" while employed in procuring for him a "paying" mine and operating the same, and, in case he did secure such a mine, to convey to him "an interest" in the mine, and, on his failure to secure a paying mine, to pay him reasonable wages. *Held*, that specific performance of defendant's agreement to convey "an interest" in the mine, plaintiff having procured for him a paying one, could not be specifically enforced, owing to the uncertainty as to the quantum of interest to be conveyed.

2. Such agreement did not constitute the parties partners inter se, under Civ. Code, § 2511, providing that a mining partnership exists when two or more persons who own or acquire a mining claim, for the purpose of extracting the mineral therefrom, actually engage in working the same, or under section 2512, providing that the relation arises from the ownership of shares or interest in the mine, and working the same for the purpose of extracting minerals therefrom.

3. Nor did the agreement amount to a "grubstake" contract, so as to entitle plaintiff to a half interest.

Department 1. Appeal from superior court, Trinity county; T. E. Jones, Judge.

Action by William Berry against Robert Woodburn. There was a judgment for plaintiff, and defendant appeals. Reversed.

D. G. Reid, Galpin & Zeigler, and T. M. Osmont, for appellant. John M. Wright, H. R. Given, and Jas. W. Bartlett, for respondent.

GAROUTTE, J. This is an appeal by defendant upon the judgment roll, without a statement or bill of exceptions. Plaintiff declares this appeal to be from a judgment establishing a trust estate in a mine, upon full performance of a verbal contract. Defendant declares the appeal to be from a judgment decreeing specific performance of a verbal contract to convey "an interest" in a mine. It is immaterial which of these views is technically true, as in substance there is but little difference. Judgment went for plaintiff, decreeing that defendant held an undivided one-half interest in the mine in trust for plaintiff, and ordering a conveyance thereof to him. The action is based upon the following parol contract, entered into between the parties, which contract is set out in the complaint, and found as a fact by the court: "That if plaintiff would go up to Trinity county, California, and endeavor to procure such a quartz mine, to wit, a quartz mine that would pay, that in the event of defendant's securing such a paying quartz mine in Trinity county, through the efforts of plaintiff, that defendant would pay to plaintiff big wages, and pay his expenses for the time occupied by him while securing the mine, and until it was demonstrated that the mine was a paying mine; and, in the event of the mine being a paying mine, that defendant would also give to plaintiff, in addition to the wages aforesaid, an interest in such mine; that, in the event of defendant not securing a paying quartz mine through the efforts of plaintiff, defendant was to pay plaintiff reasonable wages, and his expenses as compensation for his services." The court, by its findings, declared that plaintiff found a "paying quartz mine"; that defendant secured the same through the efforts of plaintiff; and decreed a conveyance of one-half thereof by defendant to plaintiff, as previously stated.

The case has been elaborately argued from many standpoints, but, as we view it, only one question is necessary to be considered, for the solution of that question presents an impassable barrier to plaintiff's right of recovery. The contract provides that, in case plaintiff's labors under it meet with success, defendant is to give him "an interest in such mine." We think this provision, as to the interest to be given, so uncertain and indefinite as to be unenforceable by a court of equity. It is elementary that a contract must be certain as to the interest to be conveyed, or equity will not take hold of it. What interest is here to be conveyed? One-half, one-fourth, or one-eighth? Upon what principle of law has the court the right to decree the conveyance of a one-half interest, rather than a one-eighth interest? Upon what sound line of reasoning may the court say that this provision of the agreement can only be satisfied by a transfer of a one-half interest, and would not be satisfied by a transfer of the smallest fractional interest? Before a contract has life, the minds of the parties must meet; and it is the court's duty alone to declare what the parties contemplated and intended when the contract was made. While plaintiff found a "paying" mine, still he was paid all his expenses and "big wages" while engaged in the labor of finding it; and it is not at all apparent from the face of the contract that if defendant should make a purchase, he should thereupon redeed to plaintiff a one-half interest. A mine paying a small net profit upon the capital invested would probably be a paying mine; yet the purchase price might be very great, and the cost of a one-half interest thereof exceed the accumulated net profit of many years. We only cite these illustrations to show that a court of equity could not from the contract say that these parties intended that defendant should be entitled to a one-half interest in the mine discovered. "An interest" is a most indefinite term, for any fraction of a unit would satisfy it; and consequently the amount of estate to be conveyed is unknown to the court, and, being unknown to the court, no decree could possibly be made passing title to it. If the decree in this case followed the language of the contract, and decreed the conveyance of "an interest," it could not be said that a half interest was the quantum upon which the decree acted; and, if the deed following the decree purported to pass "an interest," no principle of law with which we are acquainted would justify the court in declaring that a one-half interest passed.

The fact that the evidence is not before us upon which the findings of the court are based is not material to this investigation, for there is no allegation in the complaint, nor finding of fact, that the parties, or either of them, understood by their contract that they were to own equal, undivided interests in the mine, conceding, for the purposes of the case only, the propriety of such an allegation, and the admissibility of extrinsic evidence thereunder. If plaintiff's labors under the contract had looked to the finding of a farm, or a vineyard, or an hotel, rather than a mine, and such labors had met with success, there would be no question but that the character of action here presented would not lie. It would not lie for the reasons already given, regardless of other serious objections which might be interposed to it. But respondent seeks to steer clear of these obstacles in his pathway by claiming that the contract, taken in connection with the acts of the parties thereunder, created a mining partnership as to this particular mine; and being partners, in the absence of an express agreement as to their respective interests, the law would declare them equal partners. Conceding this principle to be sound, it would probably apply equally as well to any ordinary business partnership. Griggs v. Clark, 23 Cal. 427. But there is no element of such a partnership here, and neither do we think that this record discloses a state of facts even approximating to a mining partnership. Section 2511 of the Civil Code provides: "A mining partnership exists when two or more persons who own or acquire a mining claim, for the purpose of working it and extracting the mineral therefrom, actually engage in working the same." Tried by the test here provided, the facts wholly fail to meet the requirements demanded to constitute a mining partnership. The complaint does not allege a mining partnership; neither do the findings so declare. The complaint does not allege probative facts sufficient to constitute a mining partnership, nor do the findings of fact point to any such business relation. Partnerships are formed by agreement, and the subsequent acts of these parties, as disclosed by the findings, in no sense can create a partnership, but simply serve to furnish light by which we may read and construe the original agreement. This agreement shows that plaintiff was employed to seek for a paying quartz mine. If he found it, he was to be allowed by defendant his expenses incurred in the search, and also "big wages" for his time and labor. In addition thereto, he was to be given "an interest" in the mine by defendant. These were the three elements forming his compensation. He found a "paying mine," and therefore, under the contract, was entitled to the compensation agreed. It appears to be a pure contract of hiring, and lacks every element of a partnership. The fact that defendant was to give plaintiff an interest in the mine, in addition to certain sums of money, has no more tendency to make the contract one of partnership than if he had agreed to give him cattle or horses, or deed him some piece of realty.

Section 2512 of the Civil Code declares: "The relation [of partnership] arises from the ownership of shares or interests in the mine, and working the same for the purpose of extracting minerals therefrom." Inasmuch as this action may be deemed one brought by plaintiff for the express purpose of obtaining a share or interest in a mine, we think it cannot be said that plaintiff as yet has an interest therein; or, if it be said that plaintiff is an owner, but that defendant holds his interest or share in trust, still his contention for a partnership fails, for he never in conjunction with defendant worked the mine for the purpose of extracting minerals therefrom. Whatever work plaintiff did in the mine before the purchase by defendant he did under the original agreement, and was entitled to big wages therefor. He himself recognizes that fact, for in this action he has sued for and recovered the "big wages" promised by defendant. Whatever work he did in the mine after the purchase was either done under a new contract of hiring, or under the big wages contract, and in either case proves nothing looking towards a partnership. We find nothing in the findings of fact strengthening plaintiff's claims that the oral agreement constituted even a quasi or qualified mining partnership. There is nothing in the facts of this case bearing any analogy to the general principle applicable to those cases where a deed or devise is made to two or more parties, without specifically naming their respective interests thereunder. Neither may this contract be considered one in the nature of a "grubstake" contract,—a peculiar and novel character of contract, so common in the early mining history of this state, where two parties enter into a common venture, one furnishing the "grub," the other the labor, in prospecting for valuable mining properties. Clearly, such ventures were joint in their character, and all valuable discoveries would inure to the equal benefit of both. The courts declare such ventures to partake of the character of qualified partnerships; but here we have no common venture, no common ownership, no sharing of profit and loss, no furnishing of labor by one party and "grub" or money by the other. The facts in the case of Settembre v. Putnam, 30 Cal. 490 (a case upon which respondent largely relies for support in this branch of the litigation), are so dissimilar in important particulars to the facts of the case at bar that we refrain from viewing at length the principles of law there declared.

For the reasons stated, the judgment is reversed, and the cause remanded.

We concur: VAN FLEET, J.; McFARLAND, J.

107 Cal. 482

### FLAGG v. DARE et al. (No. 19,522.)

(Supreme Court of California. June 24, 1895.)

Right to Attachment—Action on Contract—Sufficiency of Affidavit—Agreement to Buy Stock.

1. An agreement to buy, after notice, bank stock, at not less than a certain price, is a contract, within Code Civ. Proc. § 538, providing that a writ of attachment may issue in an action upon a contract, express or implied, for the direct payment of money.

2. Under Code Civ. Proc. § 538, providing that the clerk must issue a writ of attachment upon receiving an affidavit showing that defendant is indebted to plaintiff on a contract, express or implied, for the direct payment of money, an affidavit stating that the indebtedness was "upon a contract for the direct payment of money, to wit, for forty shares of * * * stock, at $125 per share," is sufficient.

Commissioners' decision. Department 1. Appeal from superior court, San Diego county; George Puterbaugh, Judge.

Action by O. J. Flagg against D. D. Dare and others. From an order dissolving a writ of attachment, plaintiff appeals. Reversed.

T. J. Capps, D. M. Hammack, and Haines & Ward, for appellant. Wellborn, Stevens & Wellborn and C. L. Barber, for respondents.

BELCHER, C. This is an appeal from an order dissolving an attachment. It is alleged in the complaint that on the 20th day of January, 1891, the plaintiff purchased, and had issued to him, 40 shares of the capital stock of the California National Bank of San Diego, for which he then paid $5,000, and that he afterwards received as dividends on the stock $125, and no more; that to induce plaintiff to purchase the said stock the defendants, prior to the said purchase, made and executed their agreement in writing, reading as follows: "San Diego, California, Jan. 20, 1891. In consideration of the subscription of Mr. O. J. Flagg for forty shares of the capital stock of the California National Bank of San Diego, California, at the price of one hundred and twenty-five dollars per share, we, the undersigned, hereby agree that, in the event of the said O. J. Flagg desiring to dispose of the said forty shares of bank stock, that we will, on sixty days' notice, purchase the same at a price not less than one hundred and twenty-five dollars per share, and allow the said O. J. Flagg interest on said stock at the rate of not less than ten per cent. per annum for the time the money was invested, less any dividends which may have been paid on said stock. [Signed] D. D. Dare, J. W. Collins, S. G. Havermale." It is further alleged that on the 8th of August, 1891, plaintiff desired to dispose of his said stock, pursuant to the terms of said agreement, and so notified defendants; that he was then, and at all times mentioned, able to return said stock to defendants, and thereafter, on the 10th of October, 1891, he offered to return the same to them, and demanded of them the performance of their agreement, and that they take and purchase from him the said shares of stock at the price he paid for the same, and allow him 10 per cent, per annum on his investment of $5,000 for the time said money was invested, but to perform the same, or any part thereof, defendants failed and refused, and still fail, neglect, and refuse, to do so; that plaintiff tenders said stock into court; and prays judgment against defendants for the sum of $5,000, and interest thereon at the rate of 10 per cent. per annum from January 20, 1891, less the sum of $125 received by him as dividends thereon. At the time of filing his complaint, plaintiff asked for a writ of attachment, and, to obtain the same, presented and filed with the clerk an affidavit reading as follows: "[Title of court and cause.] State of California, County of San Diego—ss.: O. J. Flagg, being duly sworn, says that he is the plaintiff in the above entitled action; that the defendant in the said action are indebted to him in the sum of five thousand and four hundred and one and thirty-eight one-hundredths dollars, lawful money of the United States, over and above all legal setoffs and counterclaims, upon a contract for the direct payment of money, to wit, for forty shares of the California National Bank stock, at $125 per share, with ten per cent. per annum interest from January 20, 1891, less $125, semiannual dividends on said stock; and that such contract was made and is payable," etc. A writ of attachment was issued, and thereafter the defendant Havermale moved the court for an order dissolving the same, upon the grounds (1) that the action was not based upon a contract, express or implied, for the direct payment of money; (2) that no legal affidavit, as required by section 538, Code Civ. Proc., was filed with or given to the clerk of the court before the issuance of the writ. The court granted the motion, upon both of the grounds named, and from the order so made the plaintiff appeals.

Two questions only are presented for review. They are: (1) Was the action one in which, under the provisions of the Code, an attachment could be issued? And (2) was the affidavit sufficient to authorize the issuance?

Section 538 of the Code of Civil Procedure provides that a writ of attachment may be issued "in an action upon a contract, express or implied, for the direct payment of money," etc. As we read the complaint in this case, it sets up an express contract for the direct payment of money. By the agreement set out the defendants, in effect, promised to purchase from the plaintiff 40 shares of certain bank stock, and to pay him therefor not less than $125 per share, with interest, on receiving 60 days' notice that he desired to sell the same. The complaint alleges that plaintiff gave the defendants the required notice, and offered to return the stock to them, and demanded that they purchase the same, and pay therefor the agreed price of $125 per share, and interest, and that they refused to accept and pay for the stock, or to perform their agreement, or any part thereof. This clearly shows that the action was founded on contract, and was one in which an attachment might properly be issued. See Donnelly v. Strueven, 63 Cal. 182, and Dunn v. Mackey, 80 Cal. 104, 22 Pac. 64. Section 538, Code Civ. Proc., provides that the clerk of the court must issue the writ of attachment upon receiving an affidavit showing that the defendant is indebted to the plaintiff "upon a contract, express or implied, for the direct payment of money." In Hawley v. Delmas, 4 Cal. 196, the affidavit for attachment followed the language of the statute, and stated that the defendants were indebted to the plaintiff "upon a contract, express or implied, for the direct payment of money"; and it was held insufficient, because the statement was in the alternative. In Simpson v. McCarty, 78 Cal. 175, 20 Pac. 406, the words "express or implied" were entirely omitted from the affidavit, and it was simply stated that the indebtedness was "upon an account stated, a contract for the direct payment of money." This affidavit was held to be sufficient, and the court said: "As regards the right to attach, it makes not a particle of difference whether the contract is express or implied." The court further said: "It may be true, as contended by counsel for appellant, that an account stated can be either an express or implied contract; but, on the other hand, it is undeniable that in either case it is a contract for the direct payment of money. The allegation that there is an account stated makes it certain that at least the elements of the implied contract exist." In this case we think it sufficiently appears from the affidavit that there was an indebtedness arising on contract for the direct payment of money. It was not necessary that the affidavit should state whether the contract was express or implied. "The indebtedness to plaintiff is the principal element required in the affidavit, and when that appears by direct statement, and there is nothing in the affidavit inconsistent with such direct statement of indebtedness, the affidavit as to such indebtedness should, in our judgment, be held sufficient." Bank v. Boyd, 86 Cal. 388, 25 Pac. 20. We think the court erred in dissolving the attachment, and its order should be reversed.

We concur: HAYNES, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order is reversed.

107 Cal. 497

## PEOPLE v. FIY. (Cr. 6.)

(Supreme Court of California. June 26, 1895.)

EMBEZZLEMENT—CONVICTION AS TO PART OF PROPERTY—INFERENCE AS TO BALANCE.

Where defendant was indicted for embezzling a horse, wagon, and harness, and it appeared that he took the property into another county, in which he sold the horse, and that he retained the wagon and harness, the fact that the jury found him guilty as to the horse, and was silent as to the wagon and harness, does not show that they found the embezzlement to consist of the sale of the horse, so as to make the place of the commission of the crime the county in which it was sold.

Department 1. Appeal from superior court, San Diego county; E. S. Torrance, Judge.

Leong Fiy was convicted of the embezzlement of a horse, and appeals. Affirmed.

Rawson & Merchant, for appellant. Atty. Gen. Fitzgerald, for the People.

VAN FLEET, J. The defendant was informed against, tried, and convicted in the county of San Diego of the crime of embezzlement, and sentenced to the state prison for a term of two years. He appeals from the judgment, and from an order denying him a new trial. The property charged to have been embezzled was a horse, wagon, and harness. It appeared without conflict that defendant and a confederate took the property charged in the county of San Diego, and carried it into the county of Orange, where they sold or traded off the horse, but retained the wagon and harness, which latter were found in their possession when they were arrested in Orange county. The defense was that there was no intention to embezzle the property, but to return it in due time to the owner. The defendant was tried separately, and the jury found him guilty of embezzling the horse, but the verdict was silent as to the wagon and harness, which in legal effect was an acquittal as to the latter.

Although not so stated in terms, the real and only question involved in the appeal is whether the evidence sustained the verdict. The position taken by defendant is somewhat novel, not to say peculiar. The argument is that, inasmuch as the evidence shows that all the property was taken by the same act in San Diego county, and was carried together into Orange county, if defendant was guilty of embezzling the horse in San Diego he was equally guilty of embezzling the wagon and harness, and the jury would, under the evidence, necessarily have so found; and from this it is argued that the only consistent deduction to be drawn from the verdict is that the jury took the sale of the horse in Orange county to constitute the act of embezzlement, since, counsel argue, "had they found the offense to have been committed in San Diego county, as charged in the information, consistency and reason would have caused them to find the defendant guilty of embezzling the wagon and harness also." Upon these premises, counsel base the contention that the verdict is inconsistent with the evidence upon which it is based, and that the effect of the verdict is to show that defendant was prosecuted in the wrong county. However plausible the reasoning, the conclusion does not follow. Unfortunately for defendant's position, we cannot review the verdict for its apparent want of "consistency and reason," if it be good in form, and is supported by the facts and the law. It is true, as contended, that it is difficult to perceive upon what theory the jury, under the evidence, arrived at the conclusion that defendant embezzled the horse, and not the wagon and harness, since in law he was as guilty of converting the latter as the former. But we are not called upon to reconcile this apparent inconsistency. The fact remains that the verdict rendered was one which the jury were authorized under the law to find. They were not required, in order to convict, to find that defendant had embezzled all the property charged, and it was for them to say what part, if not all, had been converted. They found that he had embezzled the horse, and this finding is amply sustained by the evidence. The necessary implication of the verdict is that the act was committed in San Diego county, and this fact, likewise, there is evidence in the record to sustain. The offense was complete the moment defendant took the property with intent to wrongfully appropriate it, and this intent the jury have said by their verdict was formed in San Diego. The fact that the jury might or should, under the evidence, in order to be "consistent," have found defendant guilty of embezzling all of the property, cannot militate against the sufficiency of the verdict as found. Consistency does not always find lodgment in the jury room. The vagaries of verdicts are not infrequent, and are often inscrutable; but so long as the verdict is good in substance, and the substantial rights of the parties remain unaffected, it cannot be set aside on that ground. Judgment and order affirmed.

We concur: GAROUTTE, J.; HARRISON, J.

(107 Cal. xvii)

### PEOPLE v. JOHNS. (No. 21,191.)

(Supreme Court of California. June 27, 1895.)

Department 1. Appeal from superior court, Butte county; John C. Gray, J.

David Johns was convicted of grand larceny, and appeals. Affirmed.

John Guidery and C. F. Lott, for appellant. Atty. Gen. Fitzgerald, for the People.

PER CURIAM. The defendant was convicted of the crime of grand larceny, and appeals from the judgment and order denying his motion for a new trial. We have carefully examined appellant's brief, and also the record on appeal, and find nothing whatever demanding a new trial of the case. There is no assignment of error demanding any extended consideration. The evidence was ample to support the verdict, and the question as to the sufficiency of the identification of the hides claimed by the prosecution to have been taken from the stolen cattle is not material upon this appeal. The production in evidence of these hides was but one element or circumstance in the case tending to prove guilt. If the identification was complete, the evidence was strong. If the identification was weak, the evidence was likewise weak. The weight and importance to be attached to it was purely a matter for the jury. The instruction of the court bearing upon this question was clearly correct. We see no valid objection to the admission of the evidence of the accomplice Johnson, and find nothing in the record that would have justified the court in rejecting it upon the ground that it was given under promise of reward. Judgment and order affirmed.

(107 Cal. 500)

### WOOD et al. v. OAKLAND & B. RAPID-TRANSIT CO. (No. 15,779.)[1]

(Supreme Court of California. June 26, 1895.)

MECHANICS' LIENS—SUIT TO FORECLOSE—PARTIES—FAILURE TO RECORD CONTRACT—EFFECT.

1. Though, where the contract with the original contractor is void on account of the failure to record the same with the county recorder, the contractor is not a necessary party to an action by laborers and material men to enforce mechanics' liens, yet he may be made a party, so as to enforce his personal liability, thereby avoiding a multiplicity of suits.

2. In an action to enforce a mechanic's lien, a complaint alleging the completion of the building "on or about" a certain time, and further alleging that the claim of lien was filed within 30 days after such completion, is not demurrable for failure to allege more specifically the date of the completion of the building.

3. In an action to enforce a mechanic's lien, error in overruling a demurrer on account of the failure to allege in the complaint the char-

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[1] Rehearing denied.

acter of the extra work is not ground for reversal, where the claim for extra work was not allowed.

4. A memorandum of a building contract filed with the recorder, reciting that the contractor is to furnish the material and labor for the erection of a "one-story brick building, and all work mentioned in the specifications in connection therewith, in a workmanlike manner, and in conformity with the plans * * * by the construction committee" of plaintiff, does not contain "a statement of the general character of the work to be done" (Code Civ. Proc. § 1183, as amended in 1887); and hence the contract does not limit the owner's liability for mechanics' liens of laborers and material men.

Department 1. Appeal from superior court, Alameda county; F. W. Henshaw, Judge.

Action by Al. Wood and others against the Oakland & Berkeley Rapid-Transit Company and another. There was a judgment for plaintiffs, and the defendant transit company appeals. Affirmed.

J. E. McElrath, for appellant. Jas. C. Martin and W. H. Mahoney, for respondents.

VAN FLEET, J. This is an appeal by the defendant the Oakland & Berkeley Rapid-Transit Company from the judgment rendered against it, and an order denying it a new trial in three separate actions, consolidated and tried as one, brought for the foreclosure of certain mechanics' liens for materials furnished and labor performed in the construction of a power house for said defendant.

1. It is claimed that the court below erred in overruling the demurrers of appellant to the several complaints, which were alike in the particulars objected to. The first ground of objection is that there was a misjoinder of parties defendant, in the making of J. S. Ecker, the original contractor, a party defendant. The complaints proceed upon the theory, and allege, that the contract between the defendant corporation, the owner of the property, and the original contractor, was void, because neither the contract nor a sufficient memorandum thereof was filed with the county recorder; and the argument of appellant is that, taking this allegation to be true, there is in legal contemplation neither a contract nor an original contractor, and the laborer or material man has the right under the statute to sue the owner of the building directly to enforce his lien; that in such instance the contractor is not a necessary party to a determination of the matters involved in the action; and that making him a defendant is therefore improper. It is true that, under the facts alleged, Ecker was not a necessary party to the action, but it does not follow that he was not a proper party; and, if he was either the one or the other, the demurrer on that ground was correctly overruled. While plaintiffs could maintain their action against the owner alone to enforce their liens, the contractor with whom they dealt was alone personally liable to them for any deficiency that might arise; and, if a personal judgment against the contractor was for any reason desired, it was proper to make him a defendant. The practice has, in fact, been commended, as tending to avoid a multiplicity of actions. Giant Powder Co. v. San Diego Flume Co., 78 Cal. 198, 20 Pac. 419.

It is claimed that neither of the complaints stated a cause of action, because they fail to allege the date of the completion of the building. The particular allegation objected to is: "That the said building and structure was completed on or about the 15th day of February, 1891." Defendant contends that to allege the completion "on or about" such a date is too indefinite and uncertain to amount to an allegation of the fact, even as against a general demurrer. Assuming this to be true, the defect was cured by the further allegation that the claim of lien was filed "within thirty days after the completion of said building and structure." The only purpose of alleging the date in question was to show that plaintiffs were within the provision of the statute requiring them to file their claims of lien within 30 days from the date of the completion of the structure or improvement, and this latter allegation meets that requirement.

It is further objected that the demurrer, on the ground of uncertainty, should have been sustained, because the extent and character of the extra work alleged is not shown. It is sufficient to say that this ruling, if wrong, did not injure appellant, as nothing was allowed or awarded in the decree on account of extra work, and the ruling, therefore, does not afford ground of complaint.

2. The memorandum of contract filed in the recorder's office was wholly insufficient. It did not contain "a statement of the general character of the work to be done," as required by the statute.[1] It recites that Ecker, the contractor, is to furnish the material and labor for the erection of "a one-story brick building, and all work mentioned in the specifications in connection therewith, in a workmanlike manner, and in conformity with the plans, drawings, and specifications for the same made by the construction committee of said company," etc. But the plans, drawings, and specifications referred to for the character of the work are neither set out, nor filed in the recorder's office, nor is there any attempt to state their contents or character in the memorandum. This did not comply with the statute, and the lower court was right in holding the contract void on that ground. Yancy v. Morton, 94 Cal. 561, 29 Pac. 1111; Willamette, etc., Co. v. Los Angeles College Co., 94 Cal. 235, 29 Pac. 629; Butterworth v. Levy, 104 Cal. 506, 38 Pac. 897.

The other points do not require special mention. We have examined them, and are satisfied they are without merit.

The judgment and order are affirmed, and the court below is directed to allow respondents, as a part of their costs of appeal, a reasonable fee for the services of their attorneys in this court.

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[1] Code Civ. Proc. § 1183, as amended in 1887.

We concur: GAROUTTE, J.; HARRISON, J.

107 Cal. 492

## McDONALD v. MEZES. (No. 15,672.)

(Supreme Court of California. June 24, 1895.)

CONTRACT FOR STREET PAVING—VALIDITY—WORK NOT CALLED FOR BY CONTRACT—EFFECT—APPORTIONMENT OF ASSESSMENTS.

1. A provision in a street-paving contract, which exempts the superintendent from the performance of official duties, as between himself and the contractor, will not affect the validity of assessments for work done under the contract.

2. The fact that a contractor has done work not called for by the contract and resolution of intention, and has demanded payment therefor, will not invalidate assessments for work called for by the contract, where the apportionment of assessments for the work uncalled for is separate from the apportionment for that called for, and the demands for apportionment are separately made.

3. A provision in a contract for street paving that the work shall be commenced "within 14 days" from the date of the contract is sufficient, under St. 1885, p. 151, providing that the time for the commencement of the work shall be fixed at not more than 15 days from the date of the contract.

Department 2. Appeal from superior court, city and county of San Francisco; Eugene Garber, Judge.

Action by J. W. McDonald against Juliet J. Mezes to recover the amount of a street assessment. From a judgment for plaintiff and an order denying a motion for a new trial, defendant appeals. Modified and affirmed.

F. R. Whitcomb, for appellant. J. C. Bates, for respondent.

McFARLAND, J. This is an appeal by defendant from a judgment in favor of plaintiff in an action to recover the amount of a street assessment in San Francisco, and from an order denying a new trial. This litigation has arisen—as much former litigation arose—out of the carelessness of officers and contractors when attempting to follow statutory provisions about street work, or willful efforts to evade some of those provisions. We do not think, however, that in the case at bar any of the points made for reversal are tenable.

It is contended by appellant that the contract for the work is absolutely void because it contains the following clause: "Nor shall the said James Gilleran, said superintendent, nor his sureties or bondsmen, be liable or holden * * * for any delinquency on his part." This clause should not have been in the contract; for the superintendent can only be relieved from the "delinquency of persons and property assessed." The clause is not authorized by the statute. It proposes to relieve the superintendent from the consequences of his failure to do certain acts necessary to the validity of the assessment, upon which alone the contractor could collect the money due for his work. It proposes to exempt the superintendent from the performance of official duties, and as between the parties to the contract is probably void as against public policy. But it did not affect or prejudice the rights of the property owner, and therefore, as to appellant, did not make the contract void. Appellant relies on Brown v. Jenks, 98 Cal. 10, 32 Pac. 701; but in that case the unauthorized proposition that the contractor, after the completion of the work, should keep the streets in thorough repair for five years, was included in the proposal for bids, and it was held that as the bids were made on that basis they would necessarily be higher than if the unauthorized proposition had not been in the proposal, and the burdens of the property owner were thus increased. But in the case at bar the unauthorized proposition in the contract relating to the delinquency of the superintendent was not in the proposal, and the bids were not influenced by it.

It is contended that the judgment should be reversed because both the assessment and the demand included the cost of work not authorized by the resolution of intention. The resolution provided for granite curbs on Tenth street, between Folsom and Harrison; for paving the roadway with basalt blocks; "and that granite curbs and plank sidewalks be laid on the angular corners of the intersection of Sheridan and Tenth streets, and that granite crosswalks be laid across said intersection." The language of the contract substantially followed that of the resolution of intention, although the latter part of it is a little ambiguous. It seems, however, that the contractor, in addition to the work clearly specified in the resolution, also laid a sidewalk in front of lot 2, the lot owned by appellant. The assessment was divided into three apportionments: The first, as against said lot 2, was for $348.86; the second, for $66; and the third, for $82.92,—and appellant contends, and, we will assume, correctly, that the first and third apportionments include all the work embraced in the resolution of intention, and that the second apportionment is exclusively for work not embraced in said resolution. But the second apportionment of $66 was entirely for laying a sidewalk in front of said lot 2, and is completely separable from the two other apportionments; and it therefore did not vitiate the other apportionments. Moreover, it is apparent that the demand for each apportionment was separately made. The demand on lot 2 was made for $348.86, for $66, and for $82.92. The demands for the valid apportionments were therefore good, notwithstanding the demand for the separate amount of $66 for sidewalks. This view is within the principle of Ede v. Knight, 93 Cal. 165, 28 Pac. 860, and Parker v. Reay, 76 Cal. 103, 18 Pac. 124. The judgment should therefore be modified by striking out the $66 and interest, and in all other respects should be affirmed.

Respondent contends that the whole judgment should be affirmed, because appellant's only remedy for the unauthorized work was an appeal to the supervisors, and cites as authorities on the point Perine v. Forbush, 97 Cal. 305, 32 Pac. 226, and the cases there cited. We are not clear, however, that the facts of the case at bar bring it within the principle of those cases. The language of the superintendent with respect to the commencement of the work is as follows: "The work to be commenced within fourteen days and completed within ninety days from the date of this contract;" and appellant contends that this was not a fixing of the time for the commencement of the work, as provided by section 6 of the act. St. 1885, p. 151. That section provides that the superintendent shall fix the time for the commencement of the work, "which shall not be more than fifteen days from the date of the contract." And appellant contends that he should have named the particular day within the 15 days. "Within fourteen days," was held good in Fletcher v. Prather, 102 Cal. 424, 36 Pac. 658; but, as appellant says, the precise point here made seems not to have been made in that case. However, we do not think that there is any force in the contention. If the statute had provided that the work must be completed within a certain time after its commencement, it might be of some importance to fix the very day on which it should be commenced; but there is no such provision, the time of completion being left to the discretion of the superintendent. In the case at bar he fixed 90 days from the date of the contract for the completion, and within 14 days from said date for the commencement, of the work. The date of the contract was June 9th; and if, instead of saying "within fourteen days," he had named the fourteenth day, which would have been June 23d, the effect would have been the same. Under the present condition of the statute we really can see no importance attaching to this contention.

There are no other points necessary to be considered. The order denying the motion for a new trial is affirmed, and the cause is remanded, with instructions to the superior court to modify the judgment by striking out and deducting therefrom the sum of $66, and all interest on said last-named sum of money. In all other respects the judgment is affirmed.

We concur: HENSHAW, J.; TEMPLE, J.

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107 Cal. 513

## HALL v. CAPPS et al. (No. 19,542.)

(Supreme Court of California. June 27, 1895.)

TAX DEEDS—AFFIDAVIT OF NOTICE—UNOCCUPIED LANDS.

1. Under Pol. Code, § 3785 (before amendment of March 19. 1891), requiring the purchaser of property sold for taxes. 30 days before applying for a deed, to serve notice on the owner of, or the person occupying, the property, except where the premises are unoccupied, in which case it may be served by posting, and providing that no deed shall be issued until an affidavit is filed that the notice required has been given, an affidavit of notice by posting gives the tax collector no authority to issue a deed, when it does not show that the property was unoccupied.

2. The presumption arising from a recital in a deed that an affidavit was filed "showing that the above-described property is unoccupied, and that notice has been given," etc., is rebutted by the affidavit's showing nothing of the kind, and parol evidence is inadmissible to show that the property was unoccupied.

Commissioner's decision. Department 1. Appeal from superior court, San Diego county; W. L. Pierce, Judge.

Action by Mary C. Hall against Thomas J. Capps and another to quiet title. Plaintiff had judgment. From an order denying a motion for a new trial, defendants appeal. Affirmed.

Daney & Wright, T. J. Capps, and E. E. Capps, for appellants. McDonald & McDonald, for respondent.

SEARLS, C. This action is to quiet the title of Mary C. Hall to lot 16 in block 175 of the San Diego Land & Town Company's addition to the city of San Diego, county of San Diego, state of California. Defendants set up title in themselves, as grantees of one J. W. Payne, who claimed title to the premises under a tax deed executed March 21, 1891, upon a sale of the property made March 14, 1890, for delinquent taxes for the fiscal year 1889–90. The statement on a motion for a new trial shows that the cause was submitted in the court below upon an agreed statement of facts, in which was incorporated (1) certificate of sale; (2) notice to redeem, with affidavit of service thereof; (3) the tax deed. Pending the argument in the court below, counsel for plaintiff objected to the sufficiency of the affidavit attached to the notice of redemption, which is in the following language:

"State of California, County of San Diego—ss.: J. W. Payne, being duly sworn, says that he is the purchaser at tax sale of property described in the foregoing instrument; that on the 16th day of February, 1891, he personally posted in a conspicuous place upon said property, to wit, upon lot 16, block 175, of the San Diego Land and Town Company's addition to San Diego, a written notice, of which the foregoing is a copy. S. W. Payne.

"Subscribed and sworn to before me, 7th day of March, 1891. H. W. Weineke, Tax Collector."

Defendants thereupon offered to prove by parol evidence that the property was, at the time of posting the notice of redemption, and at all times, vacant and unoccupied, to which proposed proof the plaintiff objected, upon the ground that the same was incompetent, irrelevant, and immaterial; urged, in substance, that the point was not as to whether the premises were in fact vacant and unoccupied, but whether the tax collector, at the time he executed the deed, had sufficient evidence of such fact, based upon an affidavit, etc. The court sustained the objection, and the ruling is assigned as error.

The notice of redemption, as above stated, was served by posting upon the property on the 16th day of February, 1891. At that time section 3785 of the Political Code (which was thereafter, and on the 19th day of March, 1891, amended) required the purchaser of property sold for delinquent taxes, or his assignee, 30 days before applying for a deed, to "serve upon the owner of the property purchased, or upon the person occupying the property, if said property is occupied, a written notice, stating," etc. "In the case of unoccupied property a similar notice shall be posted in a conspicuous place upon the property at least * * * thirty days before the purchaser applies for a deed, and no deed of the property sold at delinquent tax sale shall be issued by the tax collector, or any other officer, to the purchaser of such property until after such purchaser shall have filed with such tax collector, or other officer, an affidavit showing that the notice hereinbefore required to be given has been given as herein required, which said affidavit shall be filed and preserved by the tax collector as other files, papers and records kept by him in his office." It will be observed from the foregoing statute (1) that the notice must be served upon the owner of the property, or the person occupying it, in all cases, except where the premises are unoccupied, in which case it may be served by posting upon the property; (2) that the tax collector has no authority to issue a deed for property sold until the affidavit is filed showing that the notice "has been given as herein required." Proof of two things are requisite to authorize the tax collector to issue his deed in such a case: (1) The fact of posting the notice on the property; and (2) the fact that the premises are unoccupied. Every fact stated in the affidavit of S. W Payne may have been true, and yet the premises may have been occupied, in which event the posting would have been of no avail. The tax collector had no authority to issue the deed until he was supplied by affidavit with the proof of notice given as by the statute provided, and, as the affidavit in question failed to show that such notice was given, he was without authority to issue the deed. His power comes, not alone from the existence of the facts, but from the proof of their existence, made in the manner specified in the statute, and the mode becomes the measure of his power. Service of notice in such cases by posting upon the premises constitutes an exception to the rule of the statute requiring personal notice, and he who would avail himself thereof must establish by proof the facts bringing the case within the exception.

Appellants' counsel aver in their brief that it was conceded at the trial "by respondents, in the stipulations herein filed, that the real property in controversy was vacant and unoccupied property on the 16th day of February, 1891,—the time when the purchaser thereof at the delinquent tax sale posted his notice to redeem in a conspicuous place thereon." We fail to find any such admission in the record. In Clarke v. Meade, 102 Cal. 516, 36 Pac. 862, the point made here in reference to the affidavit was not, so far as appears, made, considered, or decided. A witness in that case testified, without objection, so far as appears, that the land was vacant and unoccupied, and that he posted the notice thereon. The opinion shows also that the notice and affidavit were in evidence, and holds that the notice contained the matters required by section 3785 of the Political Code; but no point was made, so far as appears, as to the sufficiency of the affidavit. Its contents do not appear, and no comment is made thereon by the court. The deed in the present case did contain a recital that the purchaser at the tax sale had filed an affidavit "showing that the above described property is unoccupied, and that notice has been given," etc. This we may concede to be prima facie evidence of the facts stated therein, but the presumption arising therefrom is rebutted by the affidavit, from which it appears that it did not show anything of the kind. There was therefore no error in the ruling of the court excluding the parol evidence offered by the plaintiff to show that the property was vacant and unoccupied.

As the error considered involves the validity of the tax deed, which is deemed void for want of a sufficient predicate to warrant its issue, the other errors assigned need not be considered. The order appealed from should be affirmed.

We concur: VANCLIEF, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

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(107 Cal. 587)

## MORFFEW et al. v. SAN FRANCISCO & S. R. R. CO. et al. (No. 15,243.)

(Supreme Court of California. June 29, 1895.)

CONSTRUCTION OF WILL—POWER OF SALE—EVIDENCE OF EXECUTION—VESTING OF TRUST ESTATE.

1. A testator devised his half interest in the real property of the community estate to his wife, in trust for their children, subject to a life estate in herself, the expenses of the estate to be paid out of the income, and final distribution to be made on death of the widow, and after the youngest child attained its majority; none of the productive property to be sold before final distribution, and the executors to have power to sell, in their discretion, the unimproved lands; the proceeds of such sales to "be divided among the heirs as before directed." The widow qualified as executrix, and under a partial distribution took her half interest in the lands in fee, and a life estate in the other half, under the will. *Held* that, after the partial distribution, the widow had a power of sale as to the remainder in the unimproved lands as trustee, and not as executrix,

and hence a sale thereunder need not be confirmed by the court as provided by Code Civ. Proc. § 1561, in the case of sales of property made by direction of a will.

2. Where one by the express provisions of a will takes a life estate in land, with limitation over, and is also given a trustee's power of sale of the land, to be exercised at his discretion, the life estate is not enlarged to a fee by the granting of the power.

3. Where one given a trustee's naked power of sale of land by a will executes a deed of the land, the situation and circumstances under which it was executed are admissible to show that such deed was intended as an execution of the power of sale; Code Civ. Proc. § 1860, providing that the circumstances under which an instrument was executed may be considered in its construction.

4. A widow, advanced in years, holding a life estate in a tract of land, with a trustee's naked power of sale as to the remainder, conveyed the land to the agent of a railroad by a deed which failed to show an execution of the trustee's power of sale. When the deed was executed, an action by the railroad for condemnation of the land for use for railroad purposes had been properly commenced against the widow and heirs, and the widow knew that the grantee was agent for this railroad company, that the railroad was being built, and that a station was to be established on the property in question. *Held*, that the widow intended to execute her trustee's power of sale as to the remainder.

5. Civ. Code, § 863, providing that an express trust vests the whole estate in the trustee, and that the beneficiaries take no estate or interest in the property, does not prevent one with a life estate in land from having a trustee's naked power of sale as to the remainder.

Commissioners' decision. Department 2. Appeal from superior court, Marin county; E. B. Mahon, Judge.

Action by Margaret J. Morffew and others against the San Francisco & San Rafael Railroad Company and others for the possession of land. From a judgment for defendants, and an order denying a new trial, plaintiffs appeal. Affirmed.

Mich. Mullany and Wm. Grant, for appellants. Chas. F. Hanlon and Constantine E. A. Foerster, for respondents.

BRITT, C. Matthew Crooks died in the month of February, 1879, being then the owner of property amounting to $750,000 or thereabouts in value, and consisting mainly of real estate in Marin and other counties of this state. He had at that time about 2,500 acres in the county named, including two certain parcels of salt marsh and tide lands, containing together 15.21 acres, which marsh and tide land was unproductive and unimproved. Decedent left a widow, Susan Crooks, who yet survives, and the whole estate was community property. Plaintiffs are the children of said Matthew Crooks and his said wife, and claim, under the provisions of his will below stated, to be the owners as tenants in common of an undivided one-half interest in said 15.21 acres of land. They prosecute this action to quiet their alleged title to the same, though in the argument it is admitted by their counsel that their assumed interest is subject to a precedent estate vested in one of the defendants during the life of their said mother. Those of the defendants who resist the action deny that the plaintiffs have any interest in the lands, and claim that the defendant the San Francisco & North Pacific Railway Company is the owner of the whole thereof. The court below was of this opinion, and rendered judgment that the plaintiffs take nothing; from which judgment, and an order denying their motion for a new trial, the plaintiffs appeal.

Said deceased left a holographic will, of which the portions material to the present controversy are as follows: "I bequeath all my property, both real and personal, to my beloved wife, Susan Crooks, in trust for our children [naming them, there being ten in all], subject to the following conditions: That out of the income of the estate my wife, before mentioned, will pay all taxes and assessments, all just debts and current expenses, as they become due, maintain and educate our before-mentioned children; that she will pay, after my decease, the sum of $5,000 in gold coin to those of the before-mentioned children who attain the age of twenty-one years. It is my wish and desire that none of my property be sold or disposed of in any other way than by lease until my youngest surviving child shall be twenty-one years of age. It is my wish and desire that my wife, Susan Crooks, shall have control of my estate, as well as the income derived from it, during her natural life, and, in case of her death or disability to manage the estate, then I appoint the majority of the surviving heirs who have attained the age of twenty-one years to carry out the trust herein set forth. And it is my desire and will that on the death of my wife, Susan Crooks, and after my youngest surviving child shall have attained the age of twenty-one years, that the estate shall be divided among the surviving heirs share and share alike. Should it be desirable by a majority of my executors herein appointed to sell a part of the unproductive estate hereby granted before the final distribution of the same, I desire that the proceeds be divided among the surviving heirs as before directed; but none of the improved or productive property shall be sold before final distribution of the same, and it is my will and desire that the before-mentioned executors shall carry out the provisions of this will without the giving of bonds or the interference or intervention of any court." No person was in direct terms appointed executor of the will, but (in accordance, we suppose, with the testator's apparent intent,—Civ. Code § 1371) letters testamentary thereon were in March, 1879, issued to Susan Crooks, the surviving widow, by the probate court of the city and county of San Francisco, in which court the will was admitted to probate. Two of the children of said deceased were yet minors at the time of the commencement of this action, February 18, 1889.

Upon the petition of the executrix, said probate court, on the 18th day of December, 1879, made a decree of partial distribution of the estate of said deceased, containing, among other directions, the following: "That there be and is hereby distributed to her [said Susan] one undivided one-half of the property and tracts of land hereinafter described, to be held by her in her own right, being the one-half thereof belonging to her as common property of the community of the said Matthew Crooks and herself, and the remaining half, for the term of her natural life, upon the trusts declared in the will of said Matthew Crooks, deceased, as construed by this court as follows: To pay from the income as it accrues, after maintaining, supporting and educating the children of the said decedent, as directed by said will, the legacies mentioned in said will as follows: [Naming the children and the amount to be paid to each], as they shall respectively arrive at the age of twenty-one years, and for the other purposes designated in the will of the said Matthew Crooks, reference to which for that purpose is hereby made." The lands involved in this action were included among the tracts described in said decree. On April 21, 1884, said Susan Crooks executed to James M. Donahue two certain deeds, each purporting to "grant, bargain, sell, and convey" to said Donahue, his heirs and assigns, forever, one of the parcels of land, respectively, in which the plaintiffs assert an interest here. Such deeds were signed and acknowledged by Mrs. Crooks in her individual name, no reference being made in them to her capacity of executrix or trustee, or to the power of sale. The two deeds were substantially identical in form, differing as to the premises described. The sale was not reported to the superior court, nor was any confirmation of the same asked or obtained. Donahue paid to Mrs. Crooks for such land, at the time of the execution of said deeds, the sum of $4,000. Such title as he then acquired has passed to and is now vested in the defendant the San Francisco & North Pacific Railway Company, which has apparently succeeded to the interests of the other defendant companies. Since the execution of said deeds, Donahue and the successive railroad companies claiming under him have had actual possession of the lands, and erected thereon, as the court found, "expensive and valuable improvements of a permanent character partaking of the realty." Some other facts attending the execution of said deeds will be stated in connection with our views of the intent of the grantor. It was alleged in the complaint that Susan Crooks refused to join in the action as plaintiff, and she was therefore made a party defendant. She filed an answer admitting all the allegations of the complaint.

1. Susan Crooks was, of course, the owner of an undivided one-half of the land, and the judge who tried the case was of the opinion that in virtue of the will and the decree of distribution she held the other "one-half in trust for purpose of sale as to unimproved land," and that "full power and authority was specially delegated to her to sell the unimproved lands and premises as should seem desirable to her." Appellants, however, insist that no trust for the sale of lands is created by the will (and this is conceded by respondents); that the power of sale, such as it is, given to the widow, is conferred upon her as executrix, and not as trustee; that this was a naked power, not coupled with an interest; and hence, under section 1561, Code Civ. Proc., no title passed to Donahue, because the sale to him was not confirmed by the court having probate jurisdiction of the estate of Matthew Crooks. Counsel agree that the will created a trust to receive the rents and profits of the one-half interest subject to Matthew Crooks' testamentary disposal, and to apply the same as in the will directed; and we are of the opinion that the widow took a life estate in such one-half of all the lands upon the trusts created by the will, with an added power of sale—exercisable in her discretion—of the unproductive estate. In our opinion, also, the power of sale is given to Mrs. Crooks as trustee, and not as executrix, during her life and ability to act. It will be observed that the testator provided that the proceeds of sale should "be divided among the surviving heirs as before directed," thus requiring that such proceeds should be held for final apportionment among the heirs who should survive the period of distribution in the same manner as the unproductive land itself would be held in default of the execution of the power. The money to be derived from the sale is not to be used to pay expenses, or even legacies, or for any purpose which might be expected to arise in the performance of the duties of an executor. It seems to have been the intention of the testator that the corpus of the estate should be preserved as nearly as possible intact until the specified time for distribution should arrive, and to create a trust for the purpose of such preservation with an ordained succession of trustees, permitting, however, a sale of unproductive property if found desirable. As said in a case not wholly dissimilar to the present: "Under such circumstances the person named as executor takes not as executor, but as the donee of a power in his character as trustee." Bolton v. Jacks, 6 Rob. (N. Y.) 228. And see Denne v. Judge, 11 East, 288; Newton v. Bronson, 13 N. Y. 593. To such a person the property which is the subject of the trust is well delivered upon distribution of the estate. Barker v. Stanford, 53 Cal. 451; Robinson v. Tickell, 8 Ves. 142; Cooper v. Thornton, 3 Brown, Ch. 96, 186. Those were cases of pecuniary legacies, but under our system there can be no essential difference in this regard between the course to be taken by the real estate and that by the personal property of the decedent. Code Civ. Proc. §§ 1452, 1453, 1658, 1665. The lands thus delivered into the hands of Mrs. Crooks as trustee ceased to be

part of the estate in the course of administration, and the probate court, and its successor, the superior court, in the exercise of probate jurisdiction, had no further control of the same. Barker v. Stanford, 53 Cal. 451; Wheeler v. Bolton, 54 Cal. 305; Buckley v. Superior Court, 102 Cal. 6, 36 Pac. 360. The circumstance that at a future time there is to be a division of the property among the remainder-men, beneficiaries of the trust, does not, it seems, affect the rule. In re Thompson's Estate, 101 Cal. 351, 353, 35 Pac. 991, and 36 Pac. 98, 508. It was within the province of the probate court to determine whether a valid trust had been created, but the power to regulate and direct its subsequent administration lay with the court possessed of general equity jurisdiction. In re Hinckley's Estate, 58 Cal. 518; In re Thompson's Estate, supra. (It will be noted that the decree of distribution here was made several years before the enactment of sections 1699–1703, Code Civ. Proc., conferring a limited jurisdiction over testamentary trustees on the probate side of the superior court.) It seems clear that after the decree of distribution, if not before, the widow held the power of sale as trustee, and not as executrix; and that section 1561, Code Civ. Proc., has no application to the sale made to Donahue, and no confirmation by the court was required, or indeed authorized, by law; and this view, while not restricting the statute in its proper scope, allows effect to the intention of the testator that the provisions of his will shall be executed without the intervention of any court.

2. It is claimed by respondent that Mrs. Crooks had not merely the life estate, but the fee, in trust; and that, a power of sale being added, she had thus a power coupled with an interest in the fee. If this is so, then the case requires no further consideration, for upon that assumption her deeds were doubtless sufficient to pass the title. But the quantity of interest which passes to the trustee in case of an express trust is commensurate with the necessities of his office. The trustee shall have an estate in fee, if that is necessary to enable him to perform the duties imposed upon him, although it is not in terms given to him by the instrument creating the trust. On this principle a devise of lands in trust to sell clothes the trustee with the fee, because necessary to the execution of the trust; the rule being compendiously stated that the trustee "will take an estate adequate to the execution of the trust; no more nor less." Perry, Trusts, § 320; Young v. Bradley, 101 U. S. 787. In the present case there is no trust for the purpose of sale, for trusts are always imperative (Kidwell v. Brummagim, 32 Cal. 443); and here the power to sell is by the terms of the will left wholly discretionary (Civ. Code, §§ 847, 857; Cooke v. Platt, 98 N. Y. 35). And the will does not impose upon the widow any other duty which requires for its discharge an estate in the land greater than for her life. So that there is no enlargement of her life estate to be implied from the necessities of the trust; and, the life estate in the trustee being created by express words in the will, with limitation over, it is not enlarged to a fee by the power of sale. Kennedy v. Kennedy, 159 Pa. St. 327, 28 Atl. 241; Foos v. Scarf, 55 Md. 310, and numerous authorities cited; Payne v. Johnson's Ex'rs, 95 Ky. 183, 184, 24 S. W. 238, 609; Hatfield v. Sohier, 114 Mass. 48.

It is suggested by respondents that the trustee took the fee in virtue of the provision of section 863, Civ. Code. But, as said of a like statute by the court of appeals of New York: "This section does not prevent a valid limitation of a remainder to the beneficiaries of a trust to take effect upon its termination. The declaration that a valid express trust shall vest the whole estate in the trustees, and that the beneficiaries shall take no estate or interest in the land, clearly refers, as the subsequent section shows, to the trust estate, and not to an interest in the land not embraced in the trust." Stevenson v. Lesley, 70 N. Y. 516, 517. So here we think that said section 863 has application only to the particular estate in trust, and not to the remainder in the plaintiffs. In any aspect of the case, we conclude that the power of sale of this land in the hands of Susan Crooks was, as to the remainder after the termination of her life estate, a naked power to sell such remainder, and, as a consequence, that the efficacy of her deeds to pass more than an estate for her life depends upon their validity as an execution of such a power. Her authority is well illustrated by the case of Bloomer v. Waldron, 3 Hill, 361, where it was said that the deed of persons occupying a relation to the title similar to that of Mrs. Crooks here "would carry their life estates, but on any interest beyond that their deed could stand on their power of sale only, independent of their life estates." Id. 365. Accordingly it is contended strenuously by appellants' learned counsel that, since Mrs. Crooks owned in her individual right an undivided one-half interest in the fee of the land, and was besides vested with a life estate in the other half, with an undoubted power of sale as to the life estate, therefore her deeds to Donahue, which (they say) make no reference, express or implied, to the power, are to be deemed ineffectual to execute the power to dispose of the residue of the estate; that they operate to convey her individual interest, and no more; and that the case in this branch is governed by the rule which, after considerable fluctuation of judicial opinion, was established in England by the judgment of the house of lords in Roake v. Denn, 1 Dow & C. 437, decided in 1830, affirming the same case, sub nom. Denn v. Roake, 5 Barn. & C. 720. That case arose upon the construction of a will. Kent says: "The general rule of construction, both as to deeds and wills, is that, if there be an interest and a power existing together in the same person, over the same subject, and an act be done without a particular reference to the power, it will be applied to the interest, and not to the power. If there be any legal interest on which the deed can attach, it will not execute the power." 4 Comm. 334. The subject is treated at length in 1 Sugd. Powers, c. 6, § 7. Instances of the operation of the rule may be found in a number of American cases cited by appellants. Cotting v. De Sartiges, 17 R. I. 668, 24 Atl. 530; Bilderback v. Boyce, 14 S. C. 528; Hollister v. Shaw, 46 Conn. 248; Patterson v. Wilson, 64 Md. 196, 1 Atl. 68; Insurance Co. v. Shipman, 119 N. Y. 324, 24 N. E. 177; and others. "The donee of a power may execute it without referring to it, or taking the slightest notice of it, provided that the intention to execute it appear." 1 Sugd. Powers, 356. The question is as to the evidence by which the intention must appear. Lord Chancellor Thurlow said in one case: "You must not go out of the instrument itself to gather the construction of it." Andrews v. Emmot, 2 Brown, Ch. 303. Appellants hardly press their contention so far. As we understand their argument, they deduce the conclusion—it may be correctly—from the authorities they cite that in no case where the power is not coupled with an interest is the power to be deemed executed, unless (1) there is some reference to the power in the instrument of execution; or (2) there is a reference to the property which is the specific subject-matter on which the power must operate (in this case the fee after the termination of the trust estate); or (3) the instrument would be wholly inoperative if not held to be an execution of the power; and that no evidence of matters extraneous to the deeds here can be considered to demonstrate the intent of Mrs. Crooks to execute the power, except it show that the case falls within one of the three categories thus enumerated. Of course such a rule leaves little room for interpretation in the light of facts not apparent on the face of the instrument. It was said in Roake v. Denn that: "There is not one instance in which the power of appointment is held to have been executed by a will unless there is a reference in the will either to the power or to the property which is the subject of it, or unless the instrument be wholly inoperative without supposing the execution of a power. * * * It has been argued that this is a question of intention, and so it is; but then there are rules by which the intention is to be collected, and it would be dangerous to leave a question of this kind to loose and vague conjecture." 1 Dow & C. 448, 449. But it was remarked by Lord Wynford, in delivering his opinion in the same case: "I agree that there are certain rules by which the intention is to be collected, but I think they are bad rules, and I hope they will not long continue to be binding on the judges." And Sugden observes, speaking of the same subject, some years later: "It is impossible not to be struck with the number of instances where the intention has been defeated by the rule distinguishing power from property. The statute [1 Vict. c. 26, § 27, much like section 1330 of our Civil Code in its effect] now executes the supposed intention in every case of a general disposition by will when the testator has a general power. But in other cases the rule of law is to prevail. The mischief has been increased by the courts in some recent instances adopting a strict construction, with a view to establish a certain rule." 1 Sugd. Powers, 401. Of a doctrine evoking such criticism from such sources it may be suspected, as remarked by the supreme court of Illinois, that it "has been pressed beyond its legitimate domain by at least some of the adjudicated cases." Funk v. Eggleston, 92 Ill. 535. It is supposed to rest upon the case of Sir Edward Clere, 6 Coke, 17. In Blagge v. Miles, 1 Story, 426, Fed. Cas. No. 1,479, which is the leading American authority, Judge Story said of Clere's Case: "It affords a strong illustration of the true doctrine. In that case it was held that the power was well executed, notwithstanding it was not referred to, because otherwise the devise in the will would be inoperative and void." Such "true doctrine," as declared by Judge Story, is this: "If the donee of the power intends to execute, and the mode be in other respects unexceptionable, that intention, however manifested, whether directly or indirectly, positively or by just implication, will make the execution valid and operative. I agree that the intention to execute must be apparent and clear, so that the transaction is not fairly susceptible of any other interpretation. If it be doubtful under all the circumstances, then that doubt will prevent it from being deemed an execution of the power. All the authorities agree that it is not necessary that the intention to execute the power should appear by express terms or recitals in the instrument." He adds: "It is sufficient that it shall appear by words, acts, or deeds demonstrating the intention." Blagge v. Miles, 1 Story, 446, Fed. Cas. No. 1,479. Following this case are many decisions applying, and some of them enlarging, the principle thus stated. In Funk v. Eggleston, 92 Ill. 515, the subject of the power being real estate, and the question being as to the execution of the power by a will, the court held that, in order to arrive at the intention of the testator, the facts in the case dehors the will—such as the very small quantity of land involved, the circumstance that the same must be distributed among more than 200 heirs of the donor of the power, if the power was not intended to be executed, the lack of property to satisfy certain legacies, except by exercise of the power—as well as all the provisions of the will itself would be considered; and if these indicate an intention to pass the whole estate, the devise "should be held to work both by the interest and by the power, and to pass the entirety." Id. 545–548. And in White v. Hicks, 33 N. Y. 383, the court, while rightly rejecting evidence of parol declarations of intent, yet held that the intention to execute the power might be deduced from a comparison of the amount of personal property which a testatrix assumed to dispose of by will with the amount she had subject to such disposition, without the aid of the power, and in this view dissented from the rule of the later English authorities. To similar effect, Lee v. Simpson, 134 U. S. 572, 10 Sup. Ct. 631. In Gindrat v. Gaslight Co., 82 Ala. 596, 2 South. 327, involving the execution of a power by deed, the purpose for which the realty was sold and purchased, viz. the construction on the same of a system of gas works to be used in lighting a town, was said to "corroborate the intention of the deed to convey an indefeasible title"; that such purpose "implies the idea of a holding in perpetuity." "The intent is matter in pais to be collected from all the circumstances of the case." Crane v. Morris' Lessee, 6 Pet. 620. And having the same general drift are Ladd v. Chase, 155 Mass. 422, 29 N. E. 637; McCreary v. Bomberger, 151 Pa. St. 328, 24 Atl. 1066; Boyer v. Allen, 76 Mo. 498; and other cases cited by respondents. In these authorities we see, at bottom, no more than the familiar principle of evidence now embodied in our Code, and which applies alike to deeds and wills: "For the proper construction of an instrument, the circumstances under which it was made, including the situation of the subject of the instrument, and of the parties to it, may also be shown, so that the judge be placed in the position of those whose language he is to interpret." Code Civ. Proc. § 1860. This has been said here to be "the only rule of much value" in the construction of written instruments. Walsh v. Hill, 38 Cal. 487. And we perceive no substantial reason why an instrument which may or may not be construed as the execution of a power by the donee thereof, according as circumstances may unfold the intent, should form even a partial exception to this general principle; and we hold that it does not. It follows that the court below properly admitted evidence of the situation of the parties to the deeds here in question, and of the property described in the same, and of the circumstances under which they were executed.

But it is said that the evidence admitted is insufficient to sustain the inference of an intent on the part of Mrs. Crooks to act under the power. We recognize the rule that the intent to execute the power must be clear, so that such intent is not left in doubt; but within this principle we are of opinion that the evidence here, taken in connection with the deeds themselves, justifies the conclusion that Mrs. Crooks intended to execute the power and to convey the entirety of the land to Donahue, and that her deeds had that effect. It appears from the record that prior to such deeds the San Francisco & San Rafael Railroad Company, one of the defendants, had commenced an action in the superior court of Marin county to condemn a large part of the land in question for the purpose of constructing its railroad track thereon, and for the construction of wharves and other terminal facilities at Point Tiburon, on the shore of the Bay of San Francisco. Mrs. Crooks and the plaintiffs, her children, were parties defendant in that action. The company began the work of constructing the track before the deeds were executed. Donahue was a director of the company, and acted in its behalf. Mrs. Crooks testified: "I knew where the land was situated, and had reason to know that Donahue wanted it for some railroad purposes. I knew of the railroad having been built, and in the same public manner I knew he had established a station at Tiburon. I remember being sued by Donahue before I made the deed to him. All my children were joined in that action." The action was withdrawn by the plaintiff December 28, 1888. The price she received for the land—$4,000—is admitted to have been at least its full actual value. It had been appraised as part of the estate of her deceased husband at about $75 only. She was advanced in years, and could not reasonably suppose that the purchaser would desire to place improvements of the nature had in view on this land, if one moiety of it must be held upon the uncertain tenure of her life only. "The life estate of an old lady in unimproved lands would hardly have been salable unless under execution." Owens v. Ellis, 64 Mo. 89. It seems incredible that she, actuated by fair and honest motives, as we must assume she was, did not intend to transfer the whole estate, or to exercise the power necessary for that purpose. The judgment and order should be affirmed.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

5 Cal. Unrep. 59

### EATON v. METZ, Constable. (No. 19,512.)

(Supreme Court of California. June 27, 1895.)

WRONGFUL ATTACHMENT—LEVY—ACTION AGAINST OFFICER—DEFENSES—FRADULENT SALE—PLEADING AND PROOF.

1. In an action against an officer for property levied on under an attachment against plaintiff's vendor, an averment by defendant that the sale to plaintiff was made with the design on his part, and on the part of his vendor, to delay and defraud the creditors of the grantor, and to prevent the application of the property to the satisfaction of their demands, does not authorize the admission of evidence of actual fraud.

2. In an action of claim and delivery against an officer on account of a levy under an attachment against plaintiff's vendor, defendant may, under a denial of plaintiff's title, show that there was not an immediate delivery or continued change of possession as between plaintiff and his vendor, and he need not specially plead such facts.

Commissioners' decision. Department 1. Appeal from superior court, San Diego county; George Puterbaugh, Judge.

Action of claim and delivery by Fred. B. Eaton against A. W. Metz, constable. From a judgment for defendant, plaintiff appeals. Affirmed.

Trippet, Boone & Neale and A. L. Gill, for appellant. W. S. Wise and E. W. Britt, for respondent.

SEARLS, C. This is an action in claim and delivery to recover the possession from defendant of 13 horses, 1 four-horse wagon, and 1 set of double harness, or their value, alleged to be $2,000. The amended answer contains two separate defenses. The first denies the ownership or possession of the plaintiff of the property described in the complaint, or any part thereof, or that it is of any value exceeding $1,200, or that defendant at any time took the same, or any part thereof, from the possession of the plaintiff, or that he wrongfully withholds the same from said plaintiff. The second defense avers that A. C. Eaton was and is the owner of the property described in the complaint, and justifies taking the same as a constable of the township of Perris, in the county of San Diego, under and by virtue of sundry writs of attachment issued out of justice court in and for said township, in actions pending therein in favor of sundry persons against said A. C. Eaton. Defendant further averred as follows: "Defendant, here answering, is informed, and believes, and therefore alleges, that the said Fred. B. Eaton claims to be the owner of the property described in his complaint herein, in virtue of an alleged sale thereof to him by the said A. C. Eaton; and defendant avers also, upon his information and belief, that such alleged sale was made for the purpose and with the design, on the part of said A. C. Eaton and Fred. B. Eaton, to hinder, delay, and defraud the creditors of the said A. C. Eaton, particularly [naming them], and to prevent the taking and application of such property to the satisfaction of the demands of such creditors against said A. C. Eaton." The cause was tried by the court, and written findings filed, upon which judgment was entered in favor of the defendant for the redelivery to him of all the property described in the complaint, except one horse, viz.: "One sorrel horse, blind of one eye, mentioned in the complaint, or the sum of one hundred and twenty-five dollars, the value thereof." Defendant had costs. Plaintiff appeals from the judgment. The case comes up on the judgment roll, containing a bill of exceptions, in which the evidence is set out. The court found, in substance, among other things, that at the date of the levy by defendant (on or about October 5, 1892) the plaintiff was the owner of the sorrel horse described in the complaint, but was not the owner of the other property, or any part thereof, but that A. C. Eaton, the father of the plaintiff, was the owner thereof; that plaintiff claims to be the owner of all the property (except the sorrel horse) by virtue of an alleged sale thereof, made to him on or about June 25, 1892; that such sale was not accompanied by an immediate delivery of the property, although such property was then in possession of said A. C. Eaton, and that there was never an actual or continued change of possession. Upon the charge that the sale was made for the purpose and with the design, by the plaintiff and A. C. Eaton, to hinder, delay, or defraud the creditors of A. C. Eaton, etc., the finding is in favor of the plaintiff, and to the effect that it was not made for any such purpose or with such design. At the trial, plaintiff introduced evidence to show that he was the owner of the property in dispute, and that it was taken by defendant without his consent, etc. At various stages of the trial, in the cross-examination of plaintiff's witnesses, and when testimony was offered on behalf of defendant, counsel for plaintiff objected to the introduction of any and all testimony tending to show fraud, upon the ground that there was no pleading to support the same. The court overruled these several objections, and the rulings are assigned as error.

The contention of the plaintiff here is that fraud must be pleaded by setting up the facts constituting it; that general allegations are insufficient, and that defendant's answer failed to set out any facts upon which fraud could be predicated. In support of this proposition we are referred to the following cases: Sukeforth v. Lord, 87 Cal. 402, 25 Pac. 497; Pehrson v. Hewitt, 79 Cal. 598, 21 Pac. 950; Mason v. Vestal, 88 Cal. 396, 26 Pac. 213; Wetherly v. Straus, 93 Cal. 284, 28 Pac. 1045; Albertoli v. Branham, 80 Cal. 633, 22 Pac. 404. As was said in Mason v. Vestal, supra: "A defendant is not required to anticipate the source from which the plaintiff claims to derive his title, but if he does proceed to set up the acts of fraud which he charges rendered plaintiff's title invalid, he must state facts which are sufficient in law to that end." And if a defendant pleads fraud in general terms, if a demurrer is interposed to his plea, or, in the absence of such demurrer, if the evidence tending to prove the supposed fraud is objected to at the trial upon the ground of immateriality, it is error to admit it. But, in the absence of a demurrer, or objection to evidence under such general plea, there is no error of which the losing party can complain. Sukeforth v. Lord, supra. The defense of actual fraud in the case at bar was even more general than that set up in the answer in Sukeforth v. Lord, and, objection having been made to all evidence offered in support thereof, we must hold (waiving for the present the question of the admissibility of the evidence under other portions of the answer) that the court below erred in its admission. But the plaintiff was not injured by such error, for the palpable reason that the finding of the court upon the issue of actual fraud was in his favor. The finding reads as follows: "That such alleged sale was not made for the purpose and with the design, on the part of the said A. C. Eaton or Fred. B. Eaton, to hinder, delay, and defraud his creditors, and to prevent the taking and application of such property to the satisfaction of the demands of such creditors against him, the said A. C. Eaton." Error without injury is not cause for reversal.

It is further objected by appellant that the findings of the court as to constructive fraud are without the issues, because the only kind of fraud which is attempted to be pleaded is actual fraud. It is proper to say that, whatever conclusion may be reached in regard to the admission by defendant of title in the plaintiff by the plea of a fraudulent sale of the property, as set out in the second defense of defendant, such admission only goes to that defense. To illustrate: A., the payee of a promissory note, sues B., the maker. B. sets up three separate defenses: (1) That he never made the note; (2) that he has paid it; (3) that it is barred by the statute of limitations. The second and third defenses admit the making of the note; but it is only for the purposes of such defenses that the admission applies, and under the first defense the plaintiff must still prove the making of the note. Each defense must be consistent with itself, but need not be consistent with the others. Bell v. Brown, 22 Cal. 671; Wilson v. Cleaveland, 30 Cal. 192; Buhne v. Corbett, 43 Cal. 264. Defendant, in his first defense, having, as hereinbefore stated, denied the title of plaintiff to the property, and the latter having, as he was bound to do, introduced evidence of ownership in himself, the defendant was at liberty to combat such claim of ownership by showing that there was not an immediate delivery or a continued change of possession, as between plaintiff and his vendor, and that defendant, as a constable acting under a valid writ against the vendor, and in favor of his creditor, had taken the property pursuant to the command of such writ. These were facts which, under section 3440 of the Civil Code, went to defeat the title set up by plaintiff, and needed not to be specially pleaded, such title being denied. Grum v. Barney, 55 Cal. 254; Mason v. Vestal, 88 Cal. 396, 26 Pac. 213.

The bill of exceptions fails to show that any objections were made to testimony tending to show that defendant was a constable acting under valid writs of attachment, or that the parties in whose favor such writs issued were creditors of plaintiff's vendor; and the objections to the findings fail to specify any insufficiency of evidence on these points, being directed to the evidence going to the facts as found,—that plaintiff was not the owner of the property; that A. C. Eaton was such owner; that the sale from said A. C. Eaton to plaintiff was not accompanied by an immediate delivery and a continued change of possession of the property sold, although such property was at the time of such sale in the possession of said A. C. Eaton; and that defendant (except as to the sorrel horse) did not take the property from the plaintiff wrongfully or at all. Upon these alleged insufficiencies of evidence there was such a substantial conflict as must preclude a reversal here. Under such circumstances, it becomes unnecessary to detail the evidence, or to dwell upon the peculiar relations of the parties, the manner in which the property was used after the pretended sale, or the suspicious circumstances involved in the transaction. The judgment appealed from should be affirmed.

We concur: BELCHER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

107 Cal. 536

## STATLER v. SUPERIOR COURT OF ALAMEDA COUNTY. (L. A. 35.)

(Supreme Court of California. June 27, 1895.)

Insolvency Proceedings—Effect of Appeal—Subsequent Modification of Order—Land Fraudulently Conveyed.

1. After a creditor has appealed from the usual order in insolvency proceedings adjudging a debtor insolvent and staying all proceedings against him, the court cannot modify it by permitting the assignee, who is also a judgment creditor, to levy execution upon certain property of the insolvent.

2. Though it is the duty of the court to preserve an insolvent's estate for the benefit of creditors, it cannot, after appeal from the order adjudging the debtor insolvent and staying further proceedings against him, modify said order so as to subject land fraudulently conveyed by the insolvent to the claims of creditors; the remedy in such case being by action against the insolvent and his fraudulent vendees.

In bank.

Certiorari by T. K. Statler to the superior court of Alameda county to annul an order of said court. Order annulled.

Pierson & Mitchell and Robert A. Friedrich, for petitioner. A. W. Thompson, for respondent.

VAN FLEET, J. This is an original proceeding in this court by certiorari, seeking to review and have annulled an order of said superior court made in a proceeding in insolvency. In December, 1894, R. P. Thomas, a resident of Alameda county, filed in said superior court his voluntary petition in insolvency, and thereupon the usual order was made, as provided in the insolvent act, adjudging Thomas insolvent and staying all proceedings against him. Subsequently one Chetwood, a creditor, was elected and duly qualified as assignee of the estate. Thereafter, on March 18, 1895, the petitioner herein, a creditor whose claim had been filed against said estate, took and perfected an appeal to this court from said order of adjudication, and said appeal is still pending here. On March 30th, and after the perfecting of said appeal, Chetwood, whose claim is based upon a judgment theretofore recovered by him against said insolvent in the superior court of the city and county of San Francisco, but under which no execution had been levied or lien acquired in any manner upon any property of the insolvent in Alameda county, made an application to said superior court for a modification of the order of adjudication, to the extent of permitting him, as such judgment creditor and assignee, to take out execution upon his said judgment and levy it upon certain real estate constituting the homestead of the insolvent in Alameda county, which it was alleged largely exceeded in value the statutory exemption, and to subject such excess in value to the satisfaction of said judgment. The superior court granted said application, and made an order modifying said order of adjudication in the manner requested, and said Chetwood thereupon took out execution, and is proceeding to subject said property to the satisfaction of his said judgment. The said order of modification was made without notice to or consent of the petitioner; and petitioner deeming that said court had no power to make the order, and there being no appeal therefrom, he seeks the aid of this proceeding to have the order annulled.

We think it clear that the court was without authority to make the order complained of. The order of adjudication was an appealable order, and the effect of the appeal from that order was to stay "all further proceedings in the court below upon the judgment or order appealed from, or upon the matters embraced therein." Code Civ. Proc. § 946; Dennery v. Superior Court, 84 Cal. 7, 24 Pac. 147; Pennie v. Superior Court, 89 Cal. 31, 26 Pac. 617. Pending the appeal the superior court had no more power to modify the order appealed from in the manner indicated than it would have had to proceed and enforce it in its entirety. The effect of the appeal is to remove the subject-matter of the order from the jurisdiction of the lower court, and that court is without power to proceed further as to any matter embraced therein until the appeal is determined. Ruggles v. Superior Court, 103 Cal. 125, 37 Pac. 211.

It is contended, however, by respondent, that the appeal "is from the judgment and decree adjudging the said R. P. Thomas insolvent, and not from the order creating the stay," and that, therefore, the court was not prevented from modifying the stay order. This argument is based upon the assumption that that part of the order of adjudication declaring the insolvency, and the part staying proceedings, are separate and distinct orders, in no way dependent upon each other. This position is untenable. The order is one order, containing different and somewhat distinct adjudications, it is true, but still a single order, the different features of which are dependent upon each other. Insolvent Act, § 6. The appeal is "from the judgment and decree made and filed in this matter. * * * adjudging the said R. P. Thomas insolvent, and from the whole of said judgment and decree." It is apparent that the appeal was intended to embrace every part of said order, and the language is sufficiently comprehensive to make the intention effectual.

It is further urged by respondent that the order made by the superior court was solely with a view and purpose of preserving the property of the insolvent for the creditors; and that this the court had a right to do. It is undoubtedly the duty and within the power of the court to keep the property of the estate intact, and to preserve it from loss or spoliation, and to adopt proper measures to that end (Dennery v. Superior Court, supra); but it is not authorized for such purpose more than another to travel outside its jurisdiction. Assuming, as is claimed by respondent, that the only object of the order in question was for the protection of the rights of all the creditors, which is not clearly manifest from the nature of the order itself, it was wholly unnecessary for the purpose, even had it been proper. If it be true, as asserted, that the insolvent had, prior to filing his petition in insolvency, made a fraudulent transfer of his interest in the homestead property, for the purpose of covering it up and preventing any excess in value from coming to his creditors, there existed a plain and adequate remedy by which his act could be defeated and the property recovered. It was perfectly competent for Chetwood, the judgment creditor, to bring an action, on behalf of himself and the other creditors, to set aside such transfer as in fraud of creditors. Such an action is not within the prohibition of section 45 of the insolvent act. Even though necessary to make the insolvent a party, it would not be an action against him upon a debt or obligation provable against his estate, but to recover from his fraudulent vendees, for the benefit of the estate, the property so transferred. As such it would not contravene the order staying proceedings, even if the latter remained in force. The case of Miller v. Kehoe (Cal.) 40 Pac. 485, presents such an instance. Here, however, the stay order was suspended by the appeal, and no question could, therefore, arise as to the right to maintain such an action. The order complained of should, therefore, be annulled, and it is so ordered.

We concur: GAROUTTE, J.; McFARLAND, J.; HENSHAW, J.; HARRISON, J.

107 Cal. 563

## DAVIS v. PACIFIC POWER CO. (No. 15,846.)

(Supreme Court of California. June 29, 1895.)

INJURY TO EMPLOYE OF LESSEE — LIABILITY OF EMPLOYER—REVOLVING SHAFT IN BUILDING —CONTRIBUTORY NEGLIGENCE.

1. Evidence that a boy, while at work for the lessee of premises on the first floor thereof, got thistles in his fingers from a strawcutter, and went to the most available light, which was in the basement, to get them out, justifies a finding that he was in the basement for a necessary purpose in the performance of his duty, so as to impose upon the lessor the duty of protecting him while there from injuries arising from unsafe machinery placed in the basement by the lessor.

2. Where a landlord retains control of a portions of his premises, he is bound, if he puts dangerous machinery thereon, to fence it, or otherwise protect those in its vicinity from injury thereby.

3. An employé of a lessee of part of a building, having gone to a part of the leased premises in the performance of his duty, was, while there, injured by a revolving shaft placed there by the lessor for the purpose of transmitting power to other parts of the building. The employé testified that he stood at a safe distance from the shaft, and that, the first thing he knew, he was caught by it. It appeared that the surface of the shaft was rough and jagged, so as to be more likely to seize hold of clothing, and that this was not apparent when the shaft was revolving, and was unknown to the person injured. *Held*, that the question of contributory negligence was for the jury.

4. In an action for personal injuries caused by an iron shaft, a witness may, when shown the size of the shaft, refer to a piece of iron of about the same dimensions.

Department 1. Appeal from superior court, city and county of San Francisco; Charles W. Slack, Judge.

Action by Herbert Sumner Davis against the Pacific Power Company for damages for personal injuries. From a judgment for plaintiff, defendant appeals. Affirmed.

C. H. Wilson, for appellant. Geo. A. Rankin, for respondent.

VAN FLEET, J. Plaintiff recovered a verdict, and from the judgment entered thereon, and an order denying a new trial, the defendant appeals. Defendant, a corporation, is engaged in the business of leasing buildings for business purposes and furnishing steam power in connection therewith. During the year 1891, William Davis, the father of the plaintiff, occupied, under lease from defendant, the basement and first floor of one of its buildings at No. 28 Jessie street, in the city of San Francisco. These premises were used by William Davis as a factory for the manufacture of horse collars. The basement was an underground room, 52 by 25 feet. In one corner of this basement, where it fronts on Jessie street, there was a flight of stairs leading from the basement into Jessie street, and extending into the basement about 5 feet. Midway of the stairs were two large doors, consisting mostly of glass, by means of which the basement was largely lighted. The stairs and doors afforded the only means of entering the basement directly from the street, and without their use the basement was largely useless. There was no machinery in the basement when it was leased to William Davis, and he never used any therein, except some collar-blocking machines run by hand. He used certain machinery run by steam on the floor above the basement, the power to run this machinery being furnished by the defendant by means of a shaft which was in the second story of the building. The stairway in question was constantly used by William Davis and his employés in carrying goods to and from the basement and the street, and for other purposes. There was an inner stairway leading from the basement to the first floor. In September or October, 1891, the defendant entered upon the leased premises, and erected in this basement an iron shaft for the purpose of transmitting power from its power house on the west side of the leased premises to a new building erected by it across Jessie street on the east. This shaft was a little over three inches in diameter, and ran throughout the entire length of the basement, and under Jessie street to the new building. It was put up along the west wall of the basement about 10 inches out therefrom, being supported by brackets attached to the sleepers of the floor above, and was carried over and along one side of the front basement stairs aforesaid, and through the casing of one of the doors above referred to. Where it ran over the stairway, it varied in height from about four or five feet above the lower step to a little over two feet above the step on which the doors rested, where it passed through the casing. When completed and connected, the shaft, which was kept running every day except Sundays, revolved at a high rate of speed. The plaintiff, at the time of receiving the injuries which form the basis of the action, was a lad of about 16 years of age. Shortly after the erection of the shaft, about November, 1891, he went to work in his father's collar factory as an employé. For a short time he was employed partly in the basement and partly on the floor above. During this time he had occasion to observe the running of the shaft. Subsequently he was set at work on the floor above, running some of the time a steam straw cutter, and at others a collar stuffer. On the 31st of December, 1891, plaintiff, while engaged at work on the straw cutter, got some thorns or thistles in his hand, and it became necessary for him to go to the light to get them out. By reason of obstructions on the floor where plaintiff was working at the time, there was no available light sufficient for his purpose, and the only place to which he could go without leaving the building was to the glass doors in the basement. He accordingly went into the basement, and stood on the steps in front of the basement doors along which ran the shaft, as above stated; and, while engaged in removing the thistles from his hand, his clothing was caught by the revolving shaft in some manner unknown to him, and he was drawn over and around the shaft, all his clothing stripped from him, and his body and limbs very badly broken and injured. When the shaft was stopped to remove plaintiff's clothing, it was discovered that that portion of the shaft over the stairway, and where plaintiff was caught, had upon its surface a great many rough and jagged projections and raised, sharp points, varying from a sixteenth to an eighth of an inch high, and of a character calculated to make the shaft at that point much more likely to catch clothing or other substance of the kind coming in contact with it, and consequently more dangerous in that respect. These projections had the appearance of having been produced by the grinding or scraping of tongs or other instruments used in handling or turning the shaft while placing it in position. They could not be seen when the shaft was revolving, as it then appeared to have a smooth surface, and plaintiff was unaware of this condition of the shaft until after the accident. Up to the time of the injury to plaintiff, the shaft had been permitted by defendant to remain entirely unfenced and unprotected throughout the length of the basement and along the stairway, and open at all points to approach and contact by any one.

The contention of appellant is that, upon the facts disclosed, plaintiff is not entitled to recover, for the reasons—First, that at the time of the accident defendant owed the plaintiff no duty which required it to protect him from the dangers of its shaft; and, second, that the evidence shows that plaintiff was guilty of contributory negligence proximately conducing to his injury. The first proposition is subdivided by counsel into several minor heads, each of which is elaborately presented in the briefs, but they all converge eventually in the general proposition, as stated above, that defendant owed the plaintiff no duty in the premises which can render it liable in damages.

It is argued that at the time of the accident the plaintiff was wandering over the premises of his employer, for his own purposes or convenience, and not in pursuit of his employment, and away from where his duty called him; that, while so engaged, he was not on the stairway by right, but was a mere licensee; and that as such the defendant was under no obligation to guard him from injury. In the first place, this proposition rests upon the assumption of a right in the defendant itself to maintain its shaft up on the premises. The evidence upon this point is conflicting; that of plaintiff tending to show that defendant went upon the leased premises, and erected the shaft, without asking or receiving any permission from William Davis, the tenant; while the evidence on the part of the defendant is to the effect that, although defendant originally started in to erect the shaft without permission, William Davis afterwards assented thereto. In view of the fact, however, that the court below instructed the jury that, if defendant erected and maintained the shaft with the consent of William Davis, the plaintiff could not recover, the verdict must be regarded as negativing such consent. The defendant was therefore a trespasser, or at best was itself a mere licensee, exercising a privilege at bare sufferance. As such, it is not in a position to question the plaintiff's right in the premises. But, even if it were, the evidence does not sustain defendant's position. As we view it the evidence shows a clear right in the plaintiff to be where he was. There is certainly nothing to show that he had been forbidden by his employer to go into the basement, or upon the stairs, or elsewhere, or anything to indicate that he was in any way restricted as to going about the premises for any necessary purpose. But it is said that plaintiff was not on the stairway for a necessary purpose or in the performance of his duty. We think the jury were justified in saying that he was. It was not an absolute necessity, it is true, which took him there; but it is not necessary that it should have been. He needed a good light to remove the briers or thistles from his hands, and the basement doors afforded the most available place for the purpose, without going from the building, which he was not called upon to do. It is true that he did not go there directly in the line of his work, but it cannot be said that it was not in the line of his duty. He was suffering from pain and inconvenience from a cause which interfered with and prevented him from proceeding with his work, and it was his duty to his employer to remove the cause of his disability as speedily and conveniently as possible. In this view, his going to the basement and the stairway was as much in the interest of his employer as his own, and cannot therefore be justly characterized as a wandering over the premises solely for his own private ends. To hold, under the circumstances, that plaintiff was in the place where the injury occurred as a mere volunteer, and without right, would be taking an exceedingly narrow view of the rights of an employé. The case is quite distinguishable from the cases relied upon by the appellant. The plaintiff having a right to be where he was, the defendant owed him the duty of protection, whether or not the latter was rightfully maintaining its shaft upon the premises. Donnelly v. Hufschmidt, 79 Cal. 74, 21 Pac. 546.

It is said that William Davis, by failure to object to the erection and maintenance of the shaft, assumed for himself and his employés the risk of injury therefrom. But the evidence shows that William Davis did in effect, if not in terms, object to the introduction of the shaft. When he was informed that defendant was proceeding to erect the shaft, and was disturbing and interfering with his workmen in the basement, he went to its officers, and inquired into their purposes. He was informed substantially that he ought not to object, but, if he did, it would make no difference; in other words, that the shaft had to go in. He was assured that he would never know it was there, either from the space it would occupy, or the noise it would make; that defendant's servants would go in every day and look after it, and he (Davis) should never be disturbed by it. This evidence, it is true, is denied by defendant, but the jury evidently believed and acted upon it. The shaft was admittedly put in and maintained solely for the use and benefit of the defendant, and was in no way connected with or used by William Davis. It was, furthermore, wholly under the control and management of defendant, as was likewise the space that it occupied. Under such circumstances, the tenant cannot be held to have assumed any of the risks incident to its maintenance. Where the landlord retains or has control of a portion of leased premises, the responsibility rests with him to see that no injury results to those having rights there by reason of the manner in which such portion of the premises is occupied or used; and, if he puts dangerous machinery thereon, it is his duty to fence it, or use other proper means to protect those rightly in its vicinity. These principles are thoroughly well settled. 2 Shear. & R. Neg. § 719; Stewart v. College, 12 Allen, 58; Glickauf v. Maurer, 75 Ill. 289; Jessen v. Sweigert, 66 Cal. 182, 4 Pac. 1188; Readman v. Conway, 126 Mass. 374.

On the question of contributory negligence, we think the case was a proper one for the jury. It is only where the undisputed facts are such as to leave but one reasonable inference, and that of negligence, that the court is justified in taking the question from the jury. It is not enough that the evidence be without conflict. If, upon the facts disclosed, there is room for a reasonable deduction of proper care on the part of the person injured, the case is one for the jury, and the court is not justified in substituting its judgment for that of the jury, and withdrawing the question from their consideration. Fernandez v. Railway Co., 52 Cal. 45; Whart. Neg. § 420. In Shierhold v. Railroad Co., 40 Cal. 447, it is said: "The fact of negligence is generally an inference from many facts and circumstances, all of which it is the province of the jury to find. It can very seldom happen that the question is so clear from doubt that the court can undertake to say, as matter of law, that the jury could not fairly and honestly find for the plaintiff. It is not the duty of the court in such cases, any more than in any other, to usurp the province of the jury, and pass upon the facts; and the nonsuit should only be granted in such cases where the evidence of the misconduct on the part of the injured party is so clear and irresistible as to put the case on a par with those cases where a nonsuit is granted for a failure to introduce evidence sufficient to go to the jury upon some point essential to the plaintiff's case. The fact must be so clear that, looking upon the plaintiff's case in the most favorable light, and giving him the benefit of all controverted questions, the court can see that a verdict in his favor must necessarily be set aside." And see Van Praag v. Gale (No. 15,851; decided by this court June 6, 1895) 40 Pac. 555. Tested by these principles, we cannot say the evidence clearly or necessarily discloses negligence on the part of the plaintiff. It is true that plaintiff knew of the existence of the shaft along the stairway, and was aware in a general way of its dangerous character, and it was his duty to look out for it. It was his duty to use care, knowing of the danger; but he says that he did. He testifies that he stood at what he considered a safe distance from the shaft, but that, the first thing he knew, he was caught and jerked over it. Just how the thing occurred cannot be known, but it could be accounted for on many reasonable theories other than that of plaintiff's negligence. A gust of wind may have blown his apron against the shaft, or a momentary dizziness may have seized him. Even if, in a moment of forgetfulness, he moved too near the shaft, and was thereby caught, it would not necessarily be negligence. People are liable to lapses of memory with reference to facts with which they are daily confronted. It would be for the jury to say whether such lapse of memory was negligence, taking into consideration all the circumstances. Furthermore, it appears that the danger from the shaft was not wholly visible or apparent. The rough and jagged surface of the shaft at the point where plaintiff was caught tended, as shown by the evidence, to make the shaft at that point much more likely to seize and hold clothing or other pliant substance than it would otherwise have been. This condition of the shaft was not visible when the shaft was revolving, and was unknown to plaintiff. How far this roughened surface may have aided the natural centripetal tendency of the revolving shaft, and thus contributed to the injury, it is impossible to say. It may well be that the jury considered that, but for this condition of the shaft, the degree of care exercised by plaintiff would have avoided the accident. Plaintiff was only called upon to use such circumspection as would avoid those dangers which were apparent.

There are no other points requiring special consideration. It was not error to permit the witness Peterson, in illustration of his testimony with reference to the size and condition of the shaft, to refer to a piece of iron of about the same dimensions. It was not pretended that it was a model, and the jury were so expressly informed; but it was simply used to illustrate more clearly the testimony of the witness. For this purpose it was proper. The instructions, taken together, fully and fairly laid the case before the jury. If anything, they were more favorable to defendant than to the plaintiff. The judgment and order are affirmed.

We concur: GAROUTTE, J.; HARRISON, J.

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(5 Cal. Unrep. 64)

## Ex parte MEYER. (S. F. 57.)

(Supreme Court of California. June 27, 1895.)

PERJURY—EVIDENCE.

On an examination for perjury it appeared that defendant, on his voir dire as trial juror, stated, when asked if he knew the proprietor of a certain gambling place, that he had nothing to do with "such places"; that at the place referred to gambling prohibited by statute was carried on; that defendant visited places where gambling not prohibited by statute was carried on. *Held*, that he was not guilty of perjury.

Julius Meyer was arrested for perjury, and makes application for a writ of habeas corpus. Allowed.

Andrew J. Clunie, for petitioner. Edgar D. Peixotto, for respondent.

BEATTY, C. J. The petitioner has been held to answer on a charge of perjury, and asks to be discharged, upon the ground, among others, that he was committed without reasonable or probable cause. The evidence adduced before the committing magistrate is, in my opinion, wholly insufficient to sustain the charge as laid in the information, or any charge. It seems that one Paulsell was on trial in the superior court on a charge of robbing the proprietors of a faro bank. The petitioner, being a member of the regular panel of trial jurors in attendance upon that department of the superior court, was called into the jury box and examined on his voir dire touching his qualifications as a juror. He was questioned by the prosecution, and passed. Counsel for defendant then asked him the following question, among others: "Do you know a man named Carrall, or Ross, or Webber, the men who were proprietors of the gambling house at 620 Market street?" To which he answered: "No, sir; I have nothing to do with such places." The charge is that the latter part of this answer was false; that in fact petitioner did have something to do with "such places." It appears from the evidence that the place kept by Carrall, Ross & Webber at 620 Market street was a clandestine and illicit gambling house, where a game of faro was conducted. The game of faro, as well as all banking and percentage games, are prohibited by statute, and those who conduct and carry them on are subjected to heavy penalties of fine and imprisonment. Pen. Code, § 330. Such games are necessarily conducted in secret, and the places where they are carried on are guarded by every precaution to prevent discovery and prosecution. And not only are they who conduct the games engaged in an unlawful occupation, but those who go there to bet are also guilty of a misdemeanor. Such, in short, was the character of the place with which the petitioner said he had nothing to do. To prove this declaration false, evidence was adduced at the examination to the effect that the petitioner had been in the habit of resorting frequently to the Thalia and other places, where, in private club rooms, the game of poker was played, and where he usually joined in the game. And it also appeared that he had acted as a "booster," a technical term describing a person who, in the interest of the club-house proprietor, takes a hand in a game to keep it from stopping for want of a sufficient number of players, and who is furnished money to bet with, and allowed to keep his winnings as compensation for his services. All this, however, merely tends to prove that Mr. Meyer's pursuits are not of a laudable character; but it does not prove that the Thalia is such a place as the gambling house at 620 Market street. The difference between the two places is just exactly as broad as the difference between legality and illegality, or, in other words, since we have none but statutory crimes, it is as broad as the difference between guilt and innocence. Faro is a game prohibited under heavy penalties; its conductors and patrons are criminals; and the place where it is carried on is a criminal resort. Poker, played for money, however objectionable in fact, is, in the eyes of the law, as innocent as chess, or any game played for simple recreation; and its votaries, and the places where it is played, are not criminal. There is, therefore, no inconsistency between the declaration of the petitioner that he had nothing to do with such places as a faro bank and the fact that he did frequent club rooms where poker was played for money. And, since there is neither evidence nor accusation of any other false statement made by him, it follows that he cannot be held for perjury, and must be discharged from custody. It is so ordered.

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5 Cal. Unrep. 66

## BEDELL v. SCOGGINS et al. (No. 18,416.)

(Supreme Court of California. June 27, 1895.)

TRUSTS—PAYMENTS BY TRUSTEE AFTER DEATH OF CESTUI QUE TRUST—DECLARATIONS.

1. Defendant gave deceased a note, for money which he owed her, by which he promised to pay $400 for her funeral expenses or to return it to her on demand. During her last sickness, deceased handed the note to defendant, saying, "Here is something for you." *Held*, that an express trust, to expend the money, after her death, for her funeral expenses, was created.

2. Where deceased gave money to defendant in trust to expend, after her death, for her funeral, and he thus expended it, her administrator cannot recover such sum from him, where all preferred claims have been paid, and it does not appear that the probate court has disapproved of the payments made by him, even admitting that claims against a decedent's estate cannot properly be paid without the sanction of the probate court.

3. Declarations of decedent, not against interest, relative to a transaction with defendant, are not, in an action by her administrator, admissible in his favor.

Commissioners' decision. Department 1. Appeal from superior court, Colusa county; John F. Ellison, Judge.

Action by I. M. Bedell, administrator of Henrietta R. Cooke, deceased, against J. N. Scoggins and others. Judgment for defendants. Plaintiff appeals. Affirmed.

H. M. Albery and John T. Harrington, for appellant. U. W. Brown, W. G. Dyas, and Edwin Swinford, for respondents.

BELCHER, C. On the 30th day of December, 1892, Henrietta R. Cooke sold and conveyed to the defendant J. N. Scoggins a lot of land in the town of Colusa. The purchase price of the lot was $3,000, and of this sum the defendant at once paid $1,200, by assuming and discharging an indebtedness of Mrs. Cooke in that amount, which was secured by a mortgage on the property. On the 26th of February, 1893, Mrs. Cooke died, and thereafter the plaintiff was duly appointed administrator of her estate by the superior court of Colusa county, and qualified as such. In April, 1893, the plaintiff commenced this action to recover the sum of $1,800, alleged to be the balance of the purchase money still due and unpaid, and to enforce a vendor's lien therefor on the lot. The answer denied that any part of the purchase money was due and unpaid, and alleged that the purchase price, to wit, $3,000, was paid in full on December 30, 1892. The case was tried by the court without a jury, and, among other things, the court found: "That said sum of three thousand dollars was fully paid and liquidated by said defendant J. N. Scoggins in the manner and according to the agreement and understanding at the time of said purchase had between said Henrietta R. Cooke, since decased, and said defendant J. N. Scoggins. That, at the time of the institution of this suit, there was nothing due or unpaid on account of the purchase price of said lot of land and premises, but that the whole of said purchase price had been fully paid and discharged." Judgment was accordingly entered that the plaintiff take nothing by his action, from which, and from an order denying his motion for a new trial, he appeals.

The appellant contends that the findings were not justified by the evidence, and that numerous errors of law were committed by the court in the rejection of offered evidence, and hence that his motion for new trial should have been granted. As to $1,400 of the purchase money, there was direct and positive testimony that that sum was paid to Mrs. Cooke on the day the deed was executed. Scoggins testified: "I paid Mrs. Cooke $1,400, and gave her my note for $400 on the 30th of December, 1892,—note and receipt,—for her place; and released a mortgage on that place, and took it upon my old place, making altogether $1,200, and the $1,400, making $2,600. My wife was present when the money was paid. No one else was present. The note was, in case she dies, to have the money ready for her funeral expenses. This paper [identifying] is the note, signed by me. On the opposite side is a receipt which I drawed up to give her in place of the note, on the start, and she said, 'Maybe you had better give me a note.' The receipt was drawn first. Then the note was drawn, on the back of the receipt. They were drawn on the 30th of December, 1892." Mrs. Scoggins testified: "I am the wife of the defendant J. N. Scoggins. Was in Colusa on the 30th day of December, 1892; was at Mrs. Cooke's residence on that day, when certain moneys were paid to Mrs. Cooke, on the purchase price of this land. I saw Mr. Scoggins pay her the money. He came in and paid her the money. He handed it out by the hundred, and laid it in her lap. He handed out $1,400, and then they were talking about the other $400; and, as they were talking about that, I went out to the old part of the house, and was gone a few minutes, and when I came in Mr. Scoggins was reading the receipt or note, and he gave it to her, and she said that was satisfactory to her." J. E. Farris testified: "I reside in Colusa, and am a carpenter. Was in town in January, this year. Knew Mrs. Cooke in her lifetime. Know about the time of the sale of her property to Mr. Scoggins. I did work on the place. About the 7th of January, I had a conversation with Mrs. Cooke, in her house, concerning the transaction. Q. You may state about that conversation. A. Well, she came to the door and beckoned me, and I went in, and she said, 'Why should I not be one of the happiest women on earth?' I said I didn't know why. She said she had sold her property, and had plenty to keep her as long as she lived, and that she had the use of those two rooms as long as she paid rent on them, and had plenty to keep her as long as she lived, and that she had made necessary arrangements for her funeral expenses. Q. Did she say anything about her receiving her money from the property? And, if so, what did she say about that? A. She said she had received her money." To meet and overcome this evidence, the plaintiff proved that, after the sale of her property, Mrs. Cooke deposited no money in the bank at Colusa, and sent none, even through the bank, or by express, or by mail; and that, at the time of her death, she had no money in her possession, except $85, contained in a purse which a Mrs. Wescott brought and delivered to her during her last illness.

It is earnestly urged that, in view of all the circumstances shown to have attended the transaction, the defendant's evidence as to the payment of the $1,400 was wholly incredible, and ought not to have been believed. But while, of course, it seems strange that the money, if paid, should have disappeared as it did, and no one be able to account for it, still, the question as to whether the evidence in regard to the payment was true or false was a matter for determination by the trial court, and, under a well-settled rule, its conclusions cannot be disturbed in this court.

As to the remaining $400, defendant introduced in evidence a receipt and note reading as follows:

"Colusa, December 30, 1892. Received from Mrs. H. R. Cooke four hundred dollars, to be used as funeral expenses or returned to Mrs. H. R. Cooke on demand. $400. [Signed] J. N. Scoggins."

"$400. Colusa, December 30, 1892. After her [Mrs. Cooke's] death, or at her [Mrs. Cooke's] demand, I promise to pay the sum of four hundred dollars, in United States gold coin, to the aid and assistance of her [Mrs. Cooke's] funeral expense, or at her [Mrs. Cooke's] demand. Made this 30th day of December, 1892. J. N. Scoggins, Marshal. Colusa, Cal."

Scoggins testified that he drew the receipt first, and offered it to Mrs. Cooke, and she said, "Maybe you had better draw up a note, so in case anything happens to you I will have it to show," and that he then drew the note on the other side of the same paper; that he gave the paper to her, and she said she would return it to him if anything happened; and that, after she was stricken down in her last illness, she handed the paper back to him, saying: "Here is something for you." Scoggins further testified that during her illness Mrs. Cooke gave him $35 in money, stating that she wished him to see that her doctor was paid; and that he had paid the doctor and a small bill for medicines and her funeral expenses, the several sums aggregating $435, for which he produced receipts. Appellant contends that these payments by Scoggins were made without authority, and constituted no part of the purchase money, and therefore no defense to the action; that the adjustment of claims against the estate of a deceased person, whether created for funeral expenses or otherwise, is a matter of exclusive probate jurisdiction; and that, had Mrs. Cooke signed the alleged written authority, it was not within her power to create a valid trust for the payment of any indebtedness after her death, without the sanction of the probate court.

Under our statute, an express trust relating to personal property may be created by parol (Civ. Code, §§ 2221, 2222), and the evidence clearly shows that such a trust was created as to the $400. The delivery and return of the note were equivalent to a payment of the money by defendant and a return of it to him as trustee. The trust was not extinguished by the death of the trustor, but was intended to be, and apparently was, executed in good faith after her death. Now, conceding that no claim against the estate of a decedent can properly be paid without the sanction of the probate court, still, when, as in this case, preferred claims are paid, and it does not appear that any such claims remain unpaid, or that the probate court has disapproved the payments, we do not think the representative of the estate should be permitted to recover back from the trustee the money so paid. To hold otherwise would require the defendant to pay a second time, and would work out a wrong and injustice, which neither law nor equity will permit, if it can be avoided.

It is objected that, under the answer, this defense was inadmissible, but we think otherwise. The answer alleged full payment on the 30th of December, 1892; and, under that issue, it was competent to show

how and when the payment was consummated. During the trial numerous questions were propounded by the plaintiff to his witnesses as to what Mrs. Cooke had said after the sale in regard to its terms, the payments made and to be made, etc. The questions were objected to as irrelevant, incompetent, and immaterial, and the objections were sustained, and exceptions reserved. It does not appear what any of the answers would have been; but, assuming that they would have tended to support the theory of plaintiff, they were clearly inadmissible, the declarations not having been made against the interest of the declarant. Code Civ. Proc. §§ 1853, 1870, subsec. 4. As said in Fischer v. Bergson, 49 Cal. 294: "These declarations were not in disparagement of the title of the declarant. They were not offered by the defendant, but by the plaintiff himself, to strengthen his own claim. They had no greater force as evidence than they would have had had the decedent brought this action in his lifetime, in which case the inadmissibility of such declarations would be apparent." We find no prejudicial error in the record, and advise that the judgment and order be affirmed.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

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107 Cal. 541

### PEOPLE ex rel. LYNCH et al. v. HARRISON. (No. 19,546.)

(Supreme Court of California. June 28, 1895.)

Writs—Service by Publication—Setting Aside Void Judgment—Public Lands—Applications for School Lands—Curative Acts.

1. In an action by the state to foreclose the interest of a purchaser of school lands for default in the payment of installments of the price, publication of summons under Pol. Code, § 3549, must be based on an affidavit and order of publication, as in other cases.

2. Where, on motion to set aside a default judgment, made three years after its rendition, the judgment plaintiff does not deny the allegations that defendant did not appear in the action, and that no service of summons was had on him, but merely questions the necessity for an affidavit and order of publication in case of service by publication, and evidence, admitted without objection, shows want of service of summons, the judgment should be set aside as void.

3. Though, in an action to vacate a second certificate of purchase of school lands, relator relies on an application of purchase valid as of its date, he may take advantage of the curative acts of 1870 and 1872, which were general acts, without having pleaded them.

4. Act 1870, curing defective applications for the purchase of lands from the state, applies to applications for the purchase of lands, though at the time of the passage of the act the legal title to the land had not yet vested in the state.

Department 1. Appeal from superior court, San Bernardino county.

Action on the relation of John Lynch and others against Hannah E. Harrison. There was a judgment for defendant, and relators appeal. Reversed.

W. J. Curtis, J. C. Lynch, and M. L. Wicks, for appellants. W. F. Henning and H. S. Hazard, for respondent.

GAROUTTE, J. This is an action to cancel a second certificate of purchase of school lands, the state having made a prior sale on which the patent has issued. The township survey, embracing the land in controversy, was approved by the United States surveyor general for California September 18, 1868, and the map was duly filed in the United States land office July 7, 1869. John Mullan made application to the surveyor general to purchase the land January 15, 1869; and upon August 18th of the same year the surveyor general of the state applied to the United States land office for said land. About August 21, 1869, the surveyor general approved Mullan's application, and issued to him the customary certificate, which, in due time, Mullan presented to the county treasurer of San Bernardino county (in which county the land was situated), and paid the treasurer the full amount due thereon, to wit, 25 per cent. of the principal and one year's interest; and thereupon the register of the land office issued to Mullan a certificate of purchase for the land. Mullan's application to purchase was defective, in this: that the affidavit accompanying the same failed to contain a description of the land sought to be purchased, as provided by the statute in such cases. Upon the 1st day of September, 1874, the land involved was listed to the state, and Mullan made all payments due thereon, up to and including the year 1876. In the year 1880 an action was brought by the district attorney of San Bernardino county to foreclose Mullan's interest under his certificate of purchase, based upon his failure to make the payments demanded by the statute, and this action went to judgment, as prayed for in the complaint, January 4, 1881, and a copy of such judgment was filed in the land office. Upon December 21, 1882, respondent, Harrison, made application to purchase the land, and the certificate of purchase which formed the subject of this litigation was issued to her. December 29, 1884, upon motion of Mullan's successor in interest, the default judgment of foreclosure was set aside and vacated, upon the ground that the court had not acquired jurisdiction of the defendant, Mullan, no service of summons having been made upon him, either actual or constructive; and subsequently thereto the action was dismissed upon motion of the district attorney of said San Bernardino county. Patent to the land issued to Mullan's successor in interest September 20, 1886. Judgment went for defendant, Harrison, in the trial court, and this appeal is taken therefrom upon the judgment roll without a bill of exceptions.

1. The judgment of foreclosure against Mullan was set aside, upon motion, as being a void judgment; but respondent insists that the judgment was not void, and that a publication of summons in this character of action, under section 3549 of the Political Code, is not required to be based upon an affidavit and order of publication, as in other cases. Whatever might be the decision of the court upon a construction of that section of the Code, if it were presented to us as a new question, is immaterial, for it is now too late to change a rule of construction which has been recognized and approved for many years in many cases. People v. Applegarth, 64 Cal. 229, 30 Pac. 805; People v. Mullan, 65 Cal. 396, 4 Pac. 348; People v. Greene, 74 Cal. 400, 16 Pac. 197; Hyde v. Redding, 74 Cal. 501, 16 Pac. 380; People v. Pearson, 76 Cal. 400, 18 Pac. 424. Under these decisions, the decree rendered against Mullan was void, as being without the jurisdiction of the court, and should have been set aside, if appropriate proceedings had been had for that purpose.

The question still remains, had the court the power to set this judgment aside three years after its rendition, upon motion, upon evidence presented outside the judgment roll? The case of People v. Temple, 103 Cal. 447, 37 Pac. 414, in many respects, both as to the facts and the law, is similar to the case at bar; and the principle of law there declared that the court has no power to set aside a judgment upon evidence not found in the judgment roll, more than six months having elapsed since its rendition, must be held controlling as authority. But this case is distinguishable from that case in other ways, and an additional principle of law is here involved. In the discussion of this question under the authority of the Temple Case, declaring such action void, let us eliminate from the record the order of the court setting aside the judgment of foreclosure rendered against Mullan. In this case we find an allegation in the complaint in reference to such judgment, to the effect that Mullan never appeared in said action, nor was summons ever served upon him personally, nor was any affidavit ever made by any one to obtain an order of publication of summons, nor was any order ever made in said action authorizing the service of summons by publication. By her answer, respondent denies none of these allegations, but simply avers that summons was duly served by publication, as required by section 3549 of the Political Code. It is plainly apparent that no issue was made between these parties as to the facts pertaining to the service of summons. No denial is made of the allegations of the complaint in this regard, but respondent, both by her denials in the answer and by her proof, raises a question of law as to the character of service required by said section 3549. In addition to these conditions presented by the pleadings, the court found as a fact that the allegations of the complaint, as to the matter of service, were true, and that the only service upon Mullan consisted of publication of a summons, not based upon any affidavit or order. It must be borne in mind that the present appeal comes to us direct from the judgment, without a statement or bill of exceptions. No evidence is here, and by the facts found by the court we must be guided and controlled. Upon this judgment roll it therefore appears that the judgment of foreclosure rendered against Mullan was void, and this brings the case directly in line with the principle of law so clearly and forcibly declared in Hill v. Cab Co., 79 Cal. 191, 21 Pac. 728. We quote: "But this rule is not that a judgment which is void will be enforced as if it were valid, but that it cannot be shown to be void except in certain ways. If the party, however, should admit the facts which show the judgment to be void, or if he should allow them to be established without opposition, then, as a question of law upon such facts, we do not see why the case is not like that where a judgment is void upon its face. In the present case the findings establish the fact that there was no service of summons upon or authorized appearance by the defendant, and none of the evidence is brought up, nor does the question appear to have been raised by exception or demurrer, or in any other way. The facts, therefore, must be taken to be established by the record beyond all controversy, and upon such facts the law is that the judgment is void." The foregoing quotation is taken from an action brought upon a domestic judgment of a court of general jurisdiction, in which action defendant set up that he had not been served with summons in the original action, and that, therefore, the judgment was void for that reason. The court found his claims to be true, and that no service was ever made upon him, and upon appeal the case was decided upon the law as above declared. In its decision the court assumes that evidence to impeach the judgment by showing a want of service of summons would not be admissible, but declares in effect that, if the parties stipulate that there was no service, or the evidence is admitted at the trial to that effect, without objection, it is then established that the judgment is void, and that, whenever such fact is brought to the attention of the court, it is the duty of the court to so declare. A judgment roll is received as evidence in an attack upon the validity of a judgment, because it imports absolute verity; yet it is no more conclusive, as to the fact of service or nonservice of summons, than the stipulation of both parties to the litigation to that effect, or the admission of evidence to that point, upon the offer of one party, and without objection by the other.

For the foregoing reasons, we conclude that the record in this case shows the judgment of foreclosure against Mullan to have been rendered without service of summons, and that such judgment is therefore void.

2. The case then presents itself to us upon the one question, was Mullan's application

void by reason of the defective affidavit attached thereto? That the affidavit was defective in substantial parts has been decided by this court in various cases. In addition to the complaint and answer, respondent, Harrison, filed a cross complaint, setting out therein her own title, and the invalidity of the Mullan title, and praying for appropriate relief. Respondent now insists that, inasmuch as appellant in its complaint has relied upon a valid application to purchase as of its date, it cannot now, in the absence of a pleading to that effect, depend upon certain curative acts, passed subsequent to the date of the application, to make valid an application otherwise void. This point is not well taken. These curative acts of 1870 and 1872 were essentially general acts, and it was not necessary to either allege their existence or prove them at the trial.

It is further contended that neither the curative act of 1870 nor that of 1872 can be invoked in this case to validate a defective application to purchase, for the reason that the title to this land did not vest in the state until its listment thereto in the year 1874, and that neither of these acts covered lands to which the state had no title at the date of their respective passage. In construing the act of 1872 in Land Co. v. Moir, 83 Cal. 101, 22 Pac. 55, and 23 Pac. 359, a minority of the court held such to be the true construction of that act. The views there expressed did not obtain the assent of a majority of the court, and for that reason may not be considered binding as authority; and when we consider the doctrine of Rowell v. Perkins, 56 Cal. 219, and People v. Noyo Lumber Co., 99 Cal. 456, 34 Pac. 105, the soundness of these views, so promulgated, may well be doubted. But, whatever may be the true construction of the act of 1872, there can be no doubt as to the applicability of the act of 1870 to the facts of the present case; for, as we view that act, the location of the legal title at the date of its passage is not an element entering to any degree into its construction, when applied to any particular state of facts. The act is purely remedial in its character, and should receive a liberal construction. In the absence of vested rights, the legislature had the power, and it undoubtedly was their intention, to validate and ratify all defective applications to purchase land from the state, previously made in good faith. By its terms, the act applies to all applications, except where conflicting interests have arisen. The act does not purport to deal with titles, but solely with applications to purchase. In the present case, Mullan made an application to purchase this land. He was personally qualified to make the application, and had the right to make it. The state recognized these facts and his right, and entered into a contract of purchase with him for the land, and received part payment thereon. It was the very case present in the mind of the legislature when the act was passed, and to remedy defective applications like that of Mullan was the purpose of the act.

For the foregoing reasons, the judgment is reversed, and the cause remanded.

We concur: VAN FLEET, J.; HARRISON, J.

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5 Cal. Unrep. 71

## DELAFIELD v. SAN FRANCISCO & S. M. RY. CO. et al. (No. 15,911.)

(Supreme Court of California. June 27, 1895.)

CONTRACT—PLEADING—EVIDENCE—WAIVER OF OBJECTION.

1. A complaint alleging performance of services for defendant and others, at their request, and agreement of defendant to pay therefor, supports a judgment against him alone.

2. One who agreed to pay in stock and refuses to deliver it is liable for the amount in money.

3. Where the complaint alleges the performance of service, and a promise to pay therefor a certain sum, and the answer alleges a contract to pay a certain amount per month in stock, and admits that a certain number of shares thereof are due, objection to the admission of a contract like that alleged in the answer, except providing for a smaller payment, cannot for the first time be made on appeal, on the ground that it varied from that alleged in the complaint.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; D. J. Murphy, Judge.

Action by Robert H. Delafield against the San Francisco & San Mateo Railway Company and others. Judgment for plaintiff against said company, and it appeals. Modified.

Morrison, Stratton & Foerster, for appellant. A. Barnard, for respondent.

VANCLIEF, C. Plaintiff sues as assignee of Harding & Forbes, attorneys at law, to recover $1,700 for professional services alleged to have been performed by the latter for the San Francisco & San Mateo Railway Company and the S. S. Construction Company (corporations), at their instance and request, and for which, it is alleged, the former company and defendant Joost promised to pay said sum of $1,700. At the close of the evidence, counsel for defendants moved a nonsuit in favor of the S. S. Construction Company, whereupon counsel for plaintiff, by leave of court, and without objection by any one of the defendants, dismissed the action as against the defendants Joost and the S. S. Construction Company, and prayed for judgment against the San Francisco & San Mateo Railway Company alone, for the whole sum demanded, and this prayer was granted by the court. The San Francisco & San Mateo Railway Company brings this appeal from the judgment upon the judgment roll with a bill of exceptions as to matters of law and fact.

1. The principal point made by appellant is that the complaint does not support the judgment. No doubt the S. S. Construction Com-

pany and Joost were improperly joined as defendants; but, since the misjoinder was not pleaded, and the action as to them was dismissed without objection, the only question to be considered under this head is whether the complaint supports the judgment against the appellant alone; and I think it should be held that it does. It is alleged in the complaint that Harding & Forbes performed certain services for appellant and the S. S. Construction Company at their instance and request, and that appellant "agreed to pay therefor the sum of seventeen hundred (1,700) dollars."

2. It is contended that the evidence does not justify the finding that the appellant agreed to pay Harding & Forbes in money, but only that it agreed to pay in capital stock of the appellant corporation. It is agreed that the contract by which Harding & Forbes were retained, and under which they rendered the services in question, is correctly expressed in a recorded resolution of the directors of the appellant corporation, as follows: "Resolved, that R. T. Harding and Charles H. Forbes, copartners under the firm name of Harding & Forbes, attorneys and counselors at law, be retained as the attorneys of the company until the 1st day of January, 1892, and that they receive as compensation for their services the sum of $100 per month, payable in the capital stock of the company, at the rate of $50 per share, from the 1st day of January, 1891, until the bonds of the company are sold; and then and thereafter the said attorneys shall receive the sum of $100 per month in cash, payable on the 1st day of each and every month, until the expiration of said term. Said services shall not include the active prosecution or defense of any litigation in which the company may become engaged." It was proved, without conflict of evidence, that the bonds mentioned in the contract were never sold; that for the first 2½ months of the year 1891 the appellant issued and delivered to Harding & Forbes five shares of its stock in payment of their salary to March 15th, but ever thereafter refused to deliver to them any more stock, although requested by Harding & Forbes so to do after more stock became due. The legal consequence of such refusal to pay in stock, according to the contract, was that appellant became obligated to pay the salary of $100 per month in money. Cummings v. Dudley, 60 Cal. 383, and authorities there cited. It is true that the contract was not fully stated in the complaint, as it should have been; but it is alleged in the answer of defendants that appellant "retained said Harding & Forbes as the regular attorneys of said company, and agreed to pay them * * * for their services the sum of $200 per month, payable in the capital stock of the company at the rate of $100 per share"; and it is further alleged that the salary at that rate was paid in stock up to March 15, 1891; and it is further expressly admitted "that there is now due and owing to said Harding & Forbes 19 shares of the capital stock of said company." Besides, there was no objection to the admission in evidence of the contract as recorded in the minute book of the appellant corporation, which, by the way, proved to be more favorable to appellant than that set out in the answer of defendants, inasmuch as it fixed the salary of Harding & Forbes at $100 per month, whereas it was stated in the answer to have been $200 per month. Under these circumstances, the appellant should not be heard to object to the contract here for the first time, on the ground that it varies from that alleged in the complaint. Cummings v. Dudley, supra.

3. Upon the admitted and indisputable facts of the case, the plaintiff is entitled to judgment for $950, with interest thereon from January 1, 1892, and his costs in the court below, and no more. That is to say, he is entitled to recover the salary of Harding & Forbes from March 15, 1891, until January 1, 1892,—9½ months,—at $100 per month, with legal interest and his costs in the trial court, but should pay the costs of this appeal. And it clearly appears that a new trial could not lawfully result in a different judgment. The only ground upon which plaintiff claimed judgment for the additional sum of $750 was that the defendant Joost had individually promised to take from Harding & Forbes 15 shares of capital stock of appellant, and to pay them therefor $50 per share, and had failed to do so; but it was admitted by plaintiff, at the trial, that appellant was not responsible for any default of the defendant Joost.

Other points urged by appellant are considered irrelevant to the merits of the appeal. I think the cause should be remanded, with instruction to the lower court to modify the judgment in accordance with this opinion.

We concur: BELCHER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the cause is remanded, and the court below is instructed to modify the judgment in accordance with said opinion, the costs of the appeal to be taxed to respondent.

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(5 Cal. Unrep. 74)

## DAGGETT v. GRAY et al. (No. 19,410.)[1]

(Supreme Court of California. June 27, 1895.)

ACTION BY RECEIVER—CONVERSION OF PROPERTY—SUFFICIENCY OF COMPLAINT.

1. The complaint in an action by a receiver, as such, for the conversion of property during his receivership, must allege that his insolvent was the owner or entitled to possession of the property.

2. A complaint in an action by a receiver, as such, which alleges that the plaintiff was, on a certain date, by order of court in a certain suit against his insolvent, appointed receiver of the insolvent's property, with the right to take possession of and to sue for and demand the same,

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[1] Rehearing granted.

sufficiently avers plaintiff's appointment as receiver, and his right to sue.

3. In an action for conversion of property by unlawful detention, where the original possession was lawful, the complaint must allege a demand and refusal.

Commissioners' decision. Department 1. Appeal from superior court, San Diego county; E. S. Torrance, Judge.

Action by Henry Daggett, as receiver, against Will M. Gray and others for conversion of property of his insolvent. From a judgment for plaintiff, and an order denying a new trial, defendants appeal. Reversed.

Parrish & Mossholder and Walter Rose, for appellants. Johnstone Jones and D. L. Withington, for respondent.

SEARLS, C. This action is brought by the plaintiff, as the receiver of one E. M. Brickey, to recover damages in the sum of $5,500 for the conversion by defendants of a stock of drugs, claimed to have belonged to said E. M. Brickey, and to which plaintiff, as receiver, claimed to be entitled. The cause was tried by the court without a jury, and judgment rendered in favor of plaintiff for $915 damages, from which judgment, and from an order denying their motion for a new trial, defendants appeal.

Defendants interposed a demurrer to the complaint upon the ground that it failed to state facts sufficient to constitute a cause of action, which demurrer was overruled by the court, and the ruling is assigned as error. The complaint may be epitomized thus: By an order of the superior court made March 17, 1893, in the case of Mollie S. Brickey, Plaintiff, vs. Enoch M. Brickey, Defendant, plaintiff was appointed receiver of the property of defendant, with authority to take and keep possession of the property, receive rents, etc., to sue for and demand the property of said Brickey, and to demand from Brickey or Braun & Co. the stock and fixtures in the drug store in the Hotel Brewster building, etc. He filed a bond and duly qualified. On said 17th day of March, 1893, the plaintiff, as such receiver, was the owner and lawfully entitled to the immediate possession of a stock of goods in the drug store in the Hotel Brewster building, in San Diego. That on said last-named day "defendants [who are averred to be copartners under the name of F. W. Braun & Co.], then being in possession of said goods, unlawfully converted and disposed of the same to their own use," to plaintiff's damage, etc.

From the foregoing it will be observed that the receiver brought the action in his own name, as receiver, which he well might do under section 568 of our Code of Civil Procedure. There are a few cases in which a trustee, by reason of the title to the trust property being vested in him under the law, may sue in his individual name without any allegation or reference to the fiduciary relation which he occupies. This is notably so in the case of an assignee in insolvency. Dambmann v. White, 48 Cal. 439. So, too, an executor, administrator, receiver, or other trustee may in like manner sue in his own name, where the contract sued on has been entered into with him, and no extrinsic facts need be alleged. But in those cases where the obligation is not incurred to him directly, and in which title to the subject-matter is not vested in him by operation of law, and the trustee is called upon to protect trust property, or, otherwise, to bring an action for the benefit of the beneficiary, when no contract has been made with him in his own name, and when his right to represent the beneficiary will not appear without showing the facts which create the trust, then not only the facts must be pleaded showing the cause of action, but also the authority of the trustee to enforce it. Bliss, Code Pl. §§ 262–264, and cases there cited. In the present case there is probably a sufficient allegation of the appointment of plaintiff as receiver of the property of Enoch M. Brickey, and of his right to bring the action. There is not, however, any distinct allegation that Brickey ever owned or possessed the property claimed to have been converted by the defendants. If Brickey was not the owner thereof, the plaintiff could not have become the owner, or entitled to the possession thereof, by virtue of his appointment as receiver, and it is in this latter capacity that he brings the action. "In general, a receiver, by virtue of his appointment, is clothed with only such rights of action as might have been maintained by the persons over whose estate he has been appointed, and to whose rights, for purposes of litigation, he has succeeded. It is essential, therefore, in order to sustain a suit brought by him in his representative capacity, that he should allege and set forth the equities of the parties whose rights of action he represents," etc. High, Rec. (3d Ed.) § 201; Falkenbach v. Patterson, 43 Ohio St. 359, 1 N. E. 757; Coope v. Bowles, 28 How. Prac. 10, 42 Barb. 87. So far as is shown by the complaint in this case, the defendants are liable to the plaintiff here to the same extent, and no greater, than they would have been to Enoch M. Brickey, had no receiver been appointed; and the complaint should show that but for such appointment Brickey would have had a cause of action against the defendants, which, by virtue of his appointment, plaintiff is entitled to maintain. Again, the complaint fails to show that the taking of the property by defendants was unlawful, and yet it fails to aver a demand for its return before suit brought. In cases where the original possession of property is acquired by tort, no demand is necessary before suit brought. Paige v. O'Neal, 12 Cal. 496. But where the original possession is lawful, and the detention only is unlawful, a demand is necessary before the action can be maintained. Campbell v. Jones, 38 Cal. 507; Boulware v. Craddock, 30 Cal. 190; Sargent v. Strum, 23 Cal. 361; Ledley v. Hays, 1 Cal. 160. We are of opinion the complaint was fatally defective.

The judgment and order appealed from should be reversed, and the court below directed to sustain the demurrer to the complaint, with leave to the plaintiff to amend if he shall be so advised.

We concur: BELCHER, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, and the court below directed to sustain the demurrer to the complaint, with leave to the plaintiff to amend if he shall be so advised.

(110 Cal. 267)

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## In re BEISEL'S ESTATE. (No. 15,915.)[1]

### Appeal of VAN REYNEGOM.

(Supreme Court of California. June 27, 1895.)

ACCOUNTING BY TRUSTEE—MAINTENANCE OF MINOR BENEFICIARIES—LIMITATIONS.

1. Where the estate of deceased was distributed to the widow and minor children, and the former, who took charge of the persons and estates of the children several years before she was appointed legal guardian, thereafter presented an account entitled "In the matter of the guardianship of the estates of A. and B.," and embracing the whole period of her management, the accounting will be treated as an accounting in equity by the widow as trustee of the children's estates, all objections to the jurisdiction of the court being expressly waived at the hearing.

2. Where a widow has taken in charge the persons and estates of the minor children, though not appointed legal guardian till several years thereafter, she will, on an accounting, be credited with money paid for the maintenance of the minors, and expenditures incurred in good faith in improvements on their property, during the time there were no letters of guardianship on their estates.

3. The accounting being that of a voluntary trust, no allowance for proper expenditures incurred during its administration will be barred by limitations.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; J. V. Coffey, Judge.

Appeal by F. W. Van Reynegom, guardian of the estate of George D. Beisel, a minor, from a judgment settling an account of Caroline Sherrer with the estates of George D. and Gustave H. Beisel. Modified.

Otto Tum Suden, for appellant. Shadburne & Herrin, for respondent.

VAN CLIEF, C. This is an appeal by the guardian of the estate of George D. Beisel, a minor, from judgment of the superior court settling an account of Caroline Sherrer, the mother of Gustave H. Beisel and George D. Beisel, minors, and Emma N. Beisel, now of lawful age, with the estates of the minor children.

Caroline Sherrer, formerly Caroline Beisel, was the widow of Jacob Beisel, deceased, whose estate was distributed September 1, 1887, one-half to his widow, and the other half to her three minor children. The property thus distributed to the minor children consisted of $4,007 in money, and a half interest in certain real estate, consisting of tannery property. There was no legal guardianship of the estates of either of the minor children until the 13th day of May, 1892, when letters of guardianship of the persons of Gustave H. and George D. Beisel, and of the estate of Gustave H. Beisel, were granted to Caroline Sherrer; and at the same date F. W. Van Reynegom was appointed as guardian of the estate of George D. Beisel. Between the time of the distribution of the estate of Jacob Beisel, in 1887, and the issuance of the letters of guardianship, in 1892, the mother of the minor children took charge of the persons and estates of the minors, and with the money belonging to the minors purchased certain real estate on Capp street, in the city and county of San Francisco, for their benefit, taking the conveyance in her name in trust for them. The rental value of this property was about $360 per year, and Mrs. Sherrer expended on it about $600 in repairs and street work, besides taxes. In September, 1892, Emma M. Beisel, having arrived at full age, brought an action for partition of the real estate thus purchased, and procured a sale thereof, the proceeds of which netted only $3,654. One-third of that sum, amounting to $1,218, was paid to Emma N. Beisel, and a like sum distributed, returned, and inventoried in each of the estates of the minor children, besides one-sixth interest of each in the tannery property. Thereafter, on the 20th of January, 1894, the superior court made an order in the matter of the estates of both minors, allowing to Caroline Sherrer the sum of $20 per month for the support and maintenance of each of them, from and after the 20th day of January, 1892, which allowance was paid one-half from each estate. On the 21st day of February, 1894, Caroline Sherrer presented to the superior court for settlement, in the matter of both of the estates of her minor children, an account embracing the entire period of her management of the property of all of her children, charging herself with the entire $4,007 distributed to them from their father's estate, with legal interest thereon from September, 1887, to February, 1894, amounting to $1,800.19, with half of personal property sold, in the sum of $309, and with half the rents of the tannery property, in the sum of $993.50, making an aggregate of $7,109.69. She claimed credit, on the other hand, for one-half of the expenditures and improvements on account of the tannery property, in the sum of $2,130, including therein one-half of large expenditures in the building of cottages, grading, house moving, taxes, insurance, water rates, plumbing, sewer, and other items of expenditure on account of the property. She also claimed credit for support of the boys, at the rate of $20 per month, for the period of four years and four months from September, 1887, prior to the allowance made by order of the court, aggregating the sum of $2,080, and a credit of $720 for support of Emma N. Beisel during her minority, for a period of three years, at the same rate, besides credits of $1,000 under the allowance before made by the court, $100 for attorney's fees, and $500 for compensation for her services as guardian. The total of credits claimed in the account aggregated $6,530.48. The account, as presented, states a balance due from Mrs. Sherrer to the minors of $571. The court found that there was no bad faith in the management of the estate, and that Mrs. Sherrer should be charged with the sum of $4,007 and annual interest at 7 per cent., and that she should be credited with the amounts returned into court to the credit of each of the minor children from the proceeds of the sale of the Capp street property. The court further found that the account was supported by evidence and proper vouchers, and allowed the same in all respects, save the item of $500 for compensation of guardianship, which was rejected as premature, the guardianship not being yet terminated, and the account was settled by allowing a credit of the residue of the money in the hands of both guardians, amounting to $1,216; $658 being in the hands of F. W. Van Reynegom, as guardian of the estate of George D. Beisel, and $558 in the hands of Caroline Sherrer, as guardian of the estate of Gustave H. Beisel.

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[1] Rehearing granted.

1. An error is apparent in the account in including charges and credits on account of Emma N. Beisel, who was not a party to the accounting. Mrs. Sherrer has charged herself with $2,369.89 too much on account of Emma N. Beisel's one-third interest in the sum of $7,109.69, accounted for by Mrs. Sherrer. It is unnecessary to decide whether Emma N. Beisel is estopped by her proceeding in partition from claiming any further allowance from her mother on account of her share of the original $4,007, and interest thereon, in addition to the sum of $1,218 obtained by her upon sale of the Capp street property, as the result of her suit in affirmance of the purchase of that property for her benefit. It is sufficient to say that, not being a party to this accounting, no items either of credit or charge to Emma N. Beisel should appear in the account. The items credited to Mrs. Sherrer on account of Emma N. Beisel's one-sixth of the improvements and expenditures on the tannery property amount to $710. The sum of $720 is charged for her board for three years. These items deducted from the $2,369.89 leave a balance of account in favor of Emma N. Beisel in the sum of $939.89. There is no deduction in the account for the $1,218 paid to Emma N. Beisel; and the two minor children are credited in the settlement with the aggregate balance of the whole account, after deducting only the $500 for compensation of Mrs. Sherrer as guardian, and crediting the remainder of the funds in the estates of the minors. The minors were thus benefited in the sum of $939.89 to which they were not entitled. This error is against the respondent, and could not be ground for reversal upon this appeal; yet it is proper to notice it, in view of the contention of appellant that the court erred in allowing, as against the minor children, the items in the account for board of Emma N. Beisel, and for her share of expenditures of the tannery property. This contention is correct; but the error is without prejudice to the appellant, since the estate of George D. Beisel is profited by one-half of the balance of error of $939.89, with which Mrs. Sherrer is charged in the settlement with the two minors, on account of her having charged herself with Emma N. Beisel's interest in the estate of Jacob Beisel, deceased, without the allowance of any credit for the $1,218 paid to her.

2. Appellant contends that there was no warrant for an allowance by way of credit to Mrs. Sherrer for maintenance of the minor children during the time when there were no letters of guardianship upon their estates. But she is chargeable in equity as a quasi guardian or trustee of their estates, and the accounting must be deemed in the nature of an accounting in equity, and determined upon equitable principles. The court finds, in substance, that the action of Mrs. Sherrer, as the mother of the children, was bona fide; and it had jurisdiction to allow reasonable and proper credits to her for their maintenance, and for expenditures incurred on their account. A guardian de facto who is not a guardian de jure will be held to account in equity only upon equitable principles, and will be allowed for all proper disbursements for the benefit of the ward. Peale's Adm'r v. Thurmond, 77 Va. 756. "The rule is that where an infant has property of his own, and his father is dead, or is not able to support him, he may be maintained and educated out of the income of property absolutely his own, by the person in whose hands the property is held; and a court of equity will allow all payments made for this purpose, which appear upon investigation to have been reasonable and proper." Schouler, Dom. Rel. § 238. Where the income is insufficient for the maintenance and education of a child, equity will break into the principal. Barlow v. Grant, 1 Vern. 255; Bridge v. Brown, 2 Younge & C. Ch. 181; Ex parte Green, 1 Jac. & W. 253; Newport v. Cook, 2 Ashm. 332; Osborne v. Van Horn, 2 Fla. 360. A mother will be allowed in equity for the past maintenance of her children, from the death of the father, out of the estate of the children, though she has a separate estate. Wilkes v. Rogers, 6 Johns. 567, 589, 593; Gladding v. Follett, 2 Dem. Sur. 68; Aynsworth v. Pratchett, 13 Ves. 320; In re Besondy, 32 Minn. 385, 20 N. W. 366; O-

borne v. Van Horn, 2 Fla. 360. The criterion for determining whether a past maintenance should be allowed is whether a chancery court would have authorized it in advance. Alston v. Alston, 34 Ala. 27. Appellant objects that the allowance for maintenance of the children prior to the accounting was barred by the statute of limitations. But the accounting was of a voluntary trust, and no allowance to a trustee for expenditures properly incurred during the administration of the trust can be considered as barred by the statute of limitations. The expenditures made for the benefit of the children must be deemed in equity as having been made out of their funds, and as constituting an equitable offset to the liability of the trustee, who could not plead the statute of limitations in defense to the liability. The credits are no more barred by the statute than is the charge against the trustee. It would be inequitable to hold the mother to account for principal and interest of the sums received by her from the estate of her husband for the benefit of the minor children for nearly 6½ years, and to allow her no offset for maintenance of the children, and for expenditures made in good faith for their benefit, during that period. No abuse of discretion appears as to the amount of the allowance for maintenance of the children. Nor did the fact of the allowance for two years out of the $2,436 paid into court as the proceeds of the Capp street property preclude a further allowance, upon an accounting by Mrs. Sherrer of her trust during the preceding years, in which she is charged with the principal sum received by her as the children's share of the estate of their deceased father, in September, 1887, with interest thereon until February, 1894. The minors are credited in the account with their full share of the rents of the tannery property, and they are justly chargeable with their proportion of the expenditures incurred by their mother in good faith in the improvement of that property, and in the payment of necessary expenses for taxes, insurance, and repairs. The allowance of attorney's fees was in the discretion of the court, and was reasonable in amount.

3. The jurisdiction of the court to settle the account of the mother with her two minor children was assailed in the objections of appellant to the account, but all objections to the jurisdiction were expressly waived at the hearing. Although the account was entitled "In the Matter of Guardianship of the Estates of Gustave H. Beisel and Geo. D. Beisel, Minors," the accounting was in its nature an accounting in equity by the mother of the minors as trustee of their estates. In re Thompson's Estate, 101 Cal. 349, 35 Pac. 991, and 36 Pac. 98, 508; In re De Leon, 102 Cal. 537, 36 Pac. 864.

4. An error was committed in the settlement of the account, not only by including charges and credits to Emma N. Beisel, but also in taking the difference between the balance of the account as rendered and the total residue of the funds in both estates as the measure of indebtedness of both estates to the mother. The estate of George D. Beisel shows a residue of $658, while that of Gustave H. Beisel shows a residue of $558; and the two estates cannot have an equal balance of indebtedness to the mother. Excluding from the account all items relating to Emma N. Beisel, the account should be settled thus: The total amount of proper charges to Mrs. Sherrer on account of the minor children is two-thirds of $7,109.69, amounting to $4,739.79. Of this amount she had paid into court $2,436, or $1,218 to each estate, from the proceeds of the Capp street property, the sale of which is repudiated as not being for the interests of the minors; and she is therefore entitled to a credit for the whole amount paid into court, the amount paid out by order of court for board of the children and for other expenses being simply a mode of accounting for the residue now in the hands of the guardians. There remains $2,303.78 to be accounted for. But the other proper credits to Mrs. Sherrer for two-sixths of the expenditures on the tannery property, for past board of the minors, and for attorney's fees aggregate $3,600, leaving a balance of indebtedness to the mother from the estates of the two minors of $1,296.22. One-half of this, in the sum of $648.11, should be charged to each estate and paid out of the residue of property remaining in each estate. There being a residue of $658 in the estate of George D. Beisel, this will leave a residue of money in the hands of his guardian of $9.89, after Mrs. Sherrer is paid in full. In addition thereto, appellant should recover the costs of this appeal, leaving the interest of George D. Beisel in the tannery property intact. There being a residue of only $558 in the estate of Gustave H. Beisel, that estate will owe to Mrs. Sherrer a balance of $90.11, which is properly chargeable against the interest of that estate in the tannery property. The difference between the result of this accounting and the balance of account as settled by the court is not great. Some of the errors committed in the accounting have largely counterbalanced each other.

One result of a modification of the judgment in accordance with this opinion will be, according to my figuring, to require the appellant to pay to Caroline Sherrer, from the estate of his ward, $648.11, less appellant's costs of this appeal. And, as there is no dispute about the facts, I think the cause should be remanded, with instructions to modify the judgment in accordance with this opinion.

We concur: SEARLS, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the cause is remanded, with instruction to modify the judgment in accordance with this opinion.

(107 Cal. 622)

**MORSE et al. v. DE ADRO et al. (No. 18,440.)**[1]

(Supreme Court of California. July 2, 1895.)

MINING LIENS.

Code Civ. Proc., § 1183, securing a lien on mining claims for labor performed thereon, does not authorize a lien for labor in working a mine on lands held under an agricultural patent from the United States.

Department 2. Appeal from superior court, Tuolumne county; G. W. Nicol, Judge.

Action by Milton Morse and others against Matthew L. De Adro and others to enforce a mechanic's lien. From a judgment for plaintiffs, defendants appeal. Reversed.

Frank W. Street, for appellants. Frank P. Otis, for respondents.

HENSHAW, J. The action is to foreclose a lien upon defendants' property for labor performed upon a mine situated thereon. Defendant De Adro was the owner, under patent from the United States for agricultural lands, of a farm containing about 160 acres. He had sunk a shaft upon his land and discovered a bed of auriferous gravel. He had then bonded his land to his codefendant Howes, with privilege to Howes of working the gravel deposit and developing the mine. Howes engaged plaintiffs in and about this work, and, having failed to pay them, they seek by this action to enforce a lien upon the land, as a mining claim, under section 1183 of the Code of Civil Procedure.

The single question presented by this appeal is whether land held under agricultural patent may be subjected to a lien for the wages of laborers employed in working a mine upon it. The constitution (article 20, § 15), in securing liens to mechanics and others for the value of their labor, has left to the legislature the duty of providing for the enforcement of these liens. In performance of this duty the legislature has enacted that "every person who performs labor upon any mining claim has a lien upon the same," etc. Code Civ. Proc. § 1183. At the time of the passage of this section, the term "mining claim" had been used in statutes, and had a well-defined meaning which had attached to it, not only by popular acceptance, but by the countenance and authority of judicial decisions. "What, then, is a 'mining claim'?" asks the court in Mining Co. v. Collison, 5 Sawy. 439, Fed. Cas. No. 9,886, and, answering its own interrogatory, declares: "A 'mining claim' is the name given to that portion of the public mineral lands which the miner, for mining purposes, takes up and holds in accordance with mining law." In Helm v. Chapman, 66 Cal. 291, 5 Pac. 352, work had been done in the stopes and levels of a mine on a mining claim, and a lien was sought to be enforced for the value thereof. This court said: "Section 1183 does not, it is true, provide for liens upon mines, but upon 'mining claims.' The lien, if it exists, extends to the whole claim." In Williams v. Association, 66 Cal. 193, 5 Pac. 85, the question came squarely before the court, and it is thus treated: "But, if it be conceded that one who works upon or in a mining claim may secure a lien for the value of his labor on the whole claim, the court below did not find that plaintiff or his assignors 'bestowed labor' upon a mining claim. A 'mining claim,' as the term is used in the statutes of the United States, is that portion of a vein or lode and of the adjoining surface, or of the surface and subjacent material, to which a claimant has acquired the right of possession by virtue of a compliance with the laws of the United States and the local rules and customs of miners. Copp, U. S. Min. Dec. 136, 142; Weeks, Min. 118. Independent of acts of congress providing a mode for the acquisition of title to the mineral lands of the United States, the term 'mining claim' has always been applied to a portion of such lands to which the right of exclusive possession and enjoyment, by a private person or persons, has been asserted by actual occupation, or by compliance with local mining laws, or rules, or customs. In the case now here, the court below found that the defendant, the Santa Clara Company, was the owner of two tracts of land, one being a portion of the Rancho Los Capitancillos, and consisting of eleven hundred and nine $^{67}/_{100}$ acres (the title whereto was derived through a patent from the United States), and the other containing three hundred and fourteen $^{68}/_{100}$ acres, being Pueblo Tract No. 2, formerly belonging to the city of San José. The court also found that 'the whole of said land is commonly known as the "Guadaloupe Mine"'; and then proceeded to declare a lien in favor of plaintiffs upon both tracts, and to decree that the fourteen hundred and twenty-four $^{55}/_{100}$ acres should be sold to satisfy it. The lands directed to be sold were not a 'mining claim,' either in the popular sense of the words, or as the term has been employed in judicial decisions, or as it is used in the Code. The Fremont grant is not a 'mining claim,' although many mines have been opened within its boundaries, and the owners of the grant may claim such mines to be their own. The right of the defendant, the Santa Clara Company, to a portion of the Rancho Los Capitancillos, or to a portion of the Pueblo lands of San José, and to extract ores therefrom, is no way dependent upon a claim to the possession made in recognition of and in conformity to local rules adopted by miners of a mining district, or in accordance with the usages or customs of a locality. The defendant derived its title, as would seem, from the Mexican or Spanish government, to the larger tract; certainly so as to the Pueblo land. We take notice that no patent, based upon 'mining claims,' could have been issued under any act of congress for the whole or for eleven hundred and nine acres of the Rancho Los Capitancillos. The plaintiff could not acquire the statutory lien upon the lands of the Santa Clara Company, simply because the statute does not authorize it. It may be that the statute is not sufficiently comprehensive; indeed, it would perhaps be difficult to say why one class of 'material men,' or laborers, should have preference over another; why, for instance, the furnisher of seed, or the plowman, should not have a lien on the farm of him to whom the seed is supplied, or for whom the plowing is done. But the legislature has seen fit to limit the benefit of the lien to particular classes, and we are not authorized to extend it to others."

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[1] Rehearing denied.

In Bewick v. Muir, 83 Cal. 372, 23 Pac. 390, which respondent contends modifies and explains the law declared in Williams v. Association, supra, this court was called upon to decide whether the phrase "mining claim" of the lien law included mining claims after the possessory right or claim had matured into a perfect title by the issuance of a mineral patent from the United States; and this was all it was called upon to decide. This court said: "The words 'mining claim,' as used in the law, have no reference to the different stages in the acquisition of the government title. In our opinion, it includes all mines, whether the title is inchoate, as in the case of a mining claim in its strict sense, or perfect, as in the case of a fee-simple title." Reference to the record in this last-named case discloses, not only that the complaint pleaded that all the mining land and ground described therein were mining claims, but that the court in its findings so declared. In the case at bar there is no such finding. It follows, therefore, that the further expressions of the court in Bewick v. Muir were not only unnecessary to the decision, but were addressed to a condition neither involved in nor presented by the facts of the case. It is the invariable rule, well understood by the profession, that an opinion of this court becomes authority only upon the point decided, and that obiter dicta are of no binding force or effect. Indeed, such passing declarations have no weight whatever, except such as the cogency of the reasoning may entitle them to. We must turn, therefore, to Williams v. Association, as containing the last authoritative expression of the court upon the question, and we deem its reasoning to be unassailable, and its conclusion determinative of the case at bar. As is there said, the legislature has seen fit to limit the benefit of the lien to particular classes, and we are not at liberty to extend it to others. To do so would not be construction, but judicial legislation. The judgment appealed from is reversed, and the cause remanded.

We concur: McFARLAND, J.; TEMPLE, J.

107 Cal. 549

## JUDSON et al. v. GIANT POWDER CO.

(No. 15,792.)

(Supreme Court of California. June 28, 1895.)

NEGLIGENCE—ESTOPPEL TO CLAIM DAMAGES—EVIDENCE.

1. The fact that a person sold the land adjoining his own for a dynamite factory will not preclude him from suing for injuries to his own land, and the improvements thereon, caused by an explosion in the factory, resulting from the negligent handling of an explosive necessary for the manufacture of dynamite.

2. A presumption of negligence arises from the fact of an explosion in a dynamite manufactory, where there is evidence that, if dynamite is carefully handled, it will not explode.

3. In an action for damages caused by the explosion of nitro-glycerine in a dynamite manufactory, expert evidence that, if the manufacturing and handling of dynamite is properly carried on, an explosion will not occur, is admissible.

Department 1. Appeal from superior court, Alameda county; John Ellsworth, Judge.

Action by Charles C. Judson, executor, and others, against the Giant Powder Company, for damages caused by an explosion. From a judgment for plaintiffs, and an order denying a new trial, defendant appeals. Affirmed.

Galpin & Zeigler, for appellant.

Page, Eells & Wheeler, for respondents.

GAROUTTE, J. Respondents recovered judgment for the sum of $41,164.75, as damages for acts of negligence. This appeal is prosecuted from such judgment, and from an order denying a motion for a new trial. The damages to respondents' property were occasioned by an explosion of nitro-glycerine in process of manufacture into dynamite, in appellant's powder factory, situated upon the shore of the Bay of San Francisco. Appellant's factory buildings were arranged around the slope of a hill facing the bay. Nearest to respondents' property was the nitro-glycerine house; next was the washing house; next were the mixing houses; then came the packing houses; and finally the two magazines used for storing dynamite. These various buildings were situated from 50 to 150 feet apart, and a tramway ran in front of them. The explosion occurred in the morning during working hours, and originated in the nitro-glycerine house. There followed, within a few moments of time, in regular order, the explosion of the other buildings, the two magazines coming last; but, though last, they were not least, for their explosion caused the entire downfall and destruction of respondents' factory, residences, and stock on hand. There is no question but what the cause of this series of explosions following the first is directly traceable, by reason of fire or concussion, to the nitro-glycerine explosion. Of the many employés of appellant engaged in and about the nitro-glycerine factory at the time of the disaster, none were left to tell the tale. Hence any positive testimony as to the direct cause of the explosion is not to be had. The witnesses who saw and knew, like all things else around, save the earth itself, were scattered to the four winds.

1. Respondents sold the premises to appellant for the manufacture of dynamite, and it is claimed that the maxim "volenti non fit injuria" applies, and therefore no recovery can be had. We attach but little importance to this contention. The grant of these premises for the purposes of a dynamite factory in no way carried to appellant the right to conduct its factory as against the grantors in any and every way it might see fit. There is no principle of law sustaining such a proposition. Let it be conceded that respondents, by reason of their grant, could not invoke the aid of a court of equity to prevent the appellant from conducting its business; still that concession proves nothing. This action is not based upon the theory that appellant's business is a nuisance per se, but negligence in the manner in which the business was conducted was alleged in the complaint, and is now insisted upon as having been proved at the trial. In making the grant, respondents had a right to assume that due care would be exercised in the conduct of the business, and certainly they have a right to demand that such care be exercised. It is argued that the explosion of all powder works is a mere matter of time; that such explosions are necessarily contemplated by every one who builds beside such works, or who brings dynamite into his dooryard. It is further contended that appellant gave to respondents actual notice of the dangerous character of its business by a previous explosion, which damaged respondents' property, and that respondents, by still continuing in business after such notice, in a degree assumed and ratified the risk, and cannot now be heard to complain. The only element of strength in this line of argument is its originality. The contention that, in the ordinary course of events, all powder factories explode, conceding such to be the fact, presents an element foreign to the case. The doctrine of fatalism is not here involved. In the ordinary course of events the time for this explosion had not arrived, and appellant had no legal right to hasten that event

by its negligent acts. Neither do we think respondents lost any legal rights by continuing to do business in this locality after being served with notice of the danger that surrounded them. While the notice was in the form of an object lesson which came to them in no uncertain tones, yet appellant was not justified in serving it, nor were respondents negligent in disregarding it. Respondents were not bound to abandon their property, though negligence of appellant in the conduct of its factory was ever a menace and danger to their lives and property. Conceding that respondents, by their grant, thereby assumed certain risks and dangers which may be said to always surround the manufacture of dynamite, still they assumed no risks and waived no action for damages which might arise through appellant's negligence. Both reason and authority support this conclusion.

2. It is contended that respondents offered no evidence tending to show that the explosion of the nitro-glycerine factory was occasioned by the negligence of appellant, and this contention brings us to the consideration of a most important principle of law. In addition to the fact of an explosion being established, the respondent offered expert testimony, to the effect that if the factory was properly conducted, and the employés careful during the process of manufacturing, an explosion would not occur. For the present we lay aside the evidence of the experts, and meet squarely and directly the question presented: Does the proof of the explosion draw with it a presumption of negligence sufficient to establish a prima facie case for a recovery? While the cases are not in entire accord in holding that a presumption of negligence arises from the fact of the explosion, still they largely preponderate upon that side, and we think but few well-considered cases can be found looking the other way. All courts agree that, where contractual relations exist between the parties, as in cases of common carriers, proof of the accident carries with it the presumption of negligence, and makes a prima facie case. This proposition is elementary and uncontradicted. Therefore the citation of authority is unnecessary. Yet we know of no sound reason, and have found none stated in the books, why this principle of presumptions should be applicable to cases involving contractual relations, and inapplicable to cases where no contractual relations exist. It is intimated in some Indiana case that the presumption arises upon proof of the accident by reason of the carrier's contract to safely deliver the passenger at his destination, but there is no such contract. The carrier is not an insurer of his passengers. If he were, this presumption of negligence arising from the accident, aside from the act of God, would be conclusive and irrebutable; but such is not the fact, for it is only prima facie and always disputable. As was well said by the court in Rose v. Transportation Co., 11 Fed. 438: "Undoubtedly, the presumption has been more frequently applied in cases against carriers of passengers than in any other class, but there is no foundation in authority or reason for any such limitation of the rule of evidence. The presumption originates from the nature of the act, not from the nature of the relations between the parties." The carrier's contract with his passenger is simply to exercise a certain degree of care in his transportation. It is a duty which the law enjoins upon him; but the law also enjoins the duty upon this appellant and all others, in the conduct of their business, to exercise a certain degree of care towards this respondent and all mankind. The duty which the law enjoins in the two cases only differs in the degree of care to be exercised. The principle of law involved is wholly the same; and, as has been said, the reason of the rule is not found in the relations existing between the party injuring and the party injured. The presumption arises from the inherent nature and character of the act causing the injury. Presumptions arise from the doctrine of probabilities. The future is measured and weighed by the past, and presumptions are created from the experience of the past. What has happened in the past, under the same conditions will probably happen in the future, and ordinary and probable results will be presumed to take place until the contrary is shown. Based upon the foregoing principles, a rule of law has been formulated, bearing upon a certain class of cases, where damages either to person or property form the foundation of the action. This rule is well declared in Shearman and Redfield on Negligence (section 60): "When a thing which causes injury is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from the want of care." Tested by this rule, no question of contractual relation could ever form an element in the case. With the same reason it might as well be said that cases of contract were excluded from the effect of the rule, as that cases of pure tort were excluded; but, upon the contrary, it is plainly evident that both classes of actions come equally within its provisions. In speaking to this question, it is said in Cooley on Torts (page 799): "The rule applied to carriers of passengers is not a special rule to govern only their conduct, but is a general rule which may be applied wherever the circumstances impose upon one party alone the obligation of special care." The author then cites the case of a householder engaged in repairing his roof. A piece of slate falls therefrom, and injures a traveler upon the street. He then says: "True, the act of God, or some excusable accident, may

have caused the slate to fall, but the explanation should come from the party charged with the special duty of protection."

The important question here involved, and the want of harmony in the decisions of courts bearing upon it, seem to demand a citation somewhat in detail of the many authorities which hold against appellant's views of the law. In England the authorities are in entire accord. Plaintiff was passing along a highway, under a railroad bridge, when a brick used in the construction of the bridge fell and injured him. Negligence in the railroad was presumed. Kearney v. Railway Co., L. R. 5 Q. B. 411. A barrel of flour rolled out of the window of a warehouse, injuring a person passing upon the street. Negligence in the warehouseman was presumed. Byrne v. Boadle, 2 Hurl. & C. 722. The same rule was declared upon a similar state of facts in Scott v. Dock Co., 3 Hurl. & C. 596; likewise in Briggs v. Oliver, 4 Hurl. & C. 403. The explosion of a boiler of a steamboat is prima facie evidence of negligence. Posey v. Scoville, 10 Fed. 140; Rose v. Transportation Co., 11 Fed. 438; Grimsley v. Hawkins, 46 Fed. 400. In the Rose Case it is said: "In the present case the boiler which exploded was in the control of the employés of the defendant. As boilers do not usually explode when they are in a safe condition and are properly managed, the inference that this boiler was not in a safe condition, or was not properly managed, was justifiable." The same general principle is declared in Cummings v. Furnace Co., 60 Wis. 603, 18 N. W. 742, and 20 N. W. 665; Mulcairns v. City of Janesville, 67 Wis. 24, 29 N. W. 565; Kirst v. Railroad Co., 46 Wis. 489, 1 N. W. 89; Thomas v. Telegraph Co., 100 Mass. 156; Howser v. Railroad Co. (Md.) 30 Atl. 906. In the case of Dixon v. Pluns, 98 Cal. 385, 33 Pac. 268 (a case which in its facts is an exact photograph of one of the New York cases hereafter cited), a chisel, used by a workman upon a building, fell upon and injured a girl while passing upon the street below. It was held that a prima facie case of negligence was established, and that the rule as declared in section 60 of Shearman and Redfield on Negligence was sound law and controlling.

While there is some discord existing in the New York authorities as to the true doctrine upon this question, still they are largely in line with the cases we have above cited. Mullen v. St. John, 57 N. Y. 567, is a leading case upon the question, and, while it has been vigorously assaulted at various times during the past 20 years, it still stands as a declaration of law by the courts of that state, not weakened and mutilated by such assaults, but rather strengthened and unscathed. In Cahalin v. Cochran, 1 N. Y. St. Rep. 583, negligence was inferred from the fact of a chisel falling from a building where workmen were engaged, and striking plaintiff when walking upon the street. A case to the same effect is Goll v. Railway Co. (Super. N. Y.) 5 N. Y. Supp. 185. Mullen v. St. John is expressly approved, and the doctrine for which we are here contending ratified to its full limits, in the very recent case of Volkmar v. Railway Co., 134 N. Y. 418, 31 N. E. 870.

As supporting a contrary doctrine, one of the leading cases is Young v. Bransford, 12 Lea, 232. Yet in the report of that case we find the following language: "At the same time, the fact that there was an explosion, which is not an ordinary incident of the use of a steam boiler, ought to have some weight, inasmuch as it may be out of the power of the aggrieved party in some instances to prove any more. The reasonable rule would seem to be that laid down by Judge Wallace: 'That from the mere fact of an explosion it is competent for the jury to infer, as a proposition of fact, that there was some negligence in the management of the boiler, or some defect in its condition.' " Another case is Huff v. Austin, 46 Ohio St. 386, 21 N. E. 864, a case which relies for support in part upon Losee v. Buchanan, 51 N. Y. 476. Yet in Mullen v. St. John the Losee Case was expressly held to be not in point by reason of the presence of other evidence. Cosulich v. Oil Co., 122 N. Y. 118, 25 N. E. 259, is the latest authority to which our attention has been directed holding these views. It cites the Tennessee and Ohio cases, and also relies, as do other of these cases, upon a general statement, found in Thompson on Negligence (page 1,227), namely: "But it is believed that it is never true, except in contractual relations, that the proof of the mere fact that the accident happened to the plaintiff, without more, will amount to evidence of negligence on the part of the defendant." The case cited by Mr. Thompson in no way supports this text if the text is to be construed as the Cosulich Case seems to construe it, and the learned author's illustrations, which immediately follow, conclusively indicate that, in making the statement quoted, he never contemplated for it any such construction as the New York court seems to give it. This is doubly apparent when we see that upon the same page he indorses the doctrine of Byrne v. Boadle, supra. Indeed, the author prefaces his whole discussion of the question of res ipsa loquitur by a report in full of the celebrated case of Kearney v. Railway Co., supra, the doctrine of which he fully indorses, and which in no sense was a case of contractual relation. Beyond all this, the Volkmar Case, already cited, is a later expression emanating from the New York court, and earlier cases coming from the same source, if opposed to the doctrine there declared, must give way.

There is another class of cases in all essentials fully supporting our views upon this question of negligence. These cases arise in the destruction of property caused by fire escaping from locomotive engines, and, while there is some conflict in the authorities as to the true rule, it is said in Shearman and Redfield on Negligence (section 676): "The decided weight of authority and of reason is in favor of holding that, the origin of the fire being fixed upon the railroad company, it is presumptively chargeable with negligence, and must assume the burden of proving that it had used all those precautions for confining sparks and cinders (as the case may be) which have been already mentioned as necessary. This is the common law of England, and the same rule has been followed in New York, Maryland," etc., citing many other states. While we have not deemed it necessary to verify the correctness of the statement of the authors as to all the states mentioned, we do say there are numberless cases supporting the text. See Piggot v. Railway Co., 3 C. B. 229; Railroad Co. v. Reese, 85 Ala. 497, 5 South. 283; Spaulding v. Railway Co., 30 Wis. 110,—citing many cases.

In this state the question has never been directly passed upon as to whether or not negligence will be presumed from the fact of sparks escaping from a locomotive engine, and the destruction of grain fields resulting therefrom. In Butcher v. Railroad Co., 67 Cal. 518, 8 Pac. 174, the doctrine is inferentially favored, although in that case the plaintiff placed an expert witness upon the stand, who testified that "a perfect engine, properly equipped and properly run, will not ordinarily throw out sparks sufficient to start a fire." This line of evidence was also held sufficient to establish a prima facie case of negligence in Hull v. Railroad Co., 14 Cal. 387, and Henry v. Railroad Co., 50 Cal. 176. For our purpose it is not necessary to enter into a prolonged investigation to determine why this evidence of the expert strengthened plaintiff's case. But, taking the converse of the proposition, let us assume that defendant's engine was a perfect engine, properly equipped and properly run, and that, notwithstanding such conditions, it would ordinarily when in use throw out sparks of fire, leaving in its wake, as it passed through the country, property destroyed and possibly lives lost. Certainly, this could hardly be tolerated in law. Hence we fail to fully appreciate the importance of this line of evidence. Such conduct upon the part of a railroad company would render it guilty of the commission of a nuisance, and liable in damages for property destroyed. Certainly, it is no answer to such a condition of things to say that the legislative grant to the corporation to do business with the aid of steam locomotives carries with it the right to destroy the property of adjoining owners; but, rather, we must assume that the grant was made only after a prior determination by the same legislative power that a perfect locomotive engine, properly equipped and properly run, will not ordinarily throw out sufficient sparks to destroy adjoining property. It is only upon such a theory that the right to do business by the use of this character of implement was ever granted; and hence we again say that it may be considered doubtful if this class of evidence strengthens the plaintiff's case; for it is but proving, as a fact, something of which the courts and possibly all the world take full notice.

In the case at bar, following the lines marked out by the cases last cited, respondents placed before the court expert evidence to the effect that, if the correct process of manufacturing and handling dynamite was carefully carried out, an explosion would not occur. This evidence is stronger than in the smokestack cases, for here it declares as a certainty what there is only stated to be the probable or ordinary result; but, be that as it may, if this character of evidence was relevant and material in the smokestack cases, it is equally relevant and material here. If it was sufficient there to complete and perfect a prima facie case of negligence, it is ample here to do the same. Again, if appellant had the right, under the laws of the state, to manufacture dynamite (which is conceded), and, if by reason of the existence of such right, courts may assume that, if dynamite is properly handled in the process of manufacture, explosions will not probably occur, then respondents' case is doubly proven, for here we have, not only the presumption of the existence of certain conditions, but the evidence of witnesses as to the existence of them.

In concluding this branch of the case, we can only reiterate that the true rule appears to be found in section 60 of Shearman and Redfield on Negligence, which we have already quoted; and, gauging this case by the test there prescribed, a prima facie case of negligence was established by respondents' evidence. This case seems to clearly come within the provisions of the rule there declared. There is nothing to distinguish it in principle from the army of cases that have been held to come directly within its provisions. Appellant was engaged in the manufacture of dynamite. In the ordinary course of things, an explosion does not occur in such manufacture if proper care is exercised. An explosion did occur, Ergo, the real cause of the explosion being unexplained, it is probable that it was occasioned by a lack of proper care. The logic is unassailable, and the principle of law of presumptions of fact erected thereon is as sound as the logic upon which it is based.

3. Questions of negligence in the storage of the gunpowder become unnecessary to consider, owing to our views upon the main question discussed. Neither do we find anything in the record, bearing upon the measure or amount of damages declared and decreed by the court, demanding a new trial of the case.

For the foregoing reasons, the judgment and order are affirmed.

We concur: VAN FLEET, J.; HARRISON, J.

107 Cal. 602

## RANKIN v. NEWMAN et al. (No. 15,731.)

(Supreme Court of California. June 29, 1895.)

PLEADINGS AS EVIDENCE — APPEAL FROM JUDGMENT—REVIEW OF FINDINGS—ACCOUNTING BETWEEN PARTNERS.

1. A finding that a settlement was made cannot be overcome by mere evidentiary facts improperly injected into an answer which alleges the making of the settlement.

2. On an appeal from a judgment only, a finding cannot be impeached as against evidence.

3. Where a complaint asked for an accounting of the affairs of a partnership, and that a pretended settlement be declared fraudulent and null, and the answer alleges that there has been a valid settlement, and a payment of the amount agreed on, but admits that by an unintentional mistake in figuring the amount paid was less than it should have been by a certain amount, and alleges that this has been tendered to plaintiff, and refused by him, judgment for such sum should be rendered for plaintiff on its being found that the settlement was made as alleged by defendant.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

Action by Ira P. Rankin, special administrator of John Levinson, deceased, against William J. Newman and another. Judgment for defendants, and plaintiff appeals. Modified.

Horace W. Philbrook, for appellant. Edward R. Taylor and Reinstein & Eisner, for respondents.

BRITT, C. The parties differ as to the complexion of this action. Plaintiff asserts it to be "a suit in equity by the administrator (with the will annexed) of the estate of John Levinson, deceased, against his surviving copartners, for an accounting and settlement of the affairs of the partnership"; while defendants claim that it is "an action to set aside, on the ground of actual fraud, a partnership settlement made by the executor of a deceased partner with the surviving partners, to have the papers executed in the matter of the settlement adjudged to be void, and to be delivered up for cancellation, and for an accounting and a receiver." Consequences of some moment in the case are supposed to follow according as one or the other of these views of the nature of the action may be adopted. But we think both are right. The complaint resembles somewhat a bill in equity with a double aspect. Its principal object is to obtain an accounting of the affairs of the late firm of Newman & Levinson, a partnership of which the defendants, William J. and Benjamin Newman and said John Levinson, now deceased, were the members, and a distribution of its assets; and to this end it proceeds on the alleged grounds that no such accounting or settlement of the partnership affairs has ever been made; and also that certain fraudulent and collusive dealings, had between a former representative of the said deceased and the defendants, resulted in an ostensible settlement of the partnership affairs, and the cession to defendants of the interest of the deceased in its property; and the execution of certain instruments evidencing such ostensible settlement, which instruments plaintiff prays may be canceled. Upon the trial, findings of fact were waived, and defendants had judgment in their favor, from which the plaintiff appeals without bill of exceptions or statement of the evidence; so that the questions made arise on the pleadings.

It is alleged in the complaint, in substance, that Levinson died February 25, 1890, leaving a will, which was admitted to probate in the superior court of the city and county of San Francisco on March 18, 1890, and one S. W. Raveley was appointed executor thereof; that said deceased was at the time of his death, and for a long time previously had been, a member of said firm of Newman & Levinson, which firm was engaged in dealing and trading in sundry classes of merchandise at the city of San Francisco, and that such business was very extensive and profitable, and the assets of the partnership were of large amount and great value; that Levinson's contribution to the capital of the firm was three-tenths thereof; that since Levinson's death the defendants, his surviving partners, have held and managed the property and business of the partnership, and taken all the profits to themselves; that on September 6, 1890, said Raveley, as executor, had certain dealings with defendants (which plaintiff styles a "transaction or proceeding," and which defendants call a "settlement"), whereby he, claiming to act in pursuance of the articles of copartnership between Levinson and defendants, accepted from defendants their promissory notes in the aggregate sum of $20,790.88, professedly "for the interest of the estate of said Levinson in said partnership"; that the will of Levinson did not authorize a sale or transfer of the interest of his estate "in any partnership," and that the superior court never authorized or confirmed a sale or transfer of such interest "in any partnership." These allegations of the complaint appear to be undenied. The complaint further enters into a statement of the value of the assets and of the amount of the liabilities of the firm, from which the result is deduced that the value of the interest of the estate of the deceased in the business and property of the firm was more than $120,000. It is also charged that the defendants, knowing such value, and intending to cheat and defraud said estate by various false representations and fraudulent practices described in detail, and the exertion of undue influence on said executor, he being alleged to be their "mere tool," induced him to become party to said "transaction" of September 6, 1890, and to execute certain written instruments evidencing the same. All the allegations of fraud, misrepresentation, and undue influence are denied in the answer; and so of the averments respecting the value of the interest of the estate in the assets of the partnership, except that defendants, while alleging that the appraised value of such interest was $20,790.88, yet admit that the actual value was a few hundred dollars in excess of this sum. Plaintiff also avers that "the business of said partnership of John Levinson, William J. Newman, and Benjamin Newman has not, nor have the affairs thereof, been settled or closed"; and that "though demands have been often made upon them to settle the business and affairs of said partnership, and to account to said estate for the interest thereof in said partnership, the defendants have neglected and refused, and still neglect and refuse so to do." These averments are specifically denied in the answer. Defendants also set out at length the steps taken by them and by said Raveley for the adjustment of the mutual affairs of the partnership and the estate of the deceased, claiming that they proceeded as required by the written articles of copartnership under which the firm had been constituted; that, in the manner provided in such articles, they ascertained to be due to the estate of Levinson on account of his interest in the partnership the said sum of $20,790.88, which sum, they allege, they have fully paid to said executor in discharge of their promissory notes mentioned in the complaint; but they admit a mistake in this amount, to which we shall presently advert. The answer contains many other affirmative allegations not necessary to be stated here. It abounds, indeed, with evidentiary matter which, whatever may have been the requirements of the former chancery practice in such cases, should, under our system, have been omitted.

The statute (Code Civ. Proc. 1585) provides that: "When a partnership exists between a decedent, at the time of his death, and any other person, the surviving partner has the right to continue in possession of the partnership, and to settle its business, but the interest of the decedent in the partnership must be included in the inventory, and be appraised as other property. The surviving partner must settle the affairs of the partnership without delay, and account with the executor or administrator, and pay over such balances as may from time to time be payable to him, in right of the decedent. * * * And the executor or administrator may maintain against him any action which the decedent could have maintained." Obviously the important and controlling issue presented by the complaint here—drawn to enforce the duty enjoined on the surviving partners by the law expressed in this section—and the answer of the defendants is whether the Newmans have settled the affairs of the partnership, and have accounted with the executor, and paid over to him such balances as were due in right of the decedent. The plaintiff charges that they have failed and refused to perform these duties, and the defendants deny the charge. On the issue thus made up the judgment was for the defendant, and, the evidence not being before us, the judgment conclusively establishes, for purposes of this appeal (and with the qualification hereafter stated) that defendants have accounted and have paid over as the law directs.

It is the contention of the plaintiff, however, as we understand his argument, that despite the issue made on the ultimate fact of accounting and settlement, and the finding thereon to be implied from the judgment, the allegations of the defendant's answer, showing how the settlement was brought about, the inventory taken, and the mode adopted of valuing the several classes of assets, the estimate of liabilities, the construction placed by the defendants and the executor on the articles of copartnership, and the influence of such construction on the settlement reached, do yet demonstrate that the adjustment made was wholly vicious, and to be treated as null. But assuming, without at all intimating any opinion on the subject, that those averments justify the inference that the executor and the defendants adopted a false basis and pursued a wrong method in their endeavor to "settle the affairs of the partnership," so that the result should be disregarded, it is yet apparent that they are merely matters of evidence, improperly injected into the pleading, upon which the court was not required to find (Merrill v. Merrill, 102 Cal. 317, 36 Pac. 675), and which neither add to nor detract from the effect of the denials that the business and affairs of the partnership remain unsettled, and that defendants have failed to account (Botto v. Vandament, 67 Cal. 332, 7 Pac. 753, and cases cited). If the court had made the single express finding that "the defendants have accounted to said estate for the interest thereof in said partnership, and have paid over all balances payable to the executor in right of said decedent, and the business of said partnership of John Levinson, William J. Newman, and Benjamin Newman, and the affairs thereof, have been settled and closed," it would have been responsive to the paramount issues made by the pleadings, and, barring the exception below noted, would unquestionably sustain the judgment; it would show that the whole purpose of the action had been already accomplished. But such a finding, being within the issues, and logically necessary to support the judgment, is, there being no express finding, conclusively implied (Utter v. Eames, 59 Cal. 5; Wixson v. Devine, 80 Cal. 387, 22 Pac. 224; Blanc v. Mining Co., 95 Cal. 525, 30 Pac. 765); and no finding or averment of probative matter—mere items in the sum of the evidence, from which the trial court drew its final conclusion—is of any effect to qualify the ultimate fact thus established. "The rule has long been settled that, when the ultimate fact is found, no finding of probative facts which may tend to establish that the ultimate fact was found against the evidence can overcome the finding of the ultimate fact." Gill v. Driver, 90 Cal. 74, 27 Pac. 64; Smith v. Acker, 52 Cal. 217. "It has been repeatedly held that a finding of the court cannot be impeached upon the ground that it is contrary to the evidence, otherwise than by a motion for new trial and statement of evidence upon the motion. We can consider, upon appeal from the judgment, only the ultimate facts found by the court, and not the probative facts, which have no proper place in the findings." Pico v. Cuyas, 47 Cal. 178. We are informed by the brief for plaintiff here that an appeal has been taken from the order of the court below denying his (plaintiff's) motion for new trial of this action, and that in the record upon that appeal the evidence is shown. To the appeal from the order should be relegated the consideration of the more important questions which appellant has so zealously, even vehemently, urged on the present record.

The defendants state in their answer that, by reason of an unintentional mistake occurring in the preparation of the balance sheet on which the settlement with the executor was founded, the payments made by them to the executor were less than they should have been by the sum of $593.18. The error, defendants allege, was discovered in the month of April, 1892, and thereupon they tendered such sum, with interest, in all $662.40, to the plaintiff, but he refused it. They aver their readiness and willingness to pay the same whenever plaintiff will receive it, but made no deposit thereof in court. This matter appearing in the answer is a limitation upon the denial of plaintiff's allegation that the affairs of the partnership remain unsettled. The denial stands with a pro tanto exception of the alleged error. It is a statement of part of the result involved in the final adjustment, which is the ultimate fact in dispute, and is in no respect similar to the evidentiary matter set out in the answer describing the manner in which, and the theory upon which, the adjustment was made. It shows that a substantive part of the plaintiff's cause of action is by the pleadings put beyond controversy.

Respondents argue that plaintiff is not entitled to judgment for the sum admitted to be due, because, they say, he would thus recognize the validity of the settlement he is seeking to overthrow. But to the extent that the settlement is affected by the error of $593.18 in the balance sheet, it is overthrown by the allegations of the defendants themselves. It is of no moment, as regards the final relief to be granted, that the error to the prejudice of the estate arose from an inadvertent mistake admitted by defendants, and not from the intentional fraud charged by plaintiff. Belknap v. Sealey, 2 Duer, 571, cited with approval in Johnson v. Polhemus, 99 Cal. 240, 33 Pac. 908. See Zellerbach v. Allenberg, 99 Cal. 68, 33 Pac. 786. It is also objected that plaintiff should not recover what he had positively declined to accept. This consideration is of no weight in such a case. A judgment should be "the simple sentence of the law upon the material ultimate facts admitted by the pleadings or found by the court" (Gregory v. Nelson, 41 Cal. 282); and, as the record here contained matter showing that, within the proper scope of the action, the plaintiff was entitled to some further payment in right of the decedent, the appropriate sentence of the law should have emanated from the court, the previous contumacy of the plaintiff notwithstanding. The cause should be remanded, with instructions to the court below to render judgment in favor of plaintiff for the sum of $662.40.

We concur: VANCLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the cause is remanded, with instructions to the court below to render judgment in favor of plaintiff for the sum of $662.40.

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107 Cal. 577

## HELLINGS et al. v. HEYDENFELDT. (No. 15,884.)

(Supreme Court of California. June 29, 1895.)

ELECTION OF REMEDIES—CONTRACT—TENDER OF PERFORMANCE.

1. Where it was agreed that defendant would pay a certain amount to plaintiffs in consideration that plaintiffs would dismiss certain proceedings then pending in the probate court, and defendant afterwards notified plaintiffs that she rescinded and withdrew from the agreement, plaintiffs cannot maintain an action to recover the amount stipulated to be paid, while at the same time continuing to prosecute the proceedings in the probate court.

2. The mere fact that plaintiffs offered to perform will not entitle plaintiffs to recover where the offer was not bona fide, and was not kept good.

Department 2. Appeal from superior court, city and county of San Francisco; J. V. Coffey, Judge.

Action by Zeila O. Hellings and others against Elizabeth A. Heydenfeldt to recover certain moneys alleged to be due on a contract. Defendant had judgment, and plaintiffs appeal. Affirmed.

T. M. Osmont, C. P. Robinson, and H. I. Kowalsky, for appellants. Knight & Heggerty and Pierson & Mitchell, for respondent.

McFARLAND, J. This action was brought by the plaintiffs, who are children and heirs at law of Solomon Heydenfeldt, deceased, against the defendant, who is the surviving wife of said deceased, to recover various amounts of money alleged to be due plaintiffs by defendant upon a certain alleged written contract made by and between said parties. A demurrer, general and special, to the complaint, was overruled; and after answer and trial the court made findings, and rendered judgment in favor of defendant. Plaintiffs appeal from the judgment and from an order denying a new trial.

The main facts are these: The deceased, Solomon Heydenfeldt, left a will, in which, after declaring that he had made provision for his children, he gave nearly all his property to the defendant herein for her life; providing, however, that she might dispose of the personal property during her life, and might by will distribute the real property among the children in such proportions as she might choose. The will was duly probated, and letters issued to the executors named therein. Afterwards the plaintiffs herein filed in the probate court petitions for the revocation of the probate of said will, in which, among other things, they made serious charges against the character of the defendant, alleging that she was not the wife of the said deceased, that her children were not the children of the deceased, and that she was guilty of acts of unchastity and many other heinous offenses, not necessary to be here repeated. Respondent was very much affected and troubled by these charges, and sought Mr. Adolph Sutro, who had been a friend of her deceased husband, and asked him to endeavor to stop these proceedings of the appellants. She gave him her written authority to act in the premises, but on the same day she changed her mind, and revoked said authority. Afterwards, in response to a letter from Sutro, she went to see him, and after a good deal of negotiation Sutro obtained from appellants a written offer of compromise, of which the following is a copy: "We, the undersigned, plaintiffs in the contested will case of Solomon Heydenfeldt, deceased, now pending in department No. 9 of the superior court of the city and county of San Francisco, hereby agree to and do accept in full satisfaction the sum of sixty-five thousand ($65,000) dollars, to be distributed as follows, to wit: To Zeila O. Hellings the sum of twenty thousand ($20,000) dollars and the payment of a ten thousand ($10,000) dollar mortgage on her property; to Thomas O. Heydenfeldt the sum of five thousand ($5,000) dollars and the payment of a ten thousand ($10,000) dollar mortgage on his property; to Frederick O. Heydenfeldt the sum of five thousand ($5,000) dollars; to Ine O. Heydenfeldt the sum of five thousand ($5,000) dollars; to Solomon Heydenfeldt, Jr., the sum of ten thousand ($10,000) dollars. Simultaneously with the payment of said sum of sixty-five thousand ($65,000) dollars within thirty (30) days from this date, we agree to withdraw the said complaint, and each individually agree to sign a release from all claims and demands against said estate and said defendants, each paying its own cost and lawyer's fees. We furthermore agree, upon the execution of the covenants herein contained, to sign a document withdrawing and recalling all charges of a personal character made in our complaint in the above-mentioned case. In case of failure on our part to faithfully carry out this agreement, we each individually bind ourselves in the sum of ten thousand ($10,000) dollars, to be paid to the defendants in the above-mentioned case as accrued and forfeited damages. If no acceptance is made by Mrs. E. A. Heydenfeldt, the party defendant in the above-mentioned case, within three days from the date hereof, this instrument to be null and void. San Francisco, November 7, 1891. Zeila O. Hellings, Frederick O. Heydenfeldt, Thos. O. Heydenfeldt, Ine O. Heydenfeldt. By Thos. O. Heydenfeldt, Guardian." To this was attached the following: "I hereby agree to the terms of the above instrument, and bind myself to pay the sum of sixty-five thousand ($65,000) dollars to the persons named therein within thirty days, provided that all of the conditions imposed upon the plaintiffs in the above-mentioned cause are faithfully carried out; and on my failure to carry out the conditions imposed upon me in the above instrument I agree to pay to the plaintiffs in the said cause the sum of ten thousand ($10,000) dollars as accrued and forfeited damages. San Francisco, November 7, 1891." To this latter writing the respondent signed her name on the same day—November 7, 1891—in the presence of said Sutro. After signing it, at her request, the following, written by Mr. Sutro, was added: "I sign the confirmation of the above agreement with the understanding that I have already paid in cash twenty-five hundred ($2,500) dollars for the account of Solomon Heydenfeldt, Jr., and have given my obligation to pay seventy-five hundred ($7,500) dollars more, which covers the amount of ten thousand ($10,000) dollars payable under the above agreement to Solomon Heydenfeldt, Jr. San Francisco, November 7, 1891. Mrs. E. A. Heydenfeldt." "Witness: Adolph Sutro." At the time respondent signed as aforesaid she and Mr. Sutro supposed that the property left by her deceased husband was of the value of from $200,000 to $300,000, and that, if she failed to comply with the contract, she at most would only be liable in the amount of $10,000. A few days afterwards she was informed by the executors that she had agreed to pay more than her interest in the property was worth. The whole assessed valuation of the estate of the said deceased was only $107,548.90, in which she had a life estate, as aforesaid. On November 13, 1891,—six days after the signing of said instrument,—she served a written notice on appellants that she rescinded said instrument, and withdrew her acceptance thereof, and refused to perform or be bound by it, and released and absolved appellants from any compliance therewith. After the service of this notice, appellants did not withdraw their said petitions in probate, or sign any release or document recalling said charges of a personal nature against respondent, nor did they make any attempt to offer to do so until the last of said 30 days mentioned in said contract; and in the meantime they continued to prosecute in the probate court their said petitions for the revocation of the probate of said will. About 10 o'clock at night on December 7, 1891, the last of said 30 days, two men, who were clerks of the attorneys of some of the appellants, undertook to serve a certain paper on respondent as she was going through the yard of her residence. She was frightened by the men, and ran away from them into her house. The paper was thrown after her, and was found in the yard the next morning. It is contended by appellants that this paper constituted an offer by appellants to perform their covenants contained in said contract of November 7th. This paper was not signed by any one of the appellants, but the paper was prepared and the names of appellants signed to it by persons who were merely the attorneys at law of some of said appellants, and who subscribed the paper as "their attorneys." The court below found that this paper was not on its face an offer to perform the covenants of said instrument of November 7th, that the same was not made in good faith, and that it was not executed by appellants in accordance with the provisions of said instrument of November 7th; and, in our opinion, these findings were correct. Moreover, after this alleged offer, the appellants continued the prosecution of said petitions in the probate court as before. On December 12, 1891, respondent filed a petition for family allowance in said probate court, and the appellant Hellings filed a written opposition thereto, in which she averred, among other things, that respondent was not the wife, and her children not the children, of said Solomon Heydenfeldt, deceased. On January 30, 1892, an amendment was made to appellants' petition, in which the averments of the original petition were adopted and renewed. On January 21, 1892, appellants resisted respondent's motion to dismiss the contest in the probate court, and in various ways appellants prosecuted said contests to and after the commencement of this action. This contest in the probate court was carried on by appellants for more than a year after the commencement of this present action.

The court found that respondent, owing to her mental and physical condition, was not competent to make the said contract; but the record presents some embarrassing questions as to the rulings of the court about the admissibility of evidence on the issue of the competency of respondent, which, under our views of the case, we do not deem it necessary to determine. The court also found that there was no authority for signing the name of the infant Ine O. Heydenfeldt to the said contract, and that the modification of the contract made by the respondent was not accepted by the appellants, and made a number of other findings, each of which, if correct, separately and independently supports the judgment. But that we will also pass over. The complaint does not go upon the theory that appellants are entitled to the actual damages suffered by respondent's repudiation of the contract,—such damages as are ordinarily recoverable upon the breach of an executory contract. The action, though not technically such, is in the nature of an action for specific performance; that is, appellants sought to compel respondent to pay the full amounts of the exact sums of money specified in the contract, with legal interest from its date. They contend that the contract was "an obligation to pay money only," and that the damage is "the amount due by the terms of the obligation, with interest thereon," as expressed in section 3302 of the Civil Code. No damage is alleged or proven, but judgment is sought for the specific amounts of money mentioned in the contract, just as though the action were upon a promissory note. This is undoubtedly the rule when the consideration has passed to the obligor, and he has given an absolute promise to pay. But when the consideration has not passed, when the contract is executory on both sides, when the promise of the obligor is contingent upon the performance of covenants by the other party, then the amount named to be paid is not by any means the absolute measure of damage for a breach of the contract. In such a case the amount named to be paid is not the measure of damage unless the promisee has done the things required of him to be done, or has made a bona fide and valid offer and tender thereof, so as to pass the consideration to the promisor. If A. promises to deliver to B. within a certain time a certain number of tons of wheat, and B. promises to pay to A. upon such delivery $10,000, but afterwards notifies A. that he will not comply with his contract, A. may consider the contract broken, and sue B. for the actual damage, if any such he has suffered, and in such case the measure of damage would be the difference between the value of the wheat at certain different dates; or he may elect to consider the wheat as the property of B., and take steps to pass him the title, in which event he may recover the whole amount to be paid. 3 Pars. Cont. p. 223 et seq. But he cannot keep the wheat and also recover the purchase price. In most of the reported cases touching this question the subject-matter of the contract has been property, real or personal; but the same rule obtains when the covenants of one of the parties to the contract is for personal acts or omissions. In the case at bar the appellants, after having received notice from respondent that she repudiated the contract, might have elected to recover of her the actual damage—if any such could be shown—which they suffered by reason of her withdrawing from the contract. But they could not recover the whole of the specific amounts of money stipulated in the original contingent promise of respondent while retaining the consideration for which that promise was made; that is, while refusing to carry out their covenants for personal acts and omissions provided for in the contract, and continuing to prosecute their said petitions in the probate court and their charges against respondent. That would be like the conduct of a vendor who sought to both keep the goods and recover the price.

Appellants contend that it was enough to offer to perform, and that, if their offer was not good, they were excused from making any offer by respondent's notice that she would not perform. Their complaint, however, rests upon an alleged offer, and not upon an excuse for not making an offer. But it is clear that in this case appellants could not recover from respondent the specific amounts of money named (in principle, the purchase price) without performing their covenants, or making a bona fide offer and tender of performance, and remaining in a position to keep that offer and tender good. This they did not do. They did not perform any of their covenants; and their alleged tender of performance, in addition to defects hereinbefore noticed, was evidently not bona fide, and was not kept good. By continuing to prosecute the proceedings in the probate court, they themselves broke the contract. They put it out of their power to perform their covenants, for they continued to do the things which those covenants restrained them from doing. They were like the vendor of wheat who, while consuming the wheat himself, is suing the vendee for its price. For these considerations, without determining other questions in the case, we think that the judgment should be affirmed. Judgment and order appealed from affirmed.

We concur: HENSHAW, J.; TEMPLE, J.

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107 Cal. 665

## CORBIT v. KIMBALL. (No. 19,539.)

(Supreme Court of California. July 3, 1895.)

AGENT—AUTHORITY TO BIND PRINCIPAL.

Where a wife purchased a part of a tract of land as agent for her husband, the husband is bound when the transaction was fair, and there was no misunderstanding between her and the seller, though the husband believed she was buying the whole tract.

Department 2. Appeal from superior court, San Luis Obispo county; V. A. Gregg, Judge.

Action by John Corbit against John A. Kimball. Defendant appeals from the judgment against him. Reversed.

F. A. Dorn and Wm. Shipsey, for appellant. Wilcoxon & Bouldin, for respondent.

HENSHAW, J. Plaintiff avers that he gave to defendant $1,300, with which to buy a certain piece of land, containing about 40 acres, and that defendant purchased the land with the money, taking the deed in his own name. He asks that defendant be declared his trustee, and be compelled to convey. Defendant, for answer, denies these allegations, and avers, with other matters not necessary to this consideration, that he purchased the property from its owner, Goldtree, for himself and his own use, Goldtree agreeing to accept in payment therefor the sum of $1,300, or a promissory note for that amount. He received his deed upon July 12, 1893. Thereafter one M. B. Corbit, wife of plaintiff, purchased from him, for a consideration of $1,300, 30 of the 40 acres, defendant reserving ten acres and certain water rights. He further avers that he has made a deed to said M. B. Corbit of the land purchased by her, and, she being dead, expresses his willingness to make any proper additional conveyance to her representatives. The court finds that plaintiff desired to purchase the 40 acres because its water rights would enhance the value of his contiguous land; that plaintiff never employed defendant to negotiate or purchase for him the Goldtree land; that defendant did purchase the land for his own use, as above set forth; that, after said purchase, plaintiff's wife (who had become the owner by gift deed of the community land) contracted and agreed with defendant to buy 30 of the 40 acres, and paid him therefor $1,300; that defendant paid Goldtree this money for his land; that defendant, during the lifetime of plaintiff's wife, had made her a deed of the land so purchased by her; and that before the commencement of this action, he had tendered to plaintiff "a good and sufficient deed to that portion of said forty acres of land sold to said M. B. Corbit." The court further finds that plaintiff furnished to said M. B. Corbit said sum of $1,300, paid by her as stated; that in making said purchase from said Kimball, as aforesaid, said M. B. Corbit acted as the agent of plaintiff, and plaintiff understood and believed that said M. B. Corbit was purchasing the whole of said 40 acres of land, and defendant knew, or had reason to know, that the $1,300 received by him from M. B. Corbit was the money of this plaintiff. Upon these findings the court bases a decree that defendant either pay to plaintiff $1,300, or make to him a conveyance of the 40 acres. Aside from any question of variance between the allegations and proofs, this decree cannot stand. No doubt is cast by the court upon the fairness of the transaction between defendant and plaintiff's wife. In that transaction Mrs. Corbit, it is found, was acting as agent for her husband. It is elementary that an agent's acts within the scope of his authority bind the principal. There was no misunderstanding between Mrs. Corbit and the defendant. She paid what she agreed to pay, and received what she agreed to buy. That plaintiff believed his wife was purchasing all, when in fact she was purchasing but part, did not affect the situation of the parties. Neither did the fact that the defendant knew, or had reason to know, that the money paid to him was the husband's money. It is not even found that the defendant knew, or had reason to know, that the husband thought his wife was purchasing the whole tract. The judgment appealed from is reversed, and the cause remanded.

We concur: McFARLAND, J.; TEMPLE, J.

107 Cal. 614

## In re SALMON'S ESTATE. (No. 18,454.)

(Supreme Court of California. July 2, 1895.)

WILLS—OMISSION OF CHILD—PAROL EVIDENCE.

1. Civ. Code, § 1307, provides that when a testator omits to provide in his will for any of his children, or the issue of a deceased child, unless it appears that such omission was intentional, such child must have the same share in the estate as in case of intestacy. *Held*, that parol evidence is not admissible to show that the testator intended to omit a child whom he has not mentioned in his will.

2. The fact that the testator left a small legacy to the wife of a deceased son, but omitted to provide for the issue of said son, does not show an intention to omit such issue.

Department 1. Appeal from superior court, San Joaquin county; J. K. Law, Judge.

Certain devisees appeal from an order of the probate court distributing the estate of Cutler Salmon, deceased. Affirmed.

Nutter & De Vries and Jas. H. & J. E. Budd, for appellants. Nicol & Orr, for respondents.

VAN FLEET, J. Decedent failed to mention or provide in his will for certain grandchildren, the issue of two deceased sons, John and Alexander. He did, however, leave a small legacy to the widow of each of said sons, the mothers of his said grandchildren. On distribution, the omitted grandchildren claimed and were given the share of said estate which they would have taken had the decedent died intestate. Certain of the devisees appeal from the decree.

At the hearing appellants offered evidence to the effect that the testator, in giving directions for the drafting of his will, stated that his son Alexander's estate had cost him $6,000 and trouble, and that he would not give that family anything, but would give Alexander's widow $500; that, as for John's family, he would give the widow $1,000, but the boys must look out for themselves. This evidence was excluded, and its exclusion is assigned as error. The question involved is whether evidence extrinsic of the language of the will itself can be resorted to for the purpose of determining whether the omission of one entitled, in the event of intestacy, to take of the estate, was intentional on the part of the testator, the presumption being that it was not. The question is not a new one in this state. Section 1307 of the Civil Code provides: "When any testator omits to provide in his will for any of his children, or for the issue of any deceased child, unless it appears that such omission was intentional, such child, or the issue of such child, must have the same share in the estate of the testator as if he had died intestate," etc. This provision was a part of the statute of wills before the adoption of the Codes, and first received a construction at the hands of this court in Estate of Garraud, 35 Cal. 336. In that case it was held, after quite an extended review of the authorities and the principles involved, that the statute did not modify the common-law rule upon the subject which limited the investigation for determining the testator's intention to the face of the will; and that parol evidence was not admissible for such purpose. After referring to this and other provisions of the statute, it is there said: "These provisions exhibit the intention of the legislature, not only to adhere to the safeguards which the common law provided as a protection against fraud, but rather to increase and strengthen them by new enactments. With this view, nothing short of an explicit enactment, leaving no room for construction, would lead us to the conclusion that the legislature intended to substitute for the written will, as the exponent of the testator's intentions, the loose and always uncertain evidence of acts and declarations resting in parol, and which are liable to be perverted by the frail memories, obtuse understandings, or fraudulent motives of persons called to testify after the death of the testator." The rule there announced has since remained the law of this state, and is distinctly sustained and reaffirmed in the more recent case of Estate of Stevens, 83 Cal. 323, 23 Pac. 379, where the question arose under precisely similar circumstances as in the case at bar. There the testator had left his entire estate to his wife, without mentioning his two children. In the contest for a share of the estate made by one of the latter, the widow offered to show by the declarations of the testator, made contemporaneously with the writing and execution of his will, that his children were intentionally omitted; but the evidence was not admitted. In reviewing the action of the lower court it is said: "The decision of this court in Garraud's Case has stood too long without challenge to be overruled without very strong reasons. It is sustained by very powerful reasoning in the able opinion of Justice Crockett. We think it our duty to follow it, and, in accordance with the rule there declared, we must hold that the court below did not err in excluding the offered declarations of the testator."

It is further contended, however, that the fact that the testator mentions the widows of his deceased sons, the mothers of the omitted grandchildren, is sufficient, of itself, to show, without resort to extrinsic facts, that the testator had his grandchildren in his mind, and rebuts the presumption that they were forgotten. This position is equally untenable with the first. While the authorities of other states are far from being uniform or harmonious upon the subject, it is well settled in this state that the mere fact that a testator mentions one closely related by blood, or intimately associated in family relations, with the omitted heir, does not show, as matter of construction, that the omitted one was in his mind, and that the omission was intentional. Estate of Utz, 43 Cal. 200; Bush v. Lindsey, 44 Cal. 121; Estate of Stevens, 83 Cal. 323, 23 Pac. 379. In Bush v. Lindsey, supra, the testator devised his property to the child of a deceased son, but did not mention children of the testator then living. It was held that this did not show that he had his children in mind and intended to omit them. In Estate of Stevens, supra, the testator failed to mention or provide for his daughter, but left a legacy to her child, the testator's grandson; and it was held that the fact that he mentioned his daughter's child did not necessarily imply that the daughter was in his mind, and she was permitted to take as a pretermitted heir.

We think the court was correct in its ruling upon the offered evidence and upon the construction of the will, and that the decree should be affirmed. It is so ordered.

We concur: HARRISON, J.; GAROUTTE, J.

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5 Cal. Unrep. 780

## FORD v. KENTON et al. (No. 19,436.)

(Supreme Court of California. July 2, 1895.)

Action on Note — Forgery as a Defense — Amendment of Pleadings.

1. The fact that nothing was heard of a defense that an indorsement on a note was a forgery until the maker had absconded does not estop the party from asserting it, especially where there was evidence that he did not know that he was held liable until suit was commenced.

2. In an action to hold one liable as an indorser, evidence that defendant was 75 years old, and unable to read or write; that he never authorized the indorsement, but only authorized his name to be written on an undertaking for a small amount,—is sufficient to sustain a verdict that defendant did not indorse the note.

3. The reception of inadmissible evidence over appellant's objection is not reversible error where it was afterwards stricken out on appellant's motion.

4. Granting leave to amend pleadings at the trial will not be reversed except for abuse of discretion.

Commissioners' decision. Department 2. Appeal from superior court, San Luis Obispo county; V. A. Gregg, Judge.

Action by Joseph A. Ford against Thomas Kenton and another on a note. Defendants had judgment, and plaintiff appeals. Affirmed.

Wilcoxon & Bouldin and J. M. Wilcoxon, for appellant. Graves & Graves, for respondents.

BELCHER, C. In October, 1892, A. Sittenfeld and O. Mandershied were partners, doing business at Paso Robles under the firm name of A. Sittenfeld & Co., and were indebted to numerous merchants in San Francisco in sums aggregating $8,900. They were in financial trouble, and desired an extension of time to pay their debts. To obtain such extension, they executed a promissory note for the full amount of said indebtedness, payable to the order of A. Sittenfeld, in four equal installments, in 3, 6, 9, and 12 months. The payee indorsed and delivered the note to the representative of the San Francisco creditors, and he delivered it to the plaintiff. Before the note matured, the makers thereof failed and went into insolvency. In due time the plaintiff commenced this action against the defendants, Thomas Kenton and Henry Moody, to recover the amount due on the note, alleging that they were indorsers thereof, and as such liable for its payment. The defendants answered separately, and each denied that he ever indorsed the said note. The case was tried before a jury, and a general verdict was returned in favor of both defendants, and a special verdict to the effect that Kenton did not write the signature purporting to be his on the back of the note. Judgment was thereupon entered that the plaintiff take nothing by his action against the said defendants, from which, and from an order refusing to grant a new trial, the plaintiff appeals.

The grounds relied upon for a reversal are that the verdict was not justified by the evidence, and that certain errors in law were committed by the court in its rulings. As to Kenton's signature, there was positive evidence that it was a forgery. Kenton testified that he never signed, nor authorized any one else to sign, his name on the back of the note, and never saw the paper until it was presented in court; and an expert witness as to penmanship testified that the signature was not Kenton's. No direct testimony to contradict this evidence was introduced by the plaintiff, and the only claim is "that this evidence, in the face of the fact that nothing was heard of such a defense until Sittenfeld, who procured the signature, had absconded, fails." But there was nothing even tending to show an estoppel, and there was proof that Kenton never knew he was held liable on the note until suit was commenced thereon. As to Moody's signature, it was proved that he was 75 years old, and unable to read or write even his own name, and that he never authorized his name to be written on the note, but only authorized it to be written on an undertaking for $80 or $90 which Sittenfeld was about to give to obtain an attachment against one Lilienthal. Under these circumstances, the judgment cannot be reversed for want of evidence to justify the verdict.

During the progress of the trial, numerous objections to evidence offered on behalf of defendant Moody were made by plaintiff, and the objections were overruled and exceptions reserved. Afterwards, however, on motion of plaintiff, the evidence objected to was all stricken out. Conceding, therefore, that the rulings complained of were erroneous, still we fail to see that the plaintiff was in any way prejudiced by them.

At the conclusion of the evidence, counsel for defendant Moody asked leave to amend his answer by inserting the words: "Further answering, defendant avers that he did not sign his name to or indorse his name on the promissory note set out in the complaint." The amendment was allowed, over the objection of plaintiff, and this ruling is assigned as error. It is well settled that applications for leave to amend pleadings are addressed to the sound legal discretion of the trial court. They may be made at any stage of the case, and, whether granted or refused, the action of the court will not be disturbed on appeal unless a clear abuse of discretion appears. We fail to see any abuse of discretion in the action of the court here complained of. The judgment and order should be affirmed.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

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(107 Cal. 627)

## HARRELSON v. TOMICH et al. (No. 19,514.)

(Supreme Court of California. July 2, 1895.)

PAYMENT OF TAX BY MORTGAGOR — EFFECT ON MORTGAGE.

A contemporaneous parol promise by a mortgagor to pay the tax on the mortgage does not invalidate the stipulation for interest under Const. art. 13, § 5, providing that every contract obligating a debtor to pay the tax on money loaned shall in that respect, and as to any interest specified therein, be void. Daw v. Niles, 37 Pac. 876, 104 Cal. 106, followed.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Action by W. H. Harrelson against M. S. G. Tomich and others to foreclose a mortgage. Plaintiff had judgment, and defendants appeal. Affirmed.

W. T. Williams and Reymert & Orfila, for appellants. Albert M. Stephens, for respondent.

BRITT, C. The controlling question here is whether it was competent for defendants to prove an alleged oral agreement entered into by the parties to the mortgage, for the foreclosure of which plaintiff prosecutes this action, and contemporaneously with such mortgage, whereby the mortgagor undertook to pay the taxes which might be assessed or levied upon the mortgage or the debt secured by the same; this for the purpose of defeating plaintiff's claim to interest on the debt. The court below excluded such evidence, and rendered judgment for plaintiff. Counsel agree that the question presented is substantially the same as that in Daw v. Niles, which case was yet pending in this court when the briefs were filed on the present appeal. That case having been since decided (104 Cal. 106, 37 Pac. 876) adversely to the views of defendants here, on its authority the judgment and order appealed from should be affirmed.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

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(107 Cal. 618)

## In re CARRIGER'S ESTATE. (No. 15,953.) [1]

(Supreme Court of California. July 2, 1895.)

HOMESTEAD IN LANDS HELD IN COMMON—RIGHTS OF WIDOW.

1. A homestead cannot be created by a cotenant in lands held by tenancy in common.

2. A probate court cannot set apart a homestead in lands in which the deceased could not have created a homestead in his lifetime.

Department 1. Appeal from superior court, Sonoma county; S. K. Dougherty, Judge.

Kate Carriger appeals from an order denying her petition for a homestead in the estate of William W. Carriger, deceased. Affirmed.

Ross Campbell and J. T. Campbell, for appellant. Cary Howard and Barclay Henley, for respondent.

PER CURIAM. Kate C. Carriger is the widow of William W. Carriger, deceased, and appeals from an order of the superior court, in probate, denying her petition for a homestead. After the death of the husband Solomon Carriger produced what purported to be the last will and testament of the deceased, in which he was named as executor, but the widow contested the probate thereof, and pending these proceedings said Solomon Carriger was appointed special administrator, and, said contest not having been finally determined, he has ever since been, and still is, such special administrator, and as such, by order of the court, made and returned an inventory of the estate. There was no community property, and the only real estate consisted of an unoccupied and unimproved lot, of the value of $200, and a one-ninth interest, undivided, in a tract of land containing 904 and 85-100 acres, upon which there is a dwelling house, in which the husband and wife, "during their marriage, had their residence, and made and kept their home, * * * with the knowledge and consent of the cotenants of said William in said land"; and this undivided interest, her petition alleged, does not exceed in value the sum of $5,000. The foregoing are the facts stated in the petition, so far as material to be noticed, and upon which she prayed that said undivided interest be set apart to her by the court as a homestead. At the hearing the special administrator appeared by counsel, and admitted all the allegations of the petition to be true; and upon these facts the court made an order denying her petition, and from that order this appeal is taken.

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[1] Rehearing denied.

Upon this record two questions are made: (1) Has the probate court jurisdiction to set off a homestead while the estate is in the hands of the special administrator, no general administration having at any time been granted? (2) Can said undivided interest of the deceased in said larger tract be set apart to the widow as a probate homestead? If either of these questions should be decided against appellant, the order appealed from must be affirmed; and, as it is well settled in this state that a homestead cannot be created by a cotenant in lands held by tenancy in common, it is not necessary to consider the first question above stated. In Wolf v. Fleischacker, 5 Cal. 244, it was held that a homestead could not be declared by a cotenant in lands held in cotenancy. In Giblin v. Jordan, 6 Cal. 416, it was held that land held by a husband, with his wife and child, as tenants in common, is not subject to homestead rights under the laws of this state. In Kellersberger v. Kopp, 6 Cal. 564, it was held that a conveyance of a moiety of the homestead by the husband and wife destroyed the homestead. In Seaton v. Son, 32 Cal. 481, it was held that a homestead declared by one who supposed he was the sole owner of the land, but who in fact owned seventeen undivided eighteenths, was invalid. See, also, Cameto v. Dupuy, 47 Cal. 79, and Bank v. Guerra, 61 Cal. 109. These cases involved homesteads declared under the general homestead laws, and did not arise under the Code of Civil Procedure relating to probate homesteads; but as early as Kingsley v. Kingsley, 39 Cal. 665, it was held that a homestead could not be set apart by the probate court in lands in which the deceased could not have declared a homestead in his lifetime. In that case certain lands were owned by copartners, upon one parcel of which the deceased had resided with his family. After his death the part so occupied was set off to the estate upon partition of the partnership lands, and the probate court ordered the same to be set apart to the widow, upon her petition, as a homestead. The order was reversed upon appeal. There is in the opinion in that case no suggestion that there were partnership debts, but the decision is placed squarely upon the ground that, as the deceased could not have created a homestead in partnership lands during his life, the land in question could not be assigned as a homestead to the widow, though they became the property of the estate by the partition after his death. In Estate of Noah, 73 Cal. 590, 15 Pac. 290, the case of Kingsley v. Kingsley was cited and followed. These cases were questioned in the Walkerly Case, 81 Cal. 579, 22 Pac. 888; but the question there related solely to the value of a probate homestead, viz. whether a homestead of greater value than $5,000 could be set apart by the court, and it was held that it could. Appellant contends, however, that the principles decided in the Walkerly Case, and followed in Estate of Smith, 99 Cal. 449, 34 Pac. 77, which justify the allowance of a more valuable homestead, "because," as was said in the latter case, "there was no other land of the estate out of which a homestead could have been carved, and the premises which the court did set aside were indivisible," would sustain an order granting the prayer of the petitioner in this case. In these cases last above cited there was no question but that the homestead so set apart was capable of complete, full, and perfect enjoyment, unembarrassed by an equal, common right of possession by others, nor any necessity for a partition or other separation of interests in order to its perfect enjoyment. Nor do those cases involve any real conflict with prior decisions, as was explained in the Walkerly Case. Upon the question before us, however, the order appealed from cannot be reversed without overruling the numerous decisions which hold that a declaration of homestead cannot be made upon such lands, or, at the least, without overruling those other cases which hold that a probate homestead cannot be set apart in lands in which the deceased could not have created a homestead in his lifetime. Counsel for appellant cite cases from other states which sustain their contention that a homestead may be declared in lands held in tenancy in common. The states that so hold are about equal in number with those that agree with the cases found in our own Reports. So far as the weight of authority elsewhere is concerned, therefore, no satisfactory reason for departing from our prior adjudications appears; and while a hardship may result to the appellant in this case, and may result to others in other cases, from our adherence to former decisions, it is not clear that a departure might not create hardships and inconvenience equally great. It is therefore ordered that the order appealed from be affirmed.

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107 Cal. 644

## SMITH v. BRODERICK, Auditor. (No. 15,833.)

(Supreme Court of California. July 2, 1895.)

CITIES—INDEBTEDNESS IN EXCESS OF REVENUE —DUTY OF AUDITOR.

1. Under Const. art. 11, § 18, providing that a city shall not incur liabilities in any year in excess of the revenue for that year without the consent of two-thirds of the qualified electors, a levy and assessment for liabilities so incurred is void.

2. Where a levy and assessment for payment of a claim against a city is invalid, one

for payment of a judgment on such claim will also be invalid.

3. Under Consolidation Act, § 87, requiring the auditor to be acquainted with every lawful demand upon it; and section 84, requiring him to determine whether a presented claim is legally due and unpaid, and whether its payment from the city treasury is authorized; and section 88, making him liable for all moneys illegally allowed,—a disallowance by the city auditor of a judgment on a claim which exceeded the revenue for the year in which incurred is proper.

4. An order by the board of supervisors for payment of a judgment against a city out of the general fund is not authorized by St. 1858, p. 235, conferring power on that board to order any final judgment against a city or county paid "out of the surplus fund."

In bank. Appeal from superior court, city and county of San Francisco; J. M. Seawell, Judge.

Application by A. Smith against Broderick, auditor, for writ of mandamus to compel defendant to pay claims against the city. From a judgment for defendant, plaintiff appeals. Affirmed.

Walker L. Graves, for appellant. Mullany, Grant & Cushing, Stanly, Hayes, McEnerney & Bradley, E. H. Heller, and Fox, Kellogg & Gray, for respondent.

HARRISON, J. The plaintiff is the assignee of the claims of sundry individuals for merchandise sold and delivered by them to the city and county of San Francisco, and for labor performed by them for said municipality prior to June 9, 1893; and on that day he commenced an action against the city and county to recover a judgment for the amount of said claims. Prior to the commencement of the action the board of supervisors had adopted a resolution authorizing the city and county attorney to allow judgment to be taken and entered against the city and county in all cases in the litigation of claims against it for supplies, material, and labor "where such claims are or have been examined or corrected by the finance committee of this board, through the expert of said committee," for the amounts approved by said committee. After the plaintiff had commenced his action, the expert of the finance committee reported to that body that he had examined the claims, and that the amount named in the plaintiff's suit was the correct amount due him. Thereupon the finance committee directed the city and county attorney to allow judgment to be taken against the city and county for the amount claimed by the plaintiff. June 16, 1893, after the summons issued upon the complaint in said action had been served upon the city and county, a stipulation entered into between the city and county attorney and the attorney for the plaintiff was filed in said action, in which was recited the foregoing resolution of the supervisors, and allowing judgment to be entered in favor of the plaintiff and against the defendant therein for the amount of his claim; and thereupon judgment was entered in accordance with the stipulation June 19, 1893. July 5, 1893, the plaintiff presented to the board of supervisors his demand for the amount of the judgment, and the same was duly allowed and approved, and an authorization for its payment in the form of a resolution was adopted by the board of supervisors and approved by the mayor July 26th. The authorization is in the following terms: "Resolved, that an expenditure of $3,548.03 be, and the same is hereby, authorized to be made out of the general fund, in payment to A. Smith, assignee, being for goods furnished and services rendered the city and county of San Francisco, as hereinafter stated, as per judgment rendered in the superior court in case No. 41,266, and as certified by the city and county attorney, to wit" (reciting the claims of the different assignors of the plaintiff). Thereupon the plaintiff presented this authorization to the defendant herein, who was and still is the auditor of said city and county, for his approval and allowance. The defendant refused to approve and allow the same, and the plaintiff made application to the superior court for a writ of mandate commanding him to approve and allow the demand. The defendant, in his answer to the application, set forth the foregoing facts, and also alleged that the demands and claims of the plaintiff and of his assigns were for liabilities incurred by the city and county for and during the fiscal year ending June 30, 1893; that only two of the claims of his assignors—amounting to $117.89—were payable out of the general fund, and that the others were payable out of the street-department fund; that on the 8th day of June, 1893, there had been allowed and audited, for the debts and liabilities of the city and county incurred during the fiscal year ending June 30, 1893, demands against the general fund amounting to more than the moneys paid or payable into said fund; that on said 8th day of June, 1893, there was a deficiency in said general fund, which was represented by allowed and registered demands, for the payment of which no money had been provided; that said deficiency still existed, and that there had not been, since the 8th day of June, 1893, was not then, and would not at any time be, any money of the income or revenue of said fiscal year in the treasury applicable to the payment of the two demands payable out of the general fund; that on the 1st day of July, 1893, there was in the treasury, in the street department fund, for the fiscal year ending June 30, 1893, a surplus amounting to $1,687.08, out of which there had since been paid upon demands for liabilities incurred in said fiscal year the sum of $535.75, leaving unpaid the sum of $1,156.33; that there has not been since said 1st day of July, and there never will be, in the street department fund, for the fiscal year ending June 30, 1893, any sum of money applicable to the payment of the claims and demands of plaintiff's assignors which are chargeable against and payable out of the street department fund, any greater sum or amount than said sum of $1,687.08; that the deficiency in the general fund for the fiscal year ending June 30, 1893, amounts to more than the sum of $100,000, and that there was not at the end of said fiscal year, nor has there been at any time since, nor will there be, nor has there ever been, sufficient money in the treasury of the said city and county to pay the demands incurred in said fiscal year ending June 30, 1893; and there was not on that day, nor has there at any time since been, nor will there ever be, a surplus fund for said fiscal year. The court found that the foregoing matters and facts alleged in the answer of the defendant were true as therein alleged, and further found that on June 26, 1893, the board of supervisors made provision for the payment and satisfaction of the judgment recovered by the plaintiff by levying a tax therefor, and ordering the same to be collected and set apart for the payment and satisfaction of said judgment, and that the money so levied is now in, and a part of, the general fund of said city and county. Upon these facts the court denied the application of the plaintiff, from which he has appealed.

Section 18 of article 11 of the constitution is as follows: "No county, city, town, township, board of education, or school district shall incur any indebtedness or liability in any manner, or for any purpose exceeding in any year the income and revenue provided for it for such year, without the assent of two-thirds of the qualified electors thereof, voting at an election to be held for that purpose." In Gas Co. v. Brickwedel, 62 Cal. 641, it was held by this court that the framers of the constitution meant by this section "that no such indebtedness or liability should be incurred (except in the manner stated) exceeding in any year the income and revenue actually received by such county, city, town, township, board of education, or school district; in other words, that each year's income and revenue must pay each year's indebtedness and liability, and that no indebtedness or liability incurred in any one year shall be paid out of the income or revenue of any future year." The same principle was repeated in Shaw v. Statler, 74 Cal. 258, 15 Pac. 833, and Schwartz v. Wilson, 75 Cal. 504, 17 Pac. 449. See, also, Mayrhofer v. Board of Ed., 89 Cal. 114, 26 Pac. 646. To the argument of the appellant that this construction of the section is injurious to the city and county, and a hardship upon those who in good faith contract with it, we may also quote from the language of the court in the Brickwedel Case: "We have neither the right nor the disposition by judicial interpretation to take away the wholesome restriction upon municipalities thus imposed by the constitution. Of course, in giving effect to this radical change from the pre-existing condition of things, it will not be strange if some shall be found to suffer; but it must be remembered that all are presumed to know the law, and that whoever deals with a municipality is bound to know the extent of its powers. Those who contract with it, or furnish it supplies, do so with reference to the law, and must see that that limit is not exceeded. With proper care on their part and on the part of the representatives of the municipality, there is no danger of loss." See, also, Sutro v. Pettit, 74 Cal. 337, 16 Pac. 7; McBean v. City of San Bernardino, 96 Cal. 187, 31 Pac. 49; Von Schmidt v. Widber (Cal.) 38 Pac. 682.

There is ample power under the statutes which constitute the charter of San Francisco to provide for all the contingencies that are suggested in the arguments on behalf of appellant. By the seventy-first section of the consolidation act, as amended in 1866 (St. 1865–66, p. 436), the supervisors are authorized to levy a tax that will raise such an amount of money "as the said board may deem sufficient to provide for the payment of all demands upon the treasury authorized by law to be paid out of the same." The limitation upon this power, viz., $2.35 on the $100, is conceded to be far beyond any possible necessities of the municipality. The assessment roll of property subject to taxation is made prior to the levy of this tax, and in determining the amount of the tax to be levied, the supervisors, aided by the experience of the municipality in former years, and by the estimates of the several departments of the city, are enabled to exercise a judicious consideration of the expenditures likely to be incurred during the year, and to make such provision for unforeseen emergencies as ordinary prudence would suggest. As the amount of expenditures cannot, in the nature of things, be determined with accuracy, ordinary prudence would dictate, in view of the foregoing provision of the constitution, that the tax levy should be large enough to meet any unforeseen demand, and to enable the municipality to discharge all of its obligations. If the amount of money so provided is not needed for the expenditures of the year, it can be carried forward into the next fiscal year; whereas, if the revenue thus provided is not sufficient to meet the expenditures, there is no provision for meeting the deficiency, except by the "assent of two-thirds of the qualified electors thereof, voting at an election to be held for that purpose."

The right of the appellant to the relief he seeks is not affected by reason of his demand having been reduced to a judgment. The foregoing provision of the constitution cannot be evaded by a consent on the part of the officers of the municipality that a judgment may be entered against the municipality upon an open demand which constitutes no liability against the city. The effect of the judgment was only to make definite and of record a claim which previously was open to controversy, and rested in parol, and to convert a disputed into an audited claim. Sharp v.

Contra Costa Co., 34 Cal. 291. While a judgment is sometimes said to be the highest evidence of an obligation, it does not, for that reason, in all cases, foreclose an investigation of the nature of the obligation as well as the liability which it imposes. In Clark v. Rowling, 3 N. Y. 216, it was held by the court of appeals of that state that in an action to enforce a judgment it was competent for the defendant to go behind the judgment, and show that it was rendered upon a cause of action from which he had been discharged in bankruptcy, although the discharge was not rendered until after the rendition of the judgment, and a suit upon the obligation was pending when the petition in bankruptcy was filed; that the judgment, instead of being a new debt which did not exist at the time the petition was filed, was merely the old debt in a new form; and that, for the purpose of protecting the defendant, the court would look behind the judgment, and see upon what it was founded. The same rule was afterwards laid down in this state in Imlay v. Carpentier, 14 Cal. 173, where the judgment debtor sought in equity to set aside a judgment that had been rendered against him under similar circumstances. In Betts v. Bagley, 12 Pick. 580, where the same question was under discussion by the supreme court of Massachusetts, Chief Justice Shaw said: "Although a judgment to some purposes is considered as a merger of the former promise, and as constituting a new cause of action, yet, when essential rights of parties are influenced by the nature of the original contract, the court will look into the judgment for the purpose of ascertaining what the nature of such original cause of action was." See, also, Wyman v. Mitchell, 1 Cow. 316; Owens v. Sprigg's Garnishees, 2 Md. 457; McDonald v. Davis, 105 N. Y. 513, 12 N. E. 40; Commissioners v. League, 129 U. S. 493, 9 Sup. Ct. 327; Morley v. Railway Co. 146 U. S. 169, 13 Sup. Ct. 54. In U. S. v. County of Macon, 99 U. S. 582, a judgment had been rendered in favor of the relator against the county for the amount of certain coupons upon bonds that had been issued by the county. In a proceeding to compel the county to levy a tax for the purpose of paying this judgment, it was shown that the statute under which the subscription to the bonds was made contained a limitation upon the amount of tax that might be levied by the county to pay the same, and it was held by the court that, although a judgment had been rendered upon the coupons, the judgment creditor was not entitled to a writ of mandate directing the levy of a tax for the payment of the judgment, saying: "We have not been referred to any statute which gives a judgment creditor any right to a levy of taxes which he did not have before the judgment. The judgment has the effect of a judicial determination of the validity of his demand, and of the amount that is due, but it gives him no new rights in respect to the means of payment." The same principle was again asserted in Ralls County Court v. U. S., 105 U. S. 733, although it was held inapplicable in that case, as it was in U. S. v. New Orleans, 98 U. S. 381, for the reason that at the time when the bonds upon whose coupons the judgment had been rendered were issued there was no limitation upon the power of taxation, and that the payment of the bonds as they matured, or of a judgment obtained thereon, could not be avoided by any subsequent legislation, inasmuch as such legislation would be in contravention of that provision of the constitution forbidding the impairing of the obligation of a contract. This distinction is referred to in Louisiana v. Mayor of New Orleans, 109 U. S. 285, 3 Sup. Ct. 211. In that case the relators had recovered a judgment against the city of New Orleans for damage done to their property by a mob in the year 1873. By a statute of the state which was in force when the damage was done, the city was rendered liable therefor, and at the time when the judgment was rendered, as well as when the damage was done, the city was authorized to levy taxes to an amount which would be sufficient to satisfy the judgment. Subsequently, in the year 1879, a provision was made in the constitution of the state restricting the power of the city in levying taxes, by which the relators were prevented from collecting their judgments, as the funds authorized to be levied were exhausted by the current expenses of the city. Thereupon they applied for a mandamus to compel a levy by the city of taxes to meet their judgments at a rate which was permitted when the damage was done for which the judgments were rendered. The supreme court of the United States held that they were not entitled to the writ; that the judgments held by the relators did not rest upon contract in any respect; and that the obligation of the city had no further element of contract in it because merged in the judgment than it had previously possessed, and that the limitation in the constitution upon the extent to which the city could exercise the power of taxation did not infringe the provision forbidding the impairment of the obligation of a contract. Commenting upon the inapplicability of this provision of the constitution, the court said: "The cases in which we have held that the taxing power of a municipality continues notwithstanding a legislative act of limitation or repeal are founded upon contracts, and decisions in them do not rest upon the principle that the party affected in the enforcement of his contract rights has been thereby deprived of any property, but upon the principle that the remedies for the enforcement of his contracts existing when they were made have been by such legislation impaired. The usual mode in which municipal bodies meet their pecuniary contracts is by taxation, and when, upon the faith that such taxation will be levied, contracts have been made, the constitutional inhibition has been held to restrain the state from repealing or diminishing the power of the corporation, so as to deprive the holder of the contract of all adequate and efficacious remedy." In U. S. v. County of Macon, supra, the court said: "Thus, while the debt was authorized, the power of taxation for its payment was limited by the act itself, and the general statutes in force at the time, to the special tax designated in the act, and such other taxes applicable to the subject as then were or might thereafter by general or special acts be permitted. No contract has been impaired by taking away a power which was in force when the bonds were issued. The general power of taxation to pay county debts is as ample now as it was when the railroad company was incorporated and the debt incurred. The difficulty lies in the want of original power." Upon these principles the same provision of the constitution has no application here. The contracts forming the basis of the plaintiff's judgment were not entered into upon the faith that any tax would be levied with which to meet them, but with full knowledge that the municipality was prevented from paying them out of any fund other than the revenue that had already been provided for the fiscal year ending June 30, 1893. None of the remedies which then existed for the enforcement of these contracts have been in any respect impaired. If at the time of entering into the obligation there is a limitation upon the extent to which a municipality may enter into such obligation, or upon the extent of taxation for the payment of its liability, or upon the mode in which such payment is to be made, there is no violation of any provision of the constitution, or of any obligation of the municipality, in insisting that the person dealing with it shall be bound by the terms of the law as they existed when he entered into his dealings with the municipality. The same reasons which would justify the refusal of a writ of mandate to enforce the collection of a judgment by the levy of a tax which is forbidden by law require the refusal of the writ when sought to enforce a judgment by applying thereto, in contravention of an express provision in the constitution, moneys that have been already collected and are in the treasury.

The act of 1858 (St. 1858, p. 235), invoked on behalf of the appellant, is not available to him in the present case. That act conferred power upon the board of supervisors to "order paid any final judgment against said city and county, out of the surplus fund," whereas the authorization in the present case is that the judgment be paid out of the general fund. The surplus fund is provided for in section 76 of the consolidation act, and "consists of any moneys belonging to the general fund, remaining in the treasury after the satisfaction of all demands due and payable, which are specified in the first fourteen subdivisions in section ninety-five." The collection in the subsequent fiscal year of a tax levied by the board of supervisors for the express purpose of paying this judgment did not give to the plaintiff any additional right to the payment of his claim, or any right to the money thus collected. The provision of the constitution limiting the power of the municipality in incurring a liability to the income and revenue "provided for it for such year," means that only the income and revenue that had been provided for the expenditures of the year prior to incurring the liability can be appropriated for the payment of such expenditures. To hold that any deficiency in the revenues of one year can be met from taxes collected in a subsequent year, under the guise that they had been collected for the express purpose of meeting such deficiency, would sweep away the entire restriction which the constitution intended to place upon municipal extravagance.

Unless it was the duty of the auditor to allow the claim of the appellant, the writ of mandate cannot be allowed. Von Schmidt v. Widber, supra. By section 87 of the consolidation act that officer is required "to be constantly acquainted with the exact condition of the treasury and every lawful demand upon it." By section 84 of the same act, whenever a claim against the treasury is presented to him for auditing, he must "satisfy himself whether the money is legally due and remains unpaid, and whether the payment thereof from the treasury of the city and county is authorized by law, and out of what fund." Section 88 declares that, if he allow any demand on the treasury not authorized by the act, he shall be liable to the city and county individually, and on his official bond, for the amount so illegally allowed. Inasmuch, therefore, as it appeared from the facts found by the court that the claim of the appellant was not a legal demand upon the treasury, which he had the right to have paid out of funds therein at the time he presented the same to the auditor, the auditor was justified in refusing its allowance. The judgment is affirmed.

We concur: McFARLAND, J.; GAROUTTE, J.; VAN FLEET, J.; HENSHAW, J.; TEMPLE, J.

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108 Cal. 115

## In re SMITH'S ESTATE. (No. 15,754.)

(Supreme Court of California. July 12, 1895.)

ELECTION BY WIDOW—CLAIMS AGAINST EXECUTOR'S ESTATE—DEDUCTION ON DISTRIBUTION.

1. A finding declared by the court to be drawn from facts previously stated must fail if they do not support it.

2. The will of a husband devising community estate gave the wife a life estate therein, and stated that it was "made with full knowledge of property rights of husband and wife, and with the knowledge and consent of my said wife." The widow declared that she wished the will to stand, and afterwards conveyed "all her interest in said property mentioned in said

will as vesting a life estate therein upon said widow." *Held*, not to show an election to take under the will, so as to create an estoppel, unless the widow had full knowledge of the facts concerning the properties and of her right to elect.

3. Where J., an executor and legatee who received moneys of the estate, died, and W., surviving executor, presented no claim against his estate for the same, the court cannot, on the death of W. after the time for presenting claims against the estate of J. had expired, deduct upon distribution the amount collected by J. out of the share due his estate.'

In bank. Appeal from superior court, San Benito county; James N. Breen, Judge.

Petition by Robert Cardiff, administrator with the will annexed of Robert Smith, for a settlement and distribution of decedent's estate. From an order settling the administrator's final account, and from a decree of distribution the administrator and the widow appeal. Order settling the amount affirmed, and decree of distribution reversed.

N. C. Briggs and John C. Hudner, for appellants. Montgomery & Jefferson, for respondent.

HENSHAW, J. Appeals by the administrator with the will annexed and by the widow from the order settling the administrator's final account, and from the decree of distribution. Robert Smith died in April, 1891, and by his last will bequeathed one dollar to each of his four grandchildren, and the residue of his personal property among certain of his children,—to his son, William R., four-tenths thereof; to his son, John A., three-tenths thereof; to his daughter, Jessie, three-tenths thereof. Said will provided as follows: "Thirdly. I give and bequeath to my daughter, Mrs. Mary Cardiff, now of San Benito county, California, a life estate in my home ranch, in San Benito county, California, the same being described as follows, to wit, being the southwest quarter of section 6, Tp. 15 S., range 7 E., M. D. M.; also all livestock, farming utensils, household furniture, and, in fact, all personal property that may be on said ranch, excepting money on hand, securities and other evidences of money due me,—to have and hold and use during her natural life as her own, and at her death to pass in fee to her sons, Robert Cardiff and Geo. H. Cardiff, and to their heirs in fee simple. But in the event I survive my said daughter, Mary Cardiff, then at my death said property to pass directly to her said sons, Robert and George Cardiff. This bequest, however, is not to take effect during the lifetime of my wife, Mary Smith, who is now residing with me on the above-described property; and, in the event she survives me, she is to have full and free use and absolute control of said real property and personal herein referred to, and after her death to pass as above provided. This is made with full knowledge of property rights of husband and wife, and with the knowledge and consent of my said wife." The sons, John A. and William R., were named as executors. Both qualified, and both, after service, died before settlements of their accounts. In July, 1893, the Robert Cardiff above named was appointed administrator with the will annexed, and in December of the same year filed, with his final account, a petition praying for its settlement and the distribution of the estate. In January next the widow of the testator filed her written claim and notice that all of the property of her husband was community property, and that she claimed one-half thereof as being beyond his power of testamentary disposition. Thereupon, the widow of the son, John A., as executrix of her husband's estate and as one of his heirs, filed her written objections to the account and to the claim of Mary Smith, alleging that Mary Smith had previously elected to take under the will.

The court found that all of the property of the estate was community property; that Mary Cardiff had died since the death of testator, leaving her two sons, above named, her sole heirs; "that, since the death of said Robert Smith, said Mary Smith, his widow, conveyed all her interest in said property, mentioned in said will as vesting a life estate therein upon said widow, to said Robert and George Cardiff;" and, finally, "that said Mary Smith, said widow of Robert Smith, after the death of her said husband, and prior to January, 1894, said to her grandson, Robert Cardiff, 'that she wished the will to stand.' She has remained in possession of said real property, and said personal property upon and about said real property, being the property described in the will as bequeathed to her for a life estate, until in the year 1893, when she conveyed all her interest therein as hereinbefore stated." As a conclusion of law, separately stated, the court held: "From the foregoing facts the court concludes that said Mary Smith, widow of said Robert Smith, deceased, had elected to take under the said will, and is not entitled to a share of the moneys, securities, or notes referred to in said will."

The will of Robert Smith was one whose terms forced an election upon the widow. While courts will presume that a testator meant to deal with that property only over which he had power of testamentary disposition, this presumption cannot prevail against the unequivocal intention expressed in the will. That intention, when it can be deduced from the instrument, governs its construction. Morrison v. Bowman, 29 Cal. 347. Of two permissible constructions that which favors the conclusion that the testator was disposing only of his own moiety of the community property will be adopted. This is the scope of the doctrine in the cases of Silvey's Estate, 42 Cal. 210, In re Gwin's Estate, 77 Cal. 313, 19 Pac. 527, and Estate of Gilmore, 81 Cal. 240, 22 Pac. 655. Here, however, the testator undertakes in terms to dispose of all the property of the community. Any attempt to give effect to the clear provisions of the instrument would work an invasion of the widow's rights as the surviving member of the community. And this is done, so the instrument declares, with full knowledge of those rights, and with the knowledge and consent of the wife. The declaration that the disposition is made with the knowledge and consent of the wife does not, of course, bind her; but it aids in showing the intent of the testator, which intent, read into the terms of the will, was sufficient to put the widow to her election. Etcheborne v. Auzerais, 45 Cal. 121; Estate of Stewart, 74 Cal. 103, 15 Pac. 445. That election, declared upon distribution, was good and sufficient, unless, by her former acts in dealing with the property, she was estopped from making it. The previous election, which John's widow pleaded had been made by her mother-in-law, is therefore to be tested by the rules of estoppel. Bigelow, Estop. 562. The court in probate seems to have so viewed the matter, since it found the acts of the widow, and concluded from them that she had elected to take under the will. The result reached was properly placed among the conclusions of law, and will not be disturbed. Hayne, New Trial, § 242; Society v. Burnett (Cal.; No. 14,553) 39 Pac. 922. But in this case it matters little whether it be treated as a conclusion or a finding. For, if regarded as a finding, it is declared by the court to be drawn from the facts previously stated, and, if they do not support it, under the rule in People v. Reed, 81 Cal. 70, 22 Pac. 474, it must fall.

Before the widow can be denied her right to elect upon distribution it must be found that, with the knowledge of her rights, by unequivocal acts evincing her intent, she has so dealt with the property left her by the will that it would be inequitable to permit her to avoid these acts and disclaim her intent. Professor Pomeroy, in language adopted by this court in Burroughs v. De Couts, 70 Cal. 371, 11 Pac. 734, thus enunciates the principle: "To raise an inference of election from the party's conduct merely, it must appear that he knew of his right to elect, and not merely of the instrument giving such right, and that he had full knowledge of all the facts concerning the properties. As an election is necessarily a definite choice by the party to take one of the properties and to reject the other, his conduct, in order that an election may be inferred, must evince an intention to elect, and must show such an intention. The intention, however, may be inferred from a series of unequivocal acts. * * * Where a widow is required to elect between a testamentary provision in her favor and her dower, any unequivocal act of dealing with the property given by the will as her own, or the exercise of any unmistakable act of ownership over it, when done with knowledge of her right to elect, and not through a clear mistake as to the condition and value of the property, will be deemed an election by her to take under the will and to reject her dower." Pom. Eq. Jur. § 515; Bigelow, Estop. p. 568. The acts of the widow, as found by the court, do not establish this implied election or election by estoppel. An examination of the cases which find that an election has been exercised by reason of a deed discloses the fact that the deed is of property to which, except for the will, the grantor would have no title, and thus the deed becomes strong evidence of intent to take by the will, and for obvious equitable considerations the grantor will not be allowed to deny it. Such is not the present case. It is not found that she recognized by her deed the life estate in the land devised to her. She conveyed "all her interest in said property mentioned in said will as vesting a life estate therein upon said widow." The language leaves something of lucidity to be desired, but, however, interpreted, upon the death of her husband she was the owner of an undivided one-half of all of that real estate, and her deed was sufficient to convey that title, and for aught that appears was meant to do so. She remained in possession of the property, but it was the home of the family, and for a limited time at least she was entitled to remain in possession, and it is not found that she continued that possession under claim of the estate devised to her by will. She said to her grandson "that she wished the will to stand," but this is without weight or value unless it be further shown that she had full knowledge of the facts concerning the properties, and of her right to elect at the time she made the statement.

The court found that, during the executorship of John A. Smith, he received $264.65, moneys of the estate, and disbursed the sum of $17.50, leaving in his hands at the time of his death $247.15 belonging to the estate of deceased, which was never paid over. When John A. died his estate went into probate. His brother William continued as executor of the father's estate, but presented no claim against the estate of the brother. When William in turn died the time for presenting claims against the estate of John A. had expired. The court distributed to the estate of John A. the three-tenths of the residue of the personal property devised to him, and did not deduct the $247.15 from his distributive share. John A. held the estate's money as trustee, and upon his death, being indebted to his beneficiary, the estate, its position became no better than that of any other creditor unless it was able to pursue the precise trust fund. Lathrop v. Bampton, 31 Cal. 23; Roach v. Caraffa, 85 Cal. 444, 25 Pac. 22. It was the duty of William, as surviving executor, to have presented a claim against his brother's estate, or to have compelled an accounting of his brother's trust in equity. Allgier's Case, 65 Cal. 230, 3 Pac. 849; Chaquette v. Ortet, 60 Cal. 594. The court had no power to deduct the amount from the share of the estate of John A. upon distribution. Assets cannot be collected upon distribution (Estate of Cook, 77 Cal. 232, 233, 17 Pac. 923, and 19 Pac. 431), and the $247.15 was not an advance to the devisee, so that this case would come within the principle of Estate of Moore, 96 Cal. 522, 31 Pac. 584.

The order settling the administrator's account is affirmed, and decree of distribution is reversed.

We concur: TEMPLE, J.; GAROUTTE, J.; HARRISON, J.; VAN FLEET, J.

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107 Cal. 518

## MALONE v. ROY. (No. 15,684.)

(Supreme Court of California. June 27, 1895.)

MORTGAGES — INTEREST AFTER MATURITY — MORTGAGEE IN POSSESSION—IMPROVEMENTS—TRESPASS—DAMAGES.

1. Where the interest on a mortgage loan is computed to the time it will be due at a greater than the statutory rate, and added to the principal, the loan, after maturity, will bear only the legal rate.

2. A mortgagee cannot justify his possession of the mortgaged premises, so as to recover for improvements erected thereon, by asserting that he held possession from the mortgagor, where it appeared that, as security for a prior indebtedness, the land was leased to another and the rent paid to the mortgagee, but the mortgagor, in attempting to resume possession at the termination of said lease, and after the satisfaction of the prior indebtedness, was ousted by the mortgagee.

3. The fact that the mortgagee did not make improvements until after he obtained judgment in the lower court quieting his title will not entitle him to recover for their value, where the mortgagor appealed and the judgment was reversed.

4. The measure of damages in an action against a mortgagee for being wrongfully in possession is the fair value of the rents and profits, with interest on each year's income, irrespective of what the mortgagor might have realized had he been in possession.

5. A mortgagee in possession will not be allowed for improvements, further than is necessary to keep the premises in repair.

6. Where a deed absolute in form was in fact a mortgage, and the mortgagee held possession of the premises without the mortgagor's consent, he cannot recover for improvements because he was of opinion that his possession was lawful.

7. The measure of damages for trespass in cutting timber is the amount that was received for it, or if that was less than its value, then the value, with interest from date of sale.

Commissioners' decision. Department 1. Appeal from superior court, Del Norte county; James E. Murphy, Judge.

Action by John Malone against George G. Roy to foreclose a mortgage. Plaintiff had judgment, and defendant appeals. Reversed.

A. J. Bledsoe, for appellant. R. W. Miller, for respondent.

HAYNES, C. This action was brought by Malone against Roy to foreclose a mortgage. The plaintiff had judgment, and defendant appealed therefrom and from an order denying a new trial. On January 4, 1888, the defendant was the owner of 360 acres of land, under a contract of purchase, upon which he owed $6,550, and on that day he obtained that sum from the plaintiff, applied it to the payment of the balance due upon the land, obtained a conveyance to himself, and, to secure the plaintiff for the moneys so obtained, executed to the plaintiff a deed, absolute in form, for the expressed consideration of $7,532.50, and the plaintiff at the same time executed and delivered to the defendant his agreement to reconvey the premises to the defendant upon payment of said sum of $7,532.50 on January 4, 1889. In March or April, 1889, Malone, claiming said deed to be an absolute conveyance and not a mortgage, brought an action against Roy to quiet his title to said land, and on appeal this court held that the transaction constituted a mortgage. Malone v. Roy, 94 Cal. 341, 29 Pac. 712. Malone thereupon brought this action to foreclose said mortgage. Nearly all the findings are attacked, and numerous errors of law occurring on the trial are specified.

The case involves three principal questions, which are covered by the specifications, and the findings affecting these questions are in substance as follows: That the sum secured by the mortgage is $6,550, and interest thereon from January 4, 1888, at the rate of 15 per centum per annum; that Malone entered into possession of said premises under the deed from Roy, with his consent, on or about January 4, 1888, with the understanding that, if Roy should fail to purchase the property within the time limited in the paper executed by Malone, his title would become indefeasible; that Malone, being in possession, in good faith, after January 4, 1889, made valuable repairs and improvements to the amount of $2,232; that the rents and profits for the year 1888 were received by defendant; that the rents and profits since January 4, 1889, to the date of the findings and judgment, May 31, 1893, received by the plaintiff, were $2,650, and that plaintiff also received $500 for timber sold, and after charging the plaintiff with the value of the rents and profits, and timber sold, and crediting him with the amount of repairs and improvements, found there was due from the defendant $10,954, and a decree was entered accordingly. Other facts will be noticed as we proceed.

1. The court erred in its allowance of interest. The deed and defeasance constituted a mortgage to secure the payment of $7,532.50, due January 4, 1889. That sum was made up of $6,550, the money loaned, and interest thereon for one year at 15 per cent.; but there was no agreement as to the rate of interest beyond the date at which the money became due, and therefore the statutory rate of 7 per centum per annum is all that can be recovered after that date. If Malone had lent the same amount, and taken Roy's note for $7,532.50, payable one year after date, without interest, thus including the interest at the rate of 15 per cent., and made no pro-

vision as to the rate after maturity, no one would contend that more than 7 per centum per annum could be collected after maturity. Appellant insists, however, that Roy did not promise in writing to pay any rate of interest, and therefore the principal sum upon which to compute interest is the $6,550 loaned, and that interest at the rate of 7 per cent. is chargeable from the date of the loan upon that sum, and not upon the amount stated in the defeasance. But the defendant could not well insist that the instrument he received from Malone was effective to convert the deed into a mortgage, and then deny that it fixed the amount to be paid on January 4, 1889, to satisfy the mortgage.

2. As to the allowance made to the plaintiff for repairs and improvements, the findings do not show the amount expended for each separately. Respondent concedes that if his possession were wrongful he would not be entitled to be reimbursed for improvements, but relies upon the finding of the court, that he was put in possession by appellant, to sustain his claim that he was rightfully in possession. The facts upon which that finding seems to be based were that, prior to the transactions here involved, the defendant used the land in question as a dairy farm, having thereon about 70 cows and other personal property, and was indebted to the plaintiff in the sum of about $2,000, and to secure that indebtedness had given the plaintiff a bill of sale or pledge of the cows and other personal property, and by an arrangement between plaintiff and defendant, and for the better security of the plaintiff as to the pledged property, the ranch, cows, and other personal property so pledged were leased to one Giacomini, the lease being executed by the plaintiff, and the rent being paid to him and credited to defendant upon said prior indebtedness. The lease was made January 20, 1888, and expired November 1st the same year. A subsequent arrangement was made by which the tenant remained until March 4, 1889. In February, 1889, the plaintiff took possession by one of his sons without the consent of defendant, who went upon the ranch March 4th for the purpose of taking possession, but his goods were removed from the house by plaintiff, and a proceeding was commenced against him for forcible detainer. Plaintiff then commenced an action against the defendant to quiet title, and in the lower court obtained judgment, and the defendant appealed to this court and the judgment was reversed, as already stated. It is clear from the testimony that whatever possession the plaintiff had was in connection with the lease for the better security of the plaintiff as to another and wholly distinct liability from that here in question, and which was fully satisfied by the rent paid by Giacomini and a sale of some of the cows under the pledge, and that no possession was at any time given under the mortgage. The entry of defendant as soon as the tenant vacated the premises, his answer to the action brought to quiet title that the deed was given as security and was in fact a mortgage, and his successful appeal to this court in that case, negative any consent on his part to the possession of the premises by the plaintiff. In this action, brought to foreclose a mortgage, the plaintiff is estopped from saying that the mortgage he seeks to foreclose gave him any right to the possession, and, as he was not in possession under the deed by the consent of the plaintiff, his possession was without right, and therefore wrongful.

It is said, on behalf of respondent, that he made no improvements until after he obtained judgment in the superior court quieting his title; but that does not aid him. He was informed by the proceedings in that case that the defendant denied his ownership, and insisted that the deed was given as security only, and if he proceeded to make improvements as though he were owner, in the face of defendant's appeal, he can only reflect upon his own rashness. That defendant saw him make these improvements does not estop him from contesting his liability for them, as by his refusal to acquiesce in the judgment against him, and by his appeal therefrom, he constantly denied the right of possession and ownership of the plaintiff, and is unaffected by the erroneous judgment against him. "The ordinary rule in respect to improvements is that the mortgagee will not be allowed for them further than is proper to keep the premises in necessary repair. Unreasonable improvements may be of benefit to the estate; but, unless made with the consent and approbation of the mortgagor, no allowance can be made for them. The mortgagee has no right to impose them upon the owner, and thereby increase the burden of redeeming." Jones, Mortg. (5th Ed.) § 1127. The case of Mahoney v. Bostwick, 96 Cal. 53, 30 Pac. 1020, is directly in point. That was a case where a deed was given as security, and the grantee ousted the grantor and held possession. The court said: "The court did not err in refusing to credit defendant with the value of the checks, ditching, and fencing placed by him upon the premises while he was wrongfully in possession and holding adversely to the plaintiff." At common law a mortgage conveyed the fee, subject to be defeated by the performance of the conditions expressed in it; but if the conditions were not performed the mortgagee had a right of entry, and when he entered for "conditions broken" his entry and possession were lawful, and the general doctrine in regard to the rights of a mortgagee in possession grew up under that system. But under our statute, as well as that of many other states, a mortgage does not convey the title, but makes it a mere chattel, a lien; the fee and right of possession remaining in the mortgagor, both before and after condition broken. As was said by the supreme court of Minnesota: "The only logical rule is that, to constitute 'a mortgagee in possession,' the mortgagee must be in possession by reason of the agreement, or assent of the mortgagor or his assigns that he have the possession under the mortgage, and because of it." Rogers v. Benton, 39 Minn. 39, 38 N. W. 765. Or, as was said by the supreme court of Michigan, by Campbell, J.: "If the mortgagee in possession can insist on retaining it, his right must depend on his contract, and, as already suggested, should be capable of enforcement. There can be no interest in lands which cannot be enforced somewhere." Newton v. McKay, 30 Mich. 380, 383. As the plaintiff was not in possession as mortgagee, he cannot be allowed either for repairs or improvements; for, if he were not in as mortgagee, he must have been in either as tenant or disseisor. If in as tenant, he could only make repairs after notice to the owner, and the failure of the owner to make them; and there is no claim made on that ground. Raynor v. Drew, 72 Cal. 307-312, 13 Pac. 866.

3. Appellant contends that the value of the rents and profits found by the court is much less than the evidence justified. The evidence on this point is conflicting, and need not be discussed in this connection, as the judgment must be reversed on the other grounds above mentioned. The court found the value of the rents and profits from January 4, 1889, to the date of the judgment, May 31, 1893, to be $2,650. This would be at the rate of $600 per annum. This sum ($2,650), less $2,232 found to have been expended for improvements and repairs, was credited to defendant as of the date of the judgment, without any allowance of interest. As the difference was not large, the effect on the result is not great. Interest on defendant's debt should be computed from January 4, 1889, down to the date of the judgment at 7 per centum per annum, without rests, and the plaintiff should be charged interest at the same rate upon the annual value of the rents and profits for each year from the expiration of the year for which it is allowed to the date of the judgment, and upon the $500 received for timber sold from the date of the sale. That, in a court of equity, interest should be charged upon the rents and profits under the circumstances here existing, see Pujol v. McKinlay, 42 Cal. 559.

We cannot consider each of the assignments of errors of law, nor is it necessary. A few general observations upon questions that will necessarily arise upon a new trial is all that is required. The rate of interest to be charged the defendant, and the principal sum upon which it is to be computed, is conclusively fixed by the defeasance and the statute. The question as to how or when the plaintiff obtained possession of the land, the fact of his possession being admitted in his complaint, is irrelevant, except as to the question of repairs and improvements; and what has been said on that subject sufficiently indicates the character of the evidence which is relevant and competent upon that point. The opinion of the plaintiff that he was the owner of the fee, or had a right to the possession, is irrelevant. He could not be in possession rightfully under a deed which conveyed no title, otherwise than by the consent of the defendant for some purpose connected with the mortgage security. If he were put in possession, either impliedly or expressly, for the purpose of perfecting his security under the pledge of the personal property for another and distinct indebtedness, and the defendant did not afterwards consent to plaintiff's possession for some purpose connected with the mortgage here sought to be foreclosed, his possession is wrongful, and his claims for repairs, as well as improvements, must be disallowed. Upon the question of rents and profits, what the plaintiff did or did not realize from the use of the land, or what the defendant thinks he could or might have realized if he had personally occupied the land, is immaterial. The question is, what is its fair rental value annually, during the time it has been occupied by the plaintiff, for the purpose for which it was occupied at the time plaintiff took possession? As to the timber sold from the ranch, the plaintiff is liable for what he received for it, and if the value of the timber at the time of the sale was more than he received, then for such value, with interest from the date of sale.

The judgment and order appealed from should be reversed.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed.

107 Cal. 656

## LABS v. COOPER. (No. 18,345.)

(Supreme Court of California. July 3, 1895.)

PUBLIC IMPROVEMENTS—DIAGRAM.

1. A recorded diagram, in a proceeding for assessments for street work, in which there was nothing to indicate the points of the compass, whereby an owner could determine, from an inspection of the diagram and assessment, where upon the map his land was plotted, is insufficient.

2. The fact that the lot may be identified by reference to the city's official map will not cure the defect, where there was nothing in the record of assessment referring to said map, and because the court will not take judicial notice of such map, nor is the property owner chargeable with knowledge of it.

Department 2. Appeal from superior court, Sacramento county; Matt F. Johnson, Judge.

Action by B. Labs against John F. Cooper to foreclose the lien of an assessment for street work. Defendant had judgment, and plaintiff appeals. Affirmed.

Clinton L. White, for appellant. Armstrong, Bruner & Platnauer, for respondent.

HENSHAW, J. Appeal from the judgment rendered in favor of defendant in an action to foreclose the lien of an assessment for street work. The court found in favor of the plaintiff upon all his averments, excepting that of the recordation of the diagram. The diagram, as recorded, omitted the arrow and the initial letters N., E., S., and W., indicating the points of the compass. The court concluded that there was no sufficient description of the property contained in the recorded assessment and diagram, and passed judgment accordingly. The arguments here urged in support of the sufficiency of the diagram were, with few exceptions, before this court in San Francisco v. Quackenbush, 53 Cal. 52, and Norton v. Courtney, Id. 691, and there held insufficient. The purpose of the recordation being to carry notice, by an inspection of the record, to the owner and all others having dealings with the property, that it is subject to a lien, it follows that any variance between the original and recorded instruments which defeats this purpose is material. Per contra, if the diagram and assessment as recorded do contain a sufficient description, then, in this regard, any departure from the original form will be held trifling and immaterial. In the diagram as recorded, in the above cases, the relative locations of the streets to each other were shown, as were also the relative locations, frontages, and dimensions in feet of the lots assessed, and the lots bore appropriate assessment numbers. No difficulty would have been experienced by any one in fixing with mathematical accuracy the precise position of any piece of land sought to be charged, if only the points of the compass had been indicated. But without this indicator an owner could not determine from an inspection of the diagram and assessment where upon the map his land was plotted, nor whether, in fact, it was delineated at all. It is true he could determine these matters by a resort to outside aids, but the rule, "Id certum est, quod certum reddi potest," has no application to descriptions under proceedings in invitum. In such cases the description must be sufficient to enable the owner to determine from an inspection of it whether his land is sought to be subjected to the lien. The doctrine of these cases has been apparently modified in the later cases of Whiting v. Quackenbush, 54 Cal. 306; Williams v. McDonald, 58 Cal. 527; Brady v. Page, 59 Cal. 52; Williams v. Savings & Loan Soc., 97 Cal. 122, 31 Pac. 908,—but the modification is based upon the view of the court, expressed in each case, that the diagram is sufficient, because the court must take judicial notice of the streets of San Francisco, their relative locations, and the directions in which they extend. St. 1858, pp. 52, 56. But in the case at bar the description cannot be held sufficient even upon this ground. In the assessment the land is described as "all lot 6, block D and E—16 and 17," and upon the diagram a lot is numbered 6. This, appellant contends, is sufficient, because it contains the number of the lot according to the official map of the city of Sacramento. There is, however, nothing in the record to show this; the assessment does not refer to any official map; we cannot take judicial notice that there is such a map; and, what is of still more consequence, the property owner is not chargeable with knowledge of it. We conclude, then, that the recorded diagram and assessment contain no sufficient description of the land to be charged, and that the omission of the indicating arrow forms a material variance between the original and recorded diagram. The judgment is affirmed.

We concur: McFARLAND, J.; TEMPLE, J.

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108 Cal. 31

## In re HOWARD. (Cr. 37.)

(Supreme Court of California. July 8, 1895.)

CRIMINAL LAW—PROVING EXCEPTION.

Where the commissioner's report in a proceeding under Pen. Code, § 1174, to prove an exception, presents a conflict of testimony as to whether the language complained of was in fact used by the prosecuting attorney, the action of the trial court in striking it from the bill of exceptions must be sustained.

In bank. Appeal from superior court, Tulare county; Wheaton A. Gray, Judge.

John E. Howard was convicted of murder, and moves to prove an exception. Application denied.

Chas. G. Lamberson and H. C. Lillie, for appellant. Atty. Gen. Fitzgerald, for respondent.

GAROUTTE, J. This is an original proceeding, brought under section 1174 of the Penal Code, for the purpose of proving an exception. According to the petition, the defendant, Howard, was on trial, charged with murder, and during the closing argument the assistant district attorney used certain language to the jury, which, it is claimed, was unjustified by the evidence, and seriously objectionable to defendant's rights, and to which objection was made at the time, and an exception noted. This alleged language, objection thereto, and exception, were incorporated into defendant's proposed bill of exceptions to be used upon appeal, and the bill so presented to the judge for settlement. But the judge refused to settle the same, as presented, and struck therefrom the purported language of the prosecuting officer, and the exception thereto, upon the ground that no such language was used by the attorney during the argument, and thereupon settled the bill. Upon the filing of the present petition this court ordered a reference to a commissioner to take evidence as to the truth of the allegations of the petition bearing upon the language claimed to have been used. The commissioner took the evidence, and has reported the same in full to this court, without conclusions as to the ultimate fact. Upon examination of the evidence placed before us, there appears to be a square and irreconcilable conflict as to whether or not the language set out in the petition was used by the prosecuting officer in his address to the jury. Under such circumstances the action of the trial court in settling the bill of exceptions as it was settled must be sustained. For the foregoing reasons, petitioner's application is denied.

We concur: McFARLAND, J.; HARRISON, J.; HENSHAW, J.

(107 Cal. 610)

## HULFORD et al. v. NEALE. (No. 15,808.)

(Supreme Court of California. June 29, 1895.)

WAREHOUSEMEN—CHARGES.

Plaintiffs were warehousemen, and stored wheat according to a custom whereby they charged more for the first month it was in storage than the succeeding months, the difference being for "carting" the wheat. Plaintiffs sold out to defendant, and the latter agreed to collect, without charge, plaintiffs' claims for storage. *Held* that, in determining the amount due, the extra charge for the first month belonged to plaintiffs, and should not be distributed pro rata over the entire time the wheat was stored.

Department 2. Appeal from superior court, Alameda county; F. B. Ogden, Judge.

Action by E. W. Hulford and another against A. S. Neale to recover moneys collected for plaintiffs. Plaintiffs had judgment, and defendant appeals. Affirmed.

John H. Dickinson, for appellant. T. C. Coogan, for respondents.

McFARLAND, J. This action was brought to recover certain moneys alleged to have been collected and received by defendant from divers persons for and on account of plaintiffs. Judgment was rendered for plaintiffs in the sum of $2,038.65. Defendant appeals from the judgment and from an order denying a motion for a new trial.

The plaintiffs were conducting a warehouse business, and in February, 1893, they agreed to sell the business, including the good will, leases for warehouses, office furniture, and certain other personal property used in the business, to the defendant. The transaction was completed and possession given to defendant on March 1, 1893. At that time there were large quantities of grain and general merchandise stored in the warehouses, upon which money was due to plaintiffs for storage. This grain and merchandise had been taken by plaintiffs under the system called "season storage"; that is, a certain sum per ton was charged for the first month's storage, and a smaller sum for succeeding months, until a certain amount agreed upon had accrued, after which there was no further charge until the end of the "season," which was the 1st day of the following June, and the owner of the property stored had the right to allow it to remain in the warehouse until said 1st of June. For instance, if the owner was to pay 50 cents per ton for the first month, and 25 cents for the succeeding months, until the whole should amount to $1.50 per ton, then, after the expiration of five months, he could have his property remain in the warehouse until June 1st following, without further charge. At the time defendant took possession,—on March 1st,—the storage on the property which had been stored with plaintiffs was due, and they had a lien upon it for said storage; and in the written contract between the parties it was agreed as follows: "Said party of the second part [defendant] does also hereby agree that he will collect, without making any charge therefor, all claims and liens that the said parties of the first part [plaintiffs] have or hold against any property now stored at said warehouses, and deliver the amount so collected to them from time to time, promptly, upon the collection thereof, said claims and liens in all cases to be collected before the delivery of said property to the owners thereof." The court found that of these claims and liens defendant did collect the sum of $4,053.74, and that he had paid plaintiffs $1,588.90, and no more; and these findings are clearly supported by the evidence. Under these findings the plaintiffs would have been entitled to judgment for $2,464.84; but the court also found that said grain and merchandise remained for a time, and "occupied certain space in said warehouses, and was taken care of by defendant, and he performed work in delivering the same," and for this defendant was allowed $426.19, which reduced the amount of the judgment to $2,038.65. The correctness of this last finding need not be inquired into, as it was to defendant's advantage.

The main contention of appellant is directed to the point that certain charges for "cartage" were erroneously allowed respondents. It seems that under the season storage system the larger charge is made for the first month on account of the cartage, or expense of hauling the goods to the warehouse. Upon this subject there was some testimony, which was not very clear, and calculations somewhat difficult to follow; but it appears that the cartage was merely represented in the charge for storage for the first month, and that no separate charge was made for it. Therefore, no matter how it be considered,—whether charged as cartage or as storage,—it was part of the "claims and liens" which respondents had against the stored goods, and which appellant had agreed "to collect without making any charge therefor," and to pay over promptly to respondents. The contract clearly contemplates that the goods were to remain in the warehouses at least for a reasonable time, and that appellant was to collect the amounts due respondents "before the delivery of said property to the owners thereof." Having collected moneys which included the cartage, there is no reason why he should not have paid them to respondents. We are unable to see any error in the record; at least, as against appellant. The judgment and order appealed from are affirmed.

I concur: HENSHAW, J.

TEMPLE, J. (concurring). I concur in the judgment, but I do not understand the controversy exactly as it is stated by Mr. Justice McFARLAND. The court practically divided the storage money between the parties in proportion to the time the goods remained in storage before or after the assignment, without reference to the amount earned, computed by the warehouse custom. For instance, if the goods had been stored five months when the assignment was made, and therefore the full amount for storage had accrued, still if, after the assignment, they had remained two months longer, and no further charge could be made for such additional time, the court gave to plaintiffs only five-sevenths of the amount and to the defendant two-sevenths, after deducting cost of cartage, which is included in the charge for the first month. Defendant contends that he would be entitled, in the supposed case, to two-sevenths of the whole amount, since all is charged as storage. I think in this view the court properly deducted the charge for cartage before computing defendant's pro rata charge. I therefore concur in the judgment.

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107 Cal. 659

### RAMISH v. KIRSCHBRAUN et al. (No. 19,481.)

(Supreme Court of California. July 3, 1895.)

SALE—DELIVERY—BREACH OF CONTRACT—FAILURE TO DELIVER CONSIGNMENT PROMPTLY — HARMLESS ERROR—INSTRUCTIONS.

1. Where a bill of lading was sent to a bank to be delivered to the consignee on payment of the purchase price of the goods consigned, there was no transfer of title until the bill was received by the bank for delivery.

2. In an action by the consignee against the consignor for failure to deliver a consignment of eggs, whereby plaintiff was damaged by a decline in the market, it was proper to submit to the jury the question of defendant's negligence in failing to promptly forward a bill of lading, where it appeared that it was detained by defendant, and though, if promptly forwarded, it could have reached plaintiff at the same time as the consignment, it did not.

3. The fact that the consignee, by agreement with the carrier, the latter being protected by a bond, was allowed to take freight in advance of presentation of the bill of lading, did not make it incumbent on him to obtain possession of a consignment, where the agreement with the consignor was that the bill should be delivered on payment of the purchase price, and the consignor negligently detained the bill.

4. Error in admitting evidence of market value on a day not in issue is not prejudicial where it was the same as the day in controversy.

5. In an action for failure to promptly deliver a consignment, plaintiff admitted that the goods were ready for delivery to him on a certain date, though he did not take possession of them until later. Evidence of the market value after the goods were ready for delivery was excluded. *Held*, that a charge that plaintiff should recover the difference in price on the day they should have been delivered and on the day they were "actually delivered" could not have misled the jury on the computation of damages.

Department 2. Appeal from superior court, Los Angeles county; W. H. Clark, Judge.

Action by A. Ramish against Kirschbraun & Sons for breach of contract. Judgment for plaintiff, and defendants appeal. Affirmed.

Will D. Gould, for appellants. Finlayson & Finlayson, for respondent.

HENSHAW, J. Appeals from the judgment and from the order denying a new trial. The facts of the case will be found stated in the opinions of this court rendered upon former appeals. 90 Cal. 581, 27 Pac. 433, and 98 Cal. 676, 33 Pac. 780.

The evidence warranted the jury in believing, as from the verdict it will be presumed it did believe, that the car load of eggs was sold by defendants to plaintiff, to be delivered to the latter in Los Angeles in due course of freight transportation from either Omaha, Neb., or some point of shipment in Iowa. By agreement, also the bill of lading made to defendants as consignees, and by them indorsed to plaintiff, was to be sent with a sight draft to the Southern California National Bank at Los Angeles, by which it was to be delivered to plaintiff upon his payment there of the price of the eggs. Under these circumstances, there was no transfer of the title to the eggs before the bill of lading was received at the bank for delivery. Reynolds v. Scott (Cal.) 4 Pac. 346; Erwin v Harris, 87 Ga. 333, 13 S. E. 513; Kelsea v. Manufacturing Co. (N. J. Err. & App.) 26 Atl. 907, 22 L. R. A. 415, and notes; Dows v. Bank, 91 U. S. 618; Brandt v. Bowlby, 2 Barn. & Adol. 932; Newcomb v. Railroad Corp., 115 Mass. 230. The eggs arrived at 7 p. m. of July 9th, and would then have been delivered to plaintiff upon presentation of the bill of lading, though, in ordinary course of business, delivery would have been made the following day; but the bill of lading had not arrived. There had been negligent delay by defendants in mailing it from Omaha. Forwarded from the shipping point in Iowa it reached them in Omaha upon July 3d, but too late to be remailed on that day with the sight draft, which defendants first discounted at a local bank. It could have been mailed at that time with an order for payment merely. The following day was a holiday. Upon the next the matter was neglected, and upon July 6th the bill, with the draft, was forwarded. Defendants contend that, despite their failure to forward the bill as expeditiously as they might; nevertheless they put it in the post office upon July 6th, when, in the ordinary course of the mail (four days between Omaha and Los Angeles), it should have reached the bank, and, constructively, plaintiff, upon July 10th, the day when the car was ready for delivery, and that therefore they had used due diligence. But, considering the nature of the goods shipped, the market conditions, the original delay of defendants, the fact that defendants' agent,—the bank,—if it received the bill upon July 12th, yet, seemingly through dereliction, did not have it ready for delivery until the 14th, sufficient was shown to warrant the submission of the question of negligence to the jury under proper instructions. And the jury was properly instructed. The instructions, the refusal to give which is complained of, were one and all embraced in those actually given, in so far as they were proper to give at all. The fact that, under agreement with the railroad, the plaintiff, who was a truckman, was allowed to take freight of consignees in advance of presentation of the way bill,—the railroad being protected by a bond,—did not make it incumbent on him so to obtain possession of the eggs. He was under no obligation to put himself or his bondsmen in jeopardy in the matter, and it was his right to stand upon the terms of his contract. By those terms, delivery of the waybill was to be made to him through the bank upon his payment of the price, and it was the understanding of the parties that the delivery of the eggs should be had in the manner indicated.

Of the exceptions to the instructions given, one only merits special consideration. The court instructed the jury: "In estimating the damages, you will first ascertain what day the eggs should have been delivered, according to the terms of the contract, and the value of the eggs upon that day; and you will then ascertain what day the eggs were actually delivered to and received by the plaintiff, and the value of the eggs upon that day. If the value of the eggs upon the day last mentioned was the same as or greater than upon the day when they should have been delivered according to the contract, then the plaintiff has sustained no damage, and your verdict should be accordingly. If, however, you find the value of the eggs upon the last-mentioned day, namely, the day when they were actually delivered and received, was less than the value of eggs upon the day when they should have been delivered according to the terms of the contract, then the measure of damages will be the difference. By 'value of eggs' is meant the market value of eggs." The evidence showed that plaintiff took the waybill and manual possession of the eggs upon July 18th, but no evidence was admitted as to the market price of eggs upon that date. The evidence was confined to the days between the 9th and 14th of July, both included. Nor, if it be conceded that evidence of the value upon July 9th was inadmissible under the proof that in the ordinary course of business delivery would have been made on the 10th, still no prejudicial error can be predicated thereon, since all of the witnesses agree that the value remained the same on the 9th and 10th. The delivery claimed by defendants upon July 12th, and that pleaded by plaintiffs upon July 14th, both rest upon the proposition of law that the moment when defendant's agent—the bank—had the waybill ready to be turned over to plaintiff, then, so far as defendants were concerned, delivery by them had been made, and for any further delay they were not responsible. This proposition is sound, and it was more than once declared to the jury by instructions. The contention of defendants, supported by the bank's evidence, is that the bank received and held the waybill for delivery on July 12th, and it is therefore claimed that this date limits defendants' liability. Upon the part of plaintiff it is claimed, and the evidence is not disputed, that the bank, upon the 12th and 13th of July, in response to demand, declared that it did not have the bill, and that upon the 14th only was plaintiff notified of their readiness to deliver it. The determination of the time under these circumstances was left, and properly left, to the jury. The error of the instruction, and the injury worked by it, defendants claim, consist in this, that it uses the phrase "actual delivery," as contradistinguished from the constructive delivery of the 12th or 14th, and founds damage upon such actual delivery, and that the jury was therefore misled into adopting the lower market price obtaining upon July 18th, instead of the higher price of July 12th or 14th, as the basis of their computation of damages. But plaintiff pleaded delivery to himself upon July 14th; admitted the delivery on that date by telegram to defendants to that effect; the court fully and repeatedly instructed the jury that defendants' liability for further damage ceased immediately when the waybill was ready for transfer; it is admitted by plaintiff that this was upon the 14th; the pleadings have not been amended, and it has become the law of the case that evidence of damage should not go to a date later than July 14th; and, finally, as has been said, testimony of the varying market values was not admitted as to any date subsequent to the 14th. Under these circumstances, it cannot be held that the jury could have been misled by taking into their computation the value of eggs at a date upon which no evidence was given of that value. Moreover, the verdict rendered was not for an amount in excess of what the evidence reasonably supported. The judgment and order are affirmed.

We concur: McFARLAND, J.; TEMPLE, J.

(107 Cal. xvii)

## LOWE et al. v. WOODS et al. (No. 19,494.)

(Supreme Court of California. July 3, 1895.)

Commissioners' decision. Department 2. Appeal from superior court, San Luis Obispo county; V. A. Gregg, Judge.

Action by Dawson Lowe and others against E. L. Woods and others to enforce a livery stable keeper's lien. Defendants had judgment, and plaintiffs appeal. Affirmed.

Wilcoxon & Bouldin, for appellants. F. Adams and F. A. Dorn, for respondents.

SEARLS, C. This action is brought by livery and feed stable keepers to enforce a lien upon a horse for the feeding of the animal. The plaintiffs were nonsuited at the trial, and appeal from the judgment rendered thereon. The case was here once before upon an appeal from a judgment in favor of the plaintiffs, and a reversal was had. The decision in that case stated the facts and the law applicable to the case. The bill of exceptions upon which this appeal is based does not vary in any important particular from the showing on such former appeal. The evidence of James Guthrie, one of the plaintiffs on the last trial, was in part as follows: "Woods told me, at the time he left the horse with us, that he belonged to Miss Adams, and the conditions under which he held the horse under the contract with Edith Adams. I never spoke to Miss Adams, nor wrote her a letter." The evidence at the last trial being substantially in accord with the findings resulting from the former trial, no practical good can result from a restatement of the facts which it tended to prove, or the law applicable thereto. The judgment appealed from should be affirmed upon the facts and law laid down on such former appeal, reported in 100 Cal. 408, 34 Pac. 959.

We concur: BELCHER, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed upon the facts and law laid down on such former appeal, reported in 100 Cal. 408, 34 Pac. 959.

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(107 Cal. 629)

## KNOWLES v. SANDERCOCK et al. (No. 15,790.)[1]

(Supreme Court of California. July 2, 1895.)

CORPORATE STOCKHOLDERS—INDIVIDUAL LIABILITY—EVIDENCE—STOCK AND TRANSFER BOOK—ULTRA VIRES ACTS.

1. A stock-certificate book of a corporation, with entries of the number of certificates, number of shares, dates of issue, and names of holders, designed for the stock and transfer book, and apparently corresponding with the requirements of Code, § 378, requiring corporations to "keep a book to be known as the 'Stock and Transfer Book,'" though not so named, is competent to show the amount of stock outstanding.

2. The stock-certificate book, stock ledger, and stock journal, coupled with the testimony of the secretary of a corporation that they contained the names of all the stockholders, are sufficient, in an action by strangers against the stockholders, to show who the stock subscribers are, it not appearing that the corporation had any other book showing who subscribed.

3. In an action by creditors against stockholders of a corporation to enforce their liabilities as such, a complaint which sets out the original indebtedness, and also avers the execution of a note by the corporation for the same, is a correct pleading, under the Code.

4. Money paid by stockholders to the president of a corporation to discharge their proportionate liability for the entire indebtedness, if applied to the payment of a corporate debt to the extent of the proportionate shares of such stockholders, does not relieve other stockholders of their shares of the indebtedness.

5. When interest is added to a claim against a corporation, and a note given for the amount, it becomes a debt of the stockholders, though there was no agreement in writing to pay the interest.

6. A creditor of a corporation may recover against the stockholders their proportionate share of his claim, though the creditor is also a stockholder.

7. As the liability of a stockholder in a corporation is primary, in the sense that he is not a surety, he cannot defend an action against him by a creditor of the corporation on the ground that the corporation had given a mortgage to secure the debt, and that this is unforeclosed.

8. Under Const. art. 12, § 9, which forbids a corporation to engage in any business other than that which is expressly authorized in its charter, a subscription, by a corporation formed to manufacture and deal in furniture, for stock in a hotel company, is ultra vires.

Department 2. Appeal from superior court of the city and county of San Francisco; Charles W. Slack, Judge.

Action by J. N. Knowles against William Sandercock and others. From a judgment for plaintiff, defendants appeal. Reversed as to the defendant the California Furniture Manufacturing Company, and affirmed as to other defendants.

Edward P. Cole and Ernest Graves, for appellants. Smith & Pomeroy and Carter P. Pomeroy, for respondent.

TEMPLE, J. This action was brought by the assignee of numerous creditors of the California Southern Hotel Company, a corporation, against certain stockholders, to enforce their liability, as stockholders, for the debts of the corporation. The complaint contained 34 separate causes of action. Prior to the trial, one appellant, the California Furniture Manufacturing Company, paid its proportion of the indebtedness contained in the first 30 causes of action, and went to trial on the last 4. The other appellants—Nathan Goldtree, Morris Goldtree, Isaac Goldtree, and J. H. Hollister—contested all causes of action. Judgment went for plaintiff on all contested issues. All the appellants moved for a new trial, which being denied, each appeals from the whole of the several judgment against him, though all the points made by them on this appeal have reference to the last four causes of action. In each separate cause of action it is alleged that 690 shares of the capital stock of the California Southern Hotel Company, and no more, had been continuously subscribed for during all the times mentioned in the complaint, and that the appellants Goldtree had continuously been the owners of 100 shares; Hollister, of 20 shares; and the California Furniture Manufacturing Company, of 20 shares. The court found that 753 shares had been continuously subscribed for, and that appellants had during such time been the owners of the number of shares charged.

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[1] Rehearing denied.

Appellants Goldtree and Hollister attack the finding as to the number of shares subscribed. It was incumbent upon the plaintiff to prove the whole amount of stock outstanding, to enable the court to determine the liability. For that purpose, plaintiff offered in evidence the stock-certificate book, to which the defendants objected on the ground that it was immaterial, irrelevant, and incompetent, and because it was not properly kept, and was not one of the books provided for by the Civil Code. The objection being overruled, defendants reserved an exception, and the book was received. The entries were in form as follows: "Certificate No. 1. No. of shares, 10. Issued September 25, 1888, to William Sandercock. Not canceled." The stock ledger and stock journal were also put in evidence, and the secretary of the corporation testified that they contained the names of all the stockholders; also that no other persons appear on the books of the company as having owned stock during any of the times mentioned in the complaint. It is contended that this evidence is not only incompetent, but that, admitting its competency, it is insufficient. It is claimed that it is incompetent because the books are not corporation books required to be kept by the provisions of sections 377 and 378 of the Civil Code, and are not quasi public records, which by any rule of law are made binding on the stockholders. The evidence, it is said, is not sufficient because there may be other subscribers for stock besides those whose names appear in these books, and the liability of stockholders is made to depend upon the number of shares subscribed for. The burden, it is said, was on the plaintiff, not only to show that there were certain stockholders, which, at the most, is all the books introduced show, but also to prove that no more shares had been subscribed for. Section 377 of the Civil Code requires all corporations for profit to keep a journal of all meetings of the directors, members, or stockholders. Section 378 prescribes that, in addition, such corporations shall "keep a book to be known as the 'Stock and Transfer Book,' in which must be kept a record of all stock; the names of the stockholders or members, alphabetically arranged; installments paid or unpaid; assessments levied and paid or unpaid; a statement of every alienation, sale or transfer of stock made, the date thereof, and by and to whom; and all such other records as the by-laws prescribe." The book introduced seems to have been designed for the stock and transfer book. It is true that its contents are not shown here, further than is above stated. So far as its contents are set out, it corresponds with what is required by the Code. The fact that the book is not named as the Code requires is not material. The Code does not require that there shall be a subscription book, nor direct how subscriptions shall be made. It does not appear that this corporation had any other book showing who the subscribers were. The suit is by strangers to the corporation against its stockholders. I think these books, together with the testimony, sufficient. Evans v. Baily, 66 Cal. 112, 4 Pac. 1089.

The thirty-first cause of action is alleged to be "that on the 19th day of November, 1888, Ignatz Steinhart, at the special instance and request of said California Southern Hotel Company, loaned to the said California Southern Hotel Company the sum of $25,000, which sum the California Southern Hotel Company then and there promised to pay to said Ignatz Steinhart two years after the said 19th day of November, 1888, with interest on same at the rate of seven per cent. per annum until paid." The complaint then proceeds to state that, to secure the same, the corporation gave its promissory note, which it set out. It is also averred that Steinhart assigned the same to plaintiff. The objections urged to the judgment on this cause of action are (1) that the suit is brought on the note, and not on the contract of loan, which, it is said, is the primary indebtedness, for which only the stockholders are liable; (2) that the original indebtedness has not been assigned to plaintiff; and (3) that the debt had been paid.

1. The complaint, as appears from the above, sets out the original indebtedness, and also avers the execution of the note of the corporation. I think this is correct pleading, under the Code, and, if the allegations in regard to the note are surplusage, they do not harm. The complaint is not objectionable on the ground that it does not show when the debt accrued. Perhaps some confusion has arisen on this subject by expressions to the effect that the stockholder's liability is not that of a surety, but that of an original debtor. These expressions, from the point of view from which they were made, correctly state the law. Nevertheless, the statute expressly makes the stockholder liable for the debts of the corporation, and it would not be good pleading to aver that the stockholder borrowed the money or bought the goods for which the indebtedness arose. The debt to be alleged is the debt of the corporation, and I see no reason why it may not be pleaded in the usual mode. The original contract here, upon which the indebtedness arose, was the note, and the allegation of it is a sufficient

allegation of the debt of the corporation. Whether the presumption would be that the indebtedness was incurred at the time the note was given need not now be decided, for the further fact is alleged, showing when the debt was incurred. The stockholder is, perhaps, not strictly liable on the contract, but on the statute. Still, if the debt of the corporation is created by a written contract, the debt of the corporation must be pleaded in the usual mode. The liability of the stockholder in this case is no more based on a supposed original implied contract than on the note. The proper averment of a debt is against the corporation, not against the stockholder, and the showing that it was incurred while defendant was a stockholder fixes his statutory liability. Suppose, for instance, the note called for interest at 2 per cent. per month. It cannot be doubted that the stockholder would be liable for his proportion of all this interest until the statute of limitation would run in his favor. The debt of a corporation, which is a condition precedent to the liability of the stockholder, must be shown by proper averment.

2. The evidence fully sustains the finding that the note and the original debt, if there is a distinction, passed by assignment to plaintiff.

3. It is contended that the indebtedness to Steinhart had been paid by the corporation. This contention is based on the following facts: When Howard became president of the hotel corporation, he found it very much in debt. The stockholders were unwilling to pay assessments, or to make voluntary contributions. Thereupon he was advised to have the debts assigned, and bring a suit to enforce the individual liability of the stockholders. He issued a circular to the stockholders, stating the condition. Thereupon some stockholders voluntarily paid him the amount of their supposed proportionate liability and took receipts in the following form: "San Francisco, November 17, 1890. Received of [name of stockholder] —— dollars, the sum being his assumed proportion of the indebtedness of the California Southern Hotel Company, which indebtedness is considered equal to $100 per share on the issued shares of said hotel company. John L. Howard, President." Howard, when on the stand as a witness, said, "The amounts paid in by the stockholders were for the benefit of the creditors of the stockholders, as against their proportion of the entire indebtedness." There was no assessment or call in pursuance of which this money was paid, and it is manifest that the stockholders who paid intended that the payment should protect them from their liability in the proposed litigation. But as their liability was not joint, and as each stockholder owed a share of each debt, the conditions under which the money was paid to Howard did not authorize him to pay it out in satisfaction of any one debt which would constitute an inconsiderable proportion of the entire indebtedness. Nor did Howard pretend to pay the note for the corporation. He says he borrowed the money and took the note up for the West Coast Land Company, intending when he did so to assign it to plaintiff for the purpose of causing suit to be brought on it. Therefore, it was not intended as a payment of the note, and it was not a transaction of the hotel company. The money was not paid to the corporation, and was not in its possession. It was not intended to be used to pay the debts of the corporation, but to discharge the proportionate liability of the stockholders who paid it. It was held as the money of the stockholders who paid it, and was not the money of the corporation. If applied to the payment of the debt, to the extent of the proportionate shares of the stockholders who paid, that would not help appellants, for their shares of the indebtedness would be unaffected by such an application of it.

The thirty-second cause of action is for $33,069.61, due to Goodall, Perkins & Co., for which the corporation gave its note. The allegations of the complaint in regard to it are similar to those in regard to the cause of action set out in the thirty-first cause of action, and the objections to the pleading, so far as they are the same, need not be further noticed.

It is said that the claim evidenced by the note contains some charges for interest which cannot be recovered from the defendants, because the agreement to pay is not in writing. If so, when the interest became a legal debt against the corporation, by its note, it became a debt of the stockholders. The assignment of the note carried with it the original debt.

The objection is made that suit cannot be maintained upon this claim because it was a debt due to Goodall, who was also a stockholder, and it is claimed that the statute was not intended for the benefit of a stockholder who is also a creditor. The objection is founded upon certain decisions made by the courts of New York in cases growing out of statutes which made the stockholders liable jointly and severally for all the debts of the corporation. It was held that this put the corporators on the footing of partners, and, as a partner cannot sue at law for a debt due him from the partnership, they could not, under such a law, bring suit against a stockholder. Our law is entirely different, and the absurd consequences indicated cannot result. If each stockholder is liable only for his proportionate share of each debt, and if, having paid it, he becomes a creditor of the corporation, still he can recover nothing from a stockholder who has already paid his share of the debt.

The thirty-third cause of action is for the balance of an account of $3,575.09 for moneys lent, and for moneys paid, laid out, and expended, for the use of the hotel corporation, by Goodall, Perkins & Co. The only serious question in regard to this count is that it includes $225, interest which had accrued on the money lent, paid out, and expended by Goodall, Perkins & Co., and there is no mention of interest in the complaint. The count, as before stated, is for the balance of an account, and ought to have specified the nature of the items composing it. This cannot, however, be a very serious matter. It is only by force of precedents and established practice that such pleading is construed to state a cause of action at all. It can hardly be said that such a complaint states the facts constituting a cause of action. Defendant can demand a bill of particulars, and only by so doing can he really learn the facts. But all the items indicated bear interest by virtue of the statute. The complaint does show an indebtedness on the part of the corporation for the interest, and also that defendants, as stockholders, are liable for their proportion thereof.

The thirty-fourth cause of action is for $5,668.17, balance of an account for moneys lent, and for moneys paid, laid out, and expended, by the First National Bank of San Luis Obispo for the hotel corporation. It is contended that this debt had been paid by the corporation, or at least had been secured by a mortgage which the creditor still holds, and which is unforeclosed. The hotel corporation executed to the bank a mortgage for the sum of $15,000, which the witnesses testified was intended as collateral security for what the corporation then owed the bank, and for further advances. The bank, however, gave the corporation credit on its books for $15,000, and deducting the debt showed a balance of $9,529.09 cash on deposit to the credit of the hotel corporation. It is claimed that this amounted to payment. There was no agreement that it should be considered payment, but, had there been, it would have made no difference. The debt was not paid, but, at most, renewed, and no doubt the stockholder can be made to pay his proportion of it. The note was due, but the mortgage had not been foreclosed. This fact constitutes no defense for defendants. They are not affected by the fact that because of the mortgage only an action to foreclose could be brought against the corporation. The mortgage only affects the remedy against the mortgagor,—the corporation. The liability of the stockholder, as has already been said, is primary, in the sense that he is not a surety. He is not injured, nor is he benefited, by the fact that the corporation has given security. Bank v. Hill, 59 Cal. 107.

It is contended by the California Furniture Manufacturing Company that the subscription of that corporation for 20 shares of the stock of the hotel corporation was ultra vires, in the absolute sense, and is void. It was admitted that on the 26th day of October, 1888, the hotel corporation issued to the appellant corporation 20 shares of stock, and received $2,000 therefor, and that the stock is still retained by appellant. The articles of the hotel corporation declare "that the purposes for which it is formed are the building, owning, and operating an hotel in the city of San Luis Obispo." The articles of the defendant corporation declare that the "objects for which this corporation is formed are to manufacture, import, buy and sell, furniture and upholstery, and to carry on said business in all its branches, including the dealing in all materials appertaining to said business." It will be seen that the defendant corporation is not authorized to deal in stocks, or to become a stockholder in other corporations. The general rule is, undoubtedly, that a corporation cannot own corporate stock, unless expressly authorized. Indeed, it has been said that statutes in regard to the formation of corporations do not authorize any but natural persons to become corporators. Mor. Priv. Corp. § 433. "A private corporation has no implied authority to invest in shares of another private corporation. If this were so, it might, by an easy process, transfer its resources to another." Spell. Corp. § 172. See, also, Tayl. Corp. § 267; Brice, Ultra Vires, 133; Pearson v. Railroad Corp., 62 N. H. 537; Valley Ry. Co. v. Lake Erie Iron Co., 46 Ohio St. 44, 18 N. E. 486; Central R. Co. of New Jersey v. Pennsylvania R. Co., 31 N. J. Eq. 475; Hotel Co. v. Schram, 6 Wash. 134, 32 Pac. 1002; Hazlehurst v. Railroad Co., 43 Ga. 57; People v. Chicago Gas-Trust Co., 130 Ill. 268, 22 N. E. 798; Franklin Co. v. Lewiston Inst. for Savings, 68 Me. 43. In this state a corporation is forbidden to engage in any business other than is expressly authorized in its charter, or the law under which it is organized. Const. art. 12, § 9. To own stock in another corporation is to become interested in the business of such corporation. A stockholder is engaged in the business of the corporation, within the meaning of this section of the constitution. He has a voice in the management; may, in fact, control such business; and is, of course, liable for the debts incurred while he is a stockholder. The above provision makes all acts which are wholly without the business of the corporation unlawful. The only reply made by respondent to this point is that the subscription is sustained by Kennedy v. Bank, 101 Cal. 495, 35 Pac. 1039. In this, I think, counsel is mistaken. It was there held that the bank rightfully invested its funds in the shares of other corporations. It has been held that banks and other corporations whose business it is to loan money may take stock in other corporations, as collateral, and, in the process of realizing their securities, may become the owners of them. Also, in some cases, such institutions may invest temporarily surplus funds in such securities. It has, however, been held, as to such corporations, that they cannot permanently invest in the stock of other corporations, unless authorized by their articles. The corporation defendant has no funds to invest. Its capital is for the purpose of carrying on its business, no part of which consists in getting interest on money, or making a profit in outside investments. Its sole purpose is to earn a profit for its stockholders through the business to be conducted by itself as specified in its articles. Its subscription, therefore, was ultra vires, and void. The judgment and order are affirmed, as to all the appellants except the California Furniture Manufacturing Company, and as to it the judgment and order are reversed.

We concur: McFARLAND, J.; HENSHAW, J.

108 Cal. 54

## PEOPLE v. DENBY. (Cr. 18.)

(Supreme Court of California. July 11, 1895.)

VAGRANCY—RESISTING ARREST—CRIMINATING EVIDENCE—CROSS-EXAMINATION.

1. One who asked assistance on a single occasion is not guilty of vagrancy within Pen. Code, § 647, providing that a healthy person soliciting alms as a business is guilty of vagrancy.

2. One innocent of an offense is justified in resisting arrest by a private citizen acting under authority of Pen. Code, § 837, allowing a private person to arrest another for a public offense committed or attempted in his presence.

3. On a prosecution for vagrancy, the defendant cannot be required to testify as to whether he had at another time and place passed under an assumed name.

4. A witness cannot be required to testify on cross-examination as to circumstances which have no connection with those to which he testified in chief.

Department 2. Appeal from superior court, Orange county; J. W. Towner, Judge.

William Denby was convicted of assault with a deadly weapon. From the judgment, and an order denying a new trial, defendant appeals. Reversed.

F. O. Daniel, for appellant. Atty. Gen. Fitzgerald, for the People.

TEMPLE, J. Defendant was convicted of an assault with a deadly weapon, and appeals from the judgment, and from an order refusing a new trial.

The prosecuting witness testified that he saw defendant soliciting alms from the passengers on the cars. Witness saw him through the windows, but did not hear what he said. He, however, asked witness for some money, when witness arrested him, and took him to the depot, as he says, "quite a length back south from where I arrested him. I started up town with him to go to jail. I got out across the track, and he turned on me, and struck me in the face with his fist. I knocked him down. He fell on his knees, and I followed him up till he saw he had enough of it, and then he promised he would go along with me. But when we got near the jail he turned on me with a knife, and made a desperate thrust at me with the knife, which I avoided by jumping away from him, and next by throwing up my hand and striking his arm. Then I knocked him down. * * * At that time he made a desperate effort to get away from me and said, 'I am going to cut you.'" The witness held the defendant by the collar and sleeve. Witness was a special agent for the California Southern Railway Company, and had no other authority. It does not appear that he had ever seen the defendant before, nor was there any evidence tending to show that defendant had solicited alms at any other time, or that he had been guilty of any other offense.

The defendant was a witness in his own behalf, and gave a very different statement of the affair. He says he had the knife in his hand when he was arrested. He was paring his nails. He kept the knife all the way along. That he thought at first the prosecuting witness was an officer, and on the way discovered that he was not. He then declined to go with him, and was knocked down and beaten. He denies any attempt to strike the prosecuting witness with the knife, and says he did not intend to cut him with it. In his own behalf, the witness only testified to the circumstances of the arrest and the alleged assault. On cross-examination he was asked whether he was in Los Angeles in 1893. The question was objected to as not proper cross-examination, but the objection was overruled, defendant excepting. He was then asked, "Under what name did you go there?" The question was excepted to as not proper cross-examination, and as incompetent, irrelevant, and immaterial. The objection was overruled, and defendant excepted. The defendant then declined to answer on the ground that the answer would tend to degrade his character. The court nevertheless required him to answer, saying that a person may have a justifiable reason for passing under another name when no reason for so doing appeared. An exception was taken to the ruling, and the defendant answered "Thomas Swift." These rulings were manifestly erroneous, but the attorney general claims that the evidence was harmless. I do not think so. If it be conceded that one may have good reason for passing under another name, it nevertheless tends to cast suspicion upon one who does so. The district attorney evidently thought so, or he would not have insisted upon the testimony. It had no place in the case, and if it were relevant testimony it would have been improper to educe it from the defendant under the circumstancs. It had no connection with the matters concerning which he had testified in chief.

The court refused to give the following instruction asked for by the defendant: "The witness Strait, not being a peace officer, had no right to arrest or attempt to arrest the defendant for begging; and the defendant was justified in resisting such arrest, or attempting to free himself from the hold of said witness, after he had arrested him, upon ascertaining that the person so arresting him was not an officer authorized to make arrest." Upon this subject the court, against the exception of defendant, instructed the jury as follows: "Now the question arises, was this defendant committing an offense for which a private person might arrest him on the occasion of this transaction which has been detailed to you? Section 647 of the Penal Code of the state defines who are vagrants, and, as I understand the testimony given in this case, it is for the offense of vagrancy in some one or other of its forms that this arrest was made, and made by a private person, and made for the public offense of vagrancy." Section 837, Pen. Code, provides: "A private person may arrest another: (1) For the public offense committed or attempted in his presence." Vagrancy is defined in section 647, Pen. Code. In that section various classes of persons are pronounced vagrants, made such by their practices, habits, and mode of life, and dependent sometimes partially upon physical condition. There is nothing in the testimony showing or tending to show that the defendant committed or attempted to commit the public offense of vagrancy in the presence of the prosecuting witness. The statute makes it an offense for a healthy beggar to solicit alms as a business. For one to ask assistance on one occasion does not make him a vagrant. As an employé of the railroad company, the prosecutor had a right to remove the defendant from the cars, and to protect passengers from annoyance by him, using no unnecessary force to that end; but he had no right to arrest him, and defendant was justified in resisting such unlawful detention. I think the instruction ought to have been given as asked.

It would serve no useful purpose to consider other alleged errors. The judgment and order are reversed.

We concur: McFARLAND, J.; HENSHAW, J.

108 Cal. 46

## SAN DIEGO COUNTY v. SOUTHERN PAC. R. CO. (No. 18,365.)

(Supreme Court of California. July 11, 1895.)

COLLECTION OF RAILROAD TAXES.

Act April 23, 1880 (St. 1880, p. 136), providing that any county may sue in its own name for delinquent taxes, in so far as it applies to railroads operated in more than one county, is repealed by St. 1883, p. 65, providing that such suits shall be in the name of the people of the state, and otherwise changing the former procedure.

Department 1. Appeal from superior court, San Diego county; W. L. Pierce, Judge.

Action by San Diego County against the Southern Pacific Railroad Company to recover certain taxes. From a judgment for defendant, plaintiff appeals. Affirmed.

Attorney General Fitzgerald, for appellant. **A. B. Hotchkiss**, for respondent.

VAN FLEET, J. Action to recover the amount apportioned to the county of San Diego of the taxes assessed by the state board of equalization for the fiscal year ending June 30, 1888, against the franchise, roadway, roadbed, rails, and rolling stock of defendant's railway,—a railroad operated in more than one county. The lower court sustained the demurrer to the complaint, and, plaintiff declining to amend, final judgment was entered against it, from which it appeals.

One of the grounds of demurrer, and the only one that need be noticed, is that plaintiff is not authorized to maintain the action. The action is brought under the supposed authority of an act authorizing the bringing of suits for the collection of delinquent taxes, and prescribing a form of complaint therein, passed April 23, 1880 (St. 1880, p. 136), which provides "that any county, or city and county, where such taxes are delinquent, may sue in its own name for the recovery of delinquent taxes, whether the same be for county, or city and county, and state purposes, or taxes, or either of them." In 1883, however, the legislature passed an act (St. 1883, p. 65) whereby it amended certain sections of the Political Code, and added new sections thereto, wherein it provided a complete and comprehensive scheme or system for the assessment and collection of taxes on the franchise, roadbed, rails, and rolling stock of railroads operated in more than one county of the state, and repealed all acts or parts of acts in conflict with the provisions thus enacted. The provisions thus enacted place railroads of the kind mentioned in a class by themselves, and prescribe a method of assessment and collection of the taxes thereon, quite distinct and apart from that applicable to other taxable property. Section 3670,—one of the new sections there enacted,—provides that: "After the first Monday of February of each year the controller must begin an action in the proper county, in the name of the people of the state of California, to collect the delinquent taxes upon the property assessed by the state board of equalization; such suit must be for the taxes due the state, and all the counties, and cities and counties, upon property assessed by the board of equalization, and appearing delinquent upon the 'duplicate record of apportionment of railway assessments.' The demands for state and county, and city and county, taxes may be united in one action." It is apparent, as contended by respondent, that by this act the legislature intended to revise the whole system for the collection of taxes on property of this kind, and to substitute the new system for the old. The remedy therein provided by suit is specific, and must be held to be exclusive of all others. Being wholly inconsistent with the provisions of the act of April 23, 1880, which authorizes suit in the name of the county, its effect was to supersede or repeal the latter act, in so far as it affects actions to recover taxes of the character in suit. It follows that the demurrer was properly sustained. Judgment affirmed.

We concur: HARRISON, J.; GAROUTTE, J.

107 Cal. 667

## GREENBERG v. CALIFORNIA BITUMINOUS ROCK CO. (JOHNSON, Intervener). (No. 19,581.)

(Supreme Court of California. July 3, 1895.)

VENDOR AND PURCHASER—CONTRACT—DEFAULT.

1. Where land was conveyed to a corporation, to be paid for in stock, and no day was fixed for the delivery of the stock, the corporation cannot be put in default until demand for the stock is made.

2. Where plaintiff conveyed property to a corporation, and agreed to accept in payment therefor all the stock of the "corporation of the approximate value of said real estate," he cannot afterwards refuse to accept the stock, and demand, instead, a vendor's lien, on the ground that the stock had no value.

Commissioners' decision. Department 2. Appeal from superior court, San Luis Obispo county; V. A. Gregg, Judge.

Action by Meyer Greenberg against the California Bituminous Rock Company to foreclose a vendor's lien. C. B. Johnson intervened. Plaintiff dismissed his action. There was judgment that defendant issue to intervener 300 shares of its stock, and intervener appeals. Affirmed.

Van Ness & Redman, for appellant. Graves & Graves, Louis Lamy, and E. P. Cole, for respondent.

HAYNES, C. The plaintiff, and the intervener, and one L. M. Warden purchased certain lands, the title to which was conveyed to plaintiff, who executed a declaration of trust admitting that Johnson owned an undivided one-fourth thereof. These parties sold said lands to the California Bituminous Rock Company, a corporation, and, as alleged by appellant, agreed to accept in payment therefor 1,250 shares of the stock of said corporation, of the approximate value of said real property, which value was alleged to have been, at the time of the sale, $25,000. Said 1,250 shares was the entire capital stock of the corporation, and was to be issued and delivered in the following proportions: To Warden, Johnson, Greenberg, and Underhill, each 300 shares,—the latter taking one-half of Warden's interest,—and to one Ernest Graves 50 shares. Although the whole legal title was in Greenberg, Warden and Johnson joined in the conveyance to the corporation, and this sale and conveyance was made July 24, 1888. Said stock not having been issued and delivered, Greenberg in January, 1891, commenced an action against the corporation to foreclose an alleged vendor's lien, alleging a sale for the sum of $25,000, payable on demand, and that no part of the purchase money had been paid. The corporation answered January 29, 1891, the answer consisting of a general denial. Johnson, the appellant here, filed a complaint in intervention, denying that the sale was made for money, and alleging the sale for stock, and the interest of the several persons as hereinbefore stated, and further alleged as follows: "That neither said shares of stock of the approximate value of said lands, nor of any value whatever, nor any shares at all, were ever issued and delivered as agreed, or at all, and said corporation has never paid any consideration whatever to this intervener, nor to the said Greenberg, his said trustee, for said property; nor has any security, note, or other obligation ever been given therefor by said corporation." And his prayer was that, if the terms of sale were as alleged in the complaint, the plaintiff should have the relief prayed for by him in his complaint, but that in case it should be found that the consideration of the sale was as alleged by him, said intervener, then that the decree of foreclosure be rendered in favor of the plaintiff in accordance with the facts alleged by said intervener, and, in either case, that his interest be established and protected. The plaintiff and defendant each answered the complaint in intervention, and, after a general denial, further answered, in effect stating the terms of sale to have been as alleged by the intervener, but further alleging that at the time of sale it was understood and agreed by all the parties thereto that said stock should not be issued and delivered until a certain note for the sum of $2,937.50, executed by said Greenberg, Warden, and Johnson to one Jack—and which appears to have been given by said parties as part of the original purchase price of said property—should be paid; that said intervener had never paid or offered to pay his proportion of said note, or requested the issuance of the stock to which he was entitled; and further alleging that the corporation defendant was and always had been ready and willing to issue and deliver to the intervener the number of shares of said stock agreed to be issued to him. The court found the terms of the sale to the corporation to have been for stock, as alleged by the intervener; that the stock was not to be issued until said note was paid; that the intervener had never paid or offered to pay his part of said note, but that said note was paid by Greenberg on October 31, 1888, amounting, with interest, to $3,191.12; that the title and ownership of said lands, ever since said conveyance, has been and still is in said corporation; that said corporation is and always had been ready and willing to issue to the intervener the number of shares to which he is entitled, but that said intervener had never demanded or requested that said stock should be issued or delivered to him,—and upon these findings entered judgment that said corporation, defendant in the action, issue to the intervener 300 shares of said capital stock. No judgment was rendered in favor of the plaintiff, he having dismissed his action. Said intervener, C. B. Johnson, appeals from said judgment requiring said corporation to issue to him said stock, and from an order denying his motion for a new trial.

Appellant's first specification is that the third finding is not justified by the evidence, because the evidence does not show an agreement that the stock should not be delivered until said note should be paid; but, on the contrary, it is claimed that the evidence shows that the corporation assumed its payment. There was direct oral evidence of the agreement, as stated in the finding; and, as against that statement, there was put in evidence a resolution passed by the corporation, after the conveyance was made, by which it was resolved that the corporation assume the payment of said note as part of the consideration to be paid for the land. The resolution, which was adopted after the agreement of sale and conveyance was made, did not affect the correctness of the finding. If it had any effect upon any issue in the case, the additional fact should have been found that the payment of the note was afterwards assumed by the corporation. The only bearing the agreement concerning the payment of said note has in this case relates to the time at which the stock of the corporation should be issued and delivered to the intervener. If, as the court found, the stock was not to be delivered until the note was paid by the grantors, who were also the makers of the note, the time of delivery was dependent upon their act, and not upon any act of the corporation; and in such case the corporation could not be put in default for the nondelivery of the stock until payment of the note, and a demand for the delivery of the stock, accompanied by notice of such payment, had been made; while if the contention of appellant is sound, viz. that the agreement was that the note should be paid by the corporation, no day was fixed for the delivery of the stock, and in such case a demand for its delivery was necessary. Upon this point the rule is stated in Parsons on Contracts (volume 2, 8th Ed. p. *661) as follows: "If the contract specifies no time, the law implies that it shall be performed within a reasonable time, and will not permit this implication to be rebutted by extrinsic testimony going to fix a definite term, because this varies the contract. What is a reasonable time is a question of law. And if the contract specify a place in which articles shall be delivered, but not a time, this means that they are deliverable on demand." Since, therefore, a demand was necessary in either case, if the finding assailed was not justified by the evidence, appellant is not prejudiced, because the effect upon him would have been the same if the fact had been found according to his contention.

I have considered this question at greater length than would appear to be necessary, because of its bearing upon another point made by appellant, which is involved in his exception to the seventh finding, and also in his specifications of errors of law, and which may be broadly stated thus, viz. that the vendors were to receive from the corporation its capital stock, being 1,250 shares, of the value, approximately, of the land, which value is alleged to have been, at the time of the sale, $25,000. Upon the trial appellant was permitted to show without objection that at the time of the trial, and for about three years theretofore, the stock of the corporation had no value; that the judgment, therefore, gives him nothing (that is, it gives him 300 shares which have no value, while he was entitled to 300 shares of the approximate value of his interest in the land at the time of the sale); and, as it was not in the power of the corporation to give him stock of that value, that he should have had judgment foreclosing his lien for $6,250 upon an undivided one-fourth of the land conveyed to the corporation. This contention cannot be sustained. By agreeing to accept a definite number of the shares of stock in payment for the land conveyed, the vendors assented that the stock so agreed to be received was, approximately, of the value of the land. The 1,250 shares, which constituted the entire capital stock of the corporation, assuming that the corporation had no other property or assets than the land so conveyed to it, was of the same value as the land, since it represented it. If the corporation then owned other property or assets, the value of the stock exceeded the value of the land so conveyed. If the stock had then been issued and tendered, the vendors could not have questioned its value; and they are in no better situation now. Nor is there any evidence that the stock had depreciated at the time said note was paid, which was about three months after the conveyance. If appellant's contention that the corporation assumed the payment of said note be sound, he had a right to demand and receive his stock at once; since the requirement that the vendors should pay their note given for part of the purchase money of the land before the stock should be delivered could only have been intended to secure the corporation against a vendor's lien. Appellant did not allege in his complaint that he ever demanded his stock, or that the corporation ever refused to deliver it; while the corporation alleged in its answer, and the court found, that no demand for the stock was made by appellant, and that the corporation was at all times ready and willing to issue and deliver it to him. The corporation did not guaranty that the stock should always have a value equal to the then actual or estimated value of the land, or that, if the stock should decline in value, they should be paid in money, or have a vendor's lien as for a money consideration. It certainly could not have been the intention that these parties should sell their land to the corporation for a definite number of shares of its capital stock, and that they might leave their stock unissued in the hands of the corporation, so that if the corporation was prosperous, and its stock valuable, they would then take it, but if the corporation became involved they might possibly escape liability as stockholders by refusing to take it upon the ground that the stock was not of the value they contracted for, but hold the land as security for its alleged value by a proceeding to foreclose a vendor's lien. What appellant's remedy would have been if he had demanded the stock, and the corporation had refused to issue it, need not be considered, as that question is not involved.

This, however, is a second appeal, and appellant insists that the law of the case, as declared on the former appeal, required the judgment to be for the foreclosure of his vendor's lien, as hereinbefore stated. The issues as well as the evidence were different upon the first trial. The plaintiff, Greenberg, filed an answer consisting of a general denial, and the corporation made default. The judgment there was that the corporation issue to the intervener 300 shares of its capital stock upon payment by the intervener of his proportion of said note. As there was no issue upon said note, nor any mention of it in the pleadings, it was held that the intervener was entitled to judgment against the defendant upon its default as prayed for. See 33 Pac. 192, not reported in California Reports. The judgment having been reversed upon the first appeal, with leave to the intervener and plaintiff to amend their pleadings, said intervener amended his complaint, and the defendant then came in and answered, alleging, among other things, that it had always been ready and willing to issue and deliver the stock, but that appellant had never requested it to be issued; and these issues were found in favor of defendant. It is therefore obvious that the former decision could not be the law of the case upon the second trial. The judgment and order appealed from should be affirmed.

We concur: BELCHER, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

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108 Cal. 92

## BACIGALUPO v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO, DEPARTMENT NO. 10. (S. F. 71.)

(Supreme Court of California. July 11, 1895.)

PROBATE OF WILL—REVOCATION—CITATION TO EXECUTORS.

Code Civ. Proc. § 1328, provides that upon filing a petition for the revocation of probate of a will "a citation shall be issued to the executors," etc. *Held*, that such citation cannot be issued after the petition has been filed for over a year, though a prior citation had been issued, but was quashed for irregularity.

In bank.

Application by Paola Bacigalupo, as executor, for a writ of review of a certain order of the superior court of the city and county of San Francisco, department, No. 10. Order annulled.

Jos. F. Cavagnaro and Wm. J. McGee, for petitioner. Dunne & McPike, for respondent.

GAROUTTE, J. This is an original proceeding in the nature of an application for a writ of review. One Bacigalupo, the petitioner, was appointed executor of the estate of Bacigalupo, deceased. Some months thereafter, certain of the heirs of the deceased filed a petition in the court where such estate was undergoing administration, praying for a revocation of the probate of the will of said deceased, and a citation was issued thereupon to all parties interested to show cause at a certain time why the prayer of the petition should not be granted. No appearance was ever made in answer to the citation, but upon August 17, 1893, the court of its own motion vacated, set aside, and discharged said citation. Thereafter, and more than one year subsequent to the filing of said petition, said petition was dismissed upon motion of this petitioner. Thereafter, upon affidavit showing cause, the court set aside the order dismissing the petition for revocation, and, after reciting wherein the original citation was defective, ordered an amended citation to issue to all parties interested, ordering them to appear and show cause why the revocation of the probate of said will should not be had; and such citation was thereafter issued as ordered by the court.

The citation involved in this proceeding was issued too late. The contest has lapsed, and the petition and citation based thereon should be dismissed. Section 1328 of the Code of Civil Procedure provides: "Upon filing the petition a citation must be issued to the executors of the will," etc. This section clearly contemplates that such citation should in no degree be used as an instrument for the purpose of delaying the administration of estates, but, rather, that it should issue forthwith upon the filing of the petition for revocation. Again, section 1713 of the said Code provides: "Except as otherwise provided in this title, the provisions of part 2 of this Code are applicable to and constitute the rules of practice in the proceedings mentioned in this title." A citation in its general character is a summons, and under this provision of the Code, giving section 1328 the widest latitude of construction possible, the power to issue a citation would, beyond all question, cease one year after the petition for revocation was filed. Whether it would cease in less than a year we need not here decide. The fact that one citation was taken out within the year is immaterial, for that citation was quashed and set aside and discharged, and thereafter the case stood exactly as though no citation had ever been issued. After its dismissal it possessed no life. It was a quashed summons, and served no further useful purpose in the proceeding. The citation here under discussion was in no sense an amended citation, but rather a second or alias citation, and it came too late. At that time the court had no power to make the order upon which it issued. The order of the court for the issuance of citation, and the citation issued thereon, are annulled, vacated, and set aside.

We concur: HARRISON, J.; VAN FLEET, J.; HENSHAW, J.; McFARLAND, J.

108 Cal. 45

## LACEY v. LACEY. (No. 19,526.)

(Supreme Court of California. July 9, 1895.)

DIVORCE—ALLOWANCE OF COUNSEL FEES.

Under Civ. Code, § 137, providing that the court may, while an action for divorce is pending, require the husband to pay, as alimony, money necessary to enable the wife to prosecute or defend the action, an allowance of counsel fees incurred during the trial cannot be made on final judgment.

Department 2. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

Action by Isabella Lacey against William Lacey for divorce. There was a judgment granting the divorce and allowing plaintiff attorney's fees, from the latter portion of which defendant appeals. Modified.

Graves, O'Melveny & Shankland, for appellant. Graff & Latham, for respondent.

PER CURIAM. Action for divorce, and judgment for plaintiff. Defendant appeals from that part of the judgment which decrees to plaintiff $3,500, and interest, for her counsel fees.

During the pendency of the action, respondent applied for counsel fees, and the court allowed her $500, which was paid, with "leave to apply for a further allowance." In addition to this, appellant paid respondent, prior to and during the pendency of the action, $200 per month. No further allowance for counsel fees was made until the final judgment, by which respondent was awarded a large amount of real and personal property, of the value of nearly $100,000, and being about one-half of the community property. In this final judgment respondent was allowed $2,500 as additional counsel fees. The allowance was for past services, and under the circumstances was clearly not "necessary to enable the wife * * * to prosecute * * * the action;"[1] and upon the authority of Loveren v. Loveren, 100 Cal. 493, 35 Pac. 87, and Mudd v. Mudd, 98 Cal. 322, 33 Pac. 114, it is erroneous. The cause is remanded, with directions to the superior court to modify the judgment by striking therefrom that part which awards her counsel fees. In all other respects the judgment is affirmed.

108 Cal. 16

## SIMONS et al. v. WEBSTER et al. (No. 19,520.)

(Supreme Court of California. July 6, 1895.)

REVIEW ON APPEAL—MECHANIC'S LIEN—FILING BY FIRM.

1. A finding of the trial court on conflicting testimony will not be disturbed.

2. Where the right to file a mechanic's lien existed in a firm composed of three members, the sale to two of them of his general interest in the partnership by the third does not destroy the right of the remaining partners to file it.

Department 2. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Action by Ed. Simons and another against G. G. Green and others. From a judgment for plaintiffs, defendant Green appeals. Affirmed.

A. R. Metcalfe and Anderson & Anderson, for appellant. Chapman & Hendrick, for respondents.

McFARLAND, J. Action to enforce a lien for brick, lime, and sand furnished by plaintiffs as subcontractors. The defendant Webster who was the original owner of the building for which the materials were furnished, and defendant Haver, the original contractor, made default. The defendant Green, who was a subsequent mortgagee of Webster, and who now owns the premises in controversy through a foreclosure of his mortgage answered; and, judgment having been rendered for plaintiffs, Green appeals from the judgment and from an order denying his motion for a new trial.

Appellant relies entirely upon the second, third, fifth, sixth, and seventh assignments of errors, and all these assignments are simply specifications of "the particulars in which the evidence is insufficient to justify the findings." In the briefs on both sides the case is very fully, closely, and skillfully argued. The evidence is carefully analyzed, and its separate parts compared, contrasted, or harmonized in accordance with the different views and contentions of respective counsel. But, after a thorough consideration of the arguments presented by counsel and the evidence presented by the record, we are satisfied that the case is merely one of those instances of fairly and substantially conflicting evidence where the determination of issues of fact by the trial court is final. Counsel for appellant endeavors to take the case out of the rule respecting conflicting evidence by contending that a consideration of the assignments "does not involve so much an inquiry as to whether a fact found is sustained by the testimony as it does the construction of the admitted and undisputed facts of the case, and the application of the law thereto." There are cases, no doubt, to which that contention would apply, but the case at bar is not one of them. The ultimate question here was whether or not the money claimed by respondents as secured by their lien had been paid; and that was simply a question of fact, to be solved upon the evidence. The case does not materially differ from ordinary cases where findings of fact are to be arrived at by weighing evidence that is conflicting. To say anything further with respect to the case generally would be to state here all the evidence, which would be a tedious and valueless task. Perhaps the third assignment should be specially noticed. The plaintiffs did business as a partnership under the firm name of the City Brick Company, and at the time the contract for the materials was made the firm was composed of the respondents Ed. Simons, A. A. Hubbard, and one Thomas Goss. It appears that at some time between the making of the contract and the filing of the lien Goss sold all his interest in the firm to the plaintiffs, who continued the business under the same firm name, and filed the lien. The said third assignment attacks the correctness of a finding of the court that the contract was completed after Goss sold, appellant claiming that the evidence shows that Goss did not sell until after the completion of the contract. While we think that there was evidence to support the finding, we do not think that the question involved is material. Appellant contends that, if Goss did not sell until after the completion of the contract, then a new partnership was created, and, as the new firm filed a lien for a claim held by the old firm, the case is within the rule that a right to create a lien cannot be assigned, as stated in Mills v. Land Co., 97 Cal. 254, 32 Pac. 169. But the rule in the Mills Case does not apply here. In that case the persons who had furnished the materials undertook to assign their "right of lien" to an entire stranger to the transaction. In the case at bar the right to create the lien existed in respondents as partners, and in each of them, before the sale to them of Goss' interest in the firm; and that right was not destroyed by the extinguishment of Goss' general interest in the partnership. The judgment and order are affirmed.

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[1] Civ. Code, § 137.

We concur: HENSHAW, J.; TEMPLE, J.

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107 Cal. 675

## CRAIG et al. v. HESPERIA LAND & WATER CO. (No. 19,445.)

(Supreme Court of California. July 3, 1895.)

REVIEW ON APPEAL—FAILURE TO EXCEPT.

An order granting a nonsuit will not be reviewed unless the record shows that an exception was taken to the order, and such exception appeared in the stating or substantive part of the bill of exceptions.

Department 2. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Action by John W. Craig and others against the Hesperia Land & Water Company to set aside an assessment of stock made by defendant, and restrain a sale of the stock by virtue thereof. From a judgment of nonsuit, plaintiffs appeal. Affirmed.

Willis & Cole and H. A. Barclay, for appellants. Graves, O'Melveny & Shankland, for respondent.

McFARLAND, J. The court below granted a nonsuit, and judgment for defendant followed. Plaintiffs appeal, or have undertaken to appeal, from the judgment and from an order denying a new trial. Respondent has submitted a motion to dismiss the appeal on several grounds, but, under our views of the case, it is unnecessary to pass upon that motion. The main attack of appellants is upon the order granting the nonsuit. The only specification under the head of "Errors of law occurring at the trial and excepted to by the appellants" is that "the court erred in granting defendant's motion for a nonsuit." But the record shows no exception taken to the order granting the motion for a nonsuit, and therefore that order cannot be here reviewed. The ruling of a trial court upon a motion for a nonsuit presents a question of law, and, as such, must be both excepted to and specified. Malone v. Beardsley, 92 Cal. 150, 28 Pac. 218; Warner v. Darrow, 91 Cal. 309, 27 Pac. 737; Flashner v. Waldron, 86 Cal. 211, 24 Pac. 1063; Schroeder v. Schmidt, 74 Cal. 459, 16 Pac. 243; Cravens v. Dewey, 13 Cal. 43. And the exception must appear in the stating or substantive part of the bill of exceptions or statement. It is not sufficient that it be referred to in the assignment of the errors relied on, which counsel for appellants annex to bills of exception after the trial. The bill must show that the ruling thus assigned as error actually took place at the trial, and was excepted to. Braverman v. Irrigation Co., 101 Cal. 644, 36 Pac. 386; People v. Faulke, 96 Cal. 17, 30 Pac. 837. We think that the demurrer to the answer was properly overruled, and there are no other points to be discussed. Judgment and order affirmed.

We concur: HENSHAW, J.; TEMPLE, J.

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108 Cal. 33

## BUCKMAN v. FERGUSON. (No. 15,845.)

(Supreme Court of California. July 9, 1895.)

PUBLIC IMPROVEMENTS—CONTRACTS.

1. Under St. 1885, p. 151, § 6, providing that the superintendent of streets shall fix the time for the commencement, which shall not be more than 15 days from the date of the contract, and for the completion, of the work, under all contracts entered into by him, the superintendent may perform this duty on January 4th, by indorsing, on a contract executed December 23d

prior, "the work to be commenced fourteen days * * * from the date of the contract."

2. Where the term of office of the superintendent of streets expired before the 15 days from the date of a contract entered into by him, his successor may fix the time for the commencement of work within the time required by St. 1885, p. 151, § 6.

Department 1. Appeal from superior court, city and county of San Francisco; J. M. Seawell, Judge.

Action by A. E. Buckman against Oscar H. Ferguson to foreclose a street assessment. From a judgment for defendant, plaintiff appeals. Reversed.

Wm. H. Chapman and Edwin G. Knapp, for appellant. Grant & Cushing, for respondent.

HARRISON, J. Action to foreclose a street assessment in San Francisco. The validity of the assessment is contested upon the ground that the contract for doing the work was invalid by reason of the failure on the part of the superintendent of streets to fix the time for the commencement and the completion of the work. Judgment was rendered in favor of the defendant, from which, and from an order denying his motion for a new trial, the plaintiff has appealed.

The contract in question was awarded to W. H. Maxwell, and notice of the award having been posted and published December 11, 1890, the contract was entered into by Maxwell and Thomas Ashworth, as superintendent of streets, December 23, 1890. The body of the contract was written, dated, and signed on one page, which was numbered "Page 1," and provided, among other things, that Maxwell would do and perform all the work required to be performed, under the direction and to the satisfaction of said superintendent, "according to the specifications hereunto annexed, and made part of this contract." Upon the upper part of another sheet of paper, which was attached to the contract, marked "Page 2," was pasted a copy of the specifications which had been included with the notice inviting proposals for doing the work; and beneath this copy of the specifications were the following words: "The work to be commenced *fourteen* (14) days, and completed within *one hundred and twenty* (120) days, from the date of the contract." These words, except those in italics, were printed upon the page, with blank spaces in which to insert the respective periods of time, and the words in italics were written therein. At the bottom of this page, several lines below any other writing or printing, is the signature, "James Gilleran, Superintendent of Public Streets, Highways, and Squares." Ashworth's term of office as superintendent of streets expired January 4, 1891, and Gilleran succeeded him and qualified as such superintendent January 5, 1891. The court finds "that said contract was signed and executed by said Ashworth, as such superintendent, and by said Maxwell, on the 23d day of December, 1890"; and, also, "that on the 5th day of January, 1891, said James Gilleran, as such superintendent, did in form fix the time for the commencement of the work to be performed on said contract at fourteen days from and after the date of said contract, and for the completion thereof at one hundred and twenty days from the date of said contract, by indorsing upon said contract the words and figures following, to wit: 'The work to be commenced within fourteen and completed within one hundred and twenty days from the date of the contract.'"

Section 6 of the act under which these proceedings were had (St. 1885, p. 151) requires that the superintendent of streets "shall fix the time for the commencement, which shall not be more than fifteen days from the date of the contract, and for the completion of the work under all contracts entered into by him." This provision is mandatory, and an omission to comply therewith renders the contract void. Libbey v. Elsworth, 97 Cal. 316, 32 Pac. 228. The fixing of these times is not a matter of agreement between the superintendent and the contractor, nor is the signature of the contractor essential; but it is a duty imposed by law upon the superintendent (Fletcher v. Prather, 102 Cal. 425, 36 Pac. 658), and, like any other official act, must be authenticated by his signature (Dougherty v. Hitchcock, 35 Cal. 512). This requirement is found in a separate clause of section 6, and applies to "all contracts entered into by him," including not only those which have been awarded by the city council to bidders under the notice for proposals authorized by section 5, but also those which may be awarded by the superintendent himself under the provisions of section 13. The times thus to be fixed by the superintendent may be indorsed upon the contract after it has been entered into, or they may be incorporated into the body of the contract. The only limitation upon the time within which the superintendent is to perform this duty is found in the provision that the time to be fixed for the commencement of the work "shall not be more than fifteen days from the date of the contract." The provision in section 5 of the act that, if the original bidder to whom the contract is awarded "neglects, fails or refuses, for fifteen days after the first posting and publication of the notice of award, to enter into the contract," proposals shall be again invited for doing the work, shows that the "date of the contract" must be prior to the expiration of this 15 days. The superintendent may, therefore, perform this duty at any time after the date of the contract which will allow him to designate a period of not more than 15 days from such date for the commencement of the work. Inasmuch as the fixing of these times is essential to the validity of the contract, the contract, even though entered into by the contractor, is to be deemed inchoate on the part of the superintendent until he has fixed the times. Its execution by the contractor being with the understanding and agreement on his part that the superintendent may thereafter fix the times (Fletcher v. Prather, supra), the contract is not fully executed by that officer until the times have been fixed. The first publication and posting of the notice of award was made on the 11th of December, and Maxwell entered into the contract on the 23d of December. The execution of the contract was then complete on his part; but, although it was then signed on the part of the superintendent, it was inchoate until the times for the commencement and completion of the work should have been indorsed thereon. The clause fixing these times having been indorsed upon the contract before the expiration of 15 days from its date rendered its execution complete, and made the contract valid.

The provision in the contract that the work shall be done "according to the specifications hereunto annexed and made a part of this contract" does not extend to the clause by which the time for the commencement and the completion of the work is fixed. The "specifications" thus referred to are those which by section 3 of the act aforesaid (St. 1889, p. 159) are to be furnished by the city engineer, and which by section 5 of the act (St. 1889, p. 160) are to be stated with the notice inviting proposals for doing the work. As the contract was equally valid whether the superintendent indorsed thereon the clause fixing the times for the commencement and completion of the work on the same day that he signed the contract, or upon any day within 15 days from its date, it follows that, if his term of office expired before the expiration of the 15 days, this act could be performed by his successor. The act of fixing these times is the act of the officer, and not of the individual, and can be performed by the individual who at the time of performing it is the incumbent of the office. The execution of the contract being inchoate on his part until this act is performed, it is immaterial that one of the steps in the completion of its execution is performed by the outgoing officer, and the other by his successor. They are each official acts, and are entitled to the same consideration, whether performed by the same or different officers. The judgment and order denying a new trial are reversed.

We concur: GAROUTTE, J.; VAN FLEET, J.

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108 Cal. 19

## GARD v. GARD et al. (No. 18,389.)

(Supreme Court of California. July 6, 1895.)

VENDOR'S LIEN—WAIVER.

Plaintiff conveyed all his property to his son, the consideration named being $950. It was agreed that the deed should not be operative until the manner and time of payment should be agreed on. Plaintiff remained in possession until it was rendered to the son under an agreement to pay plaintiff during life a certain sum per month if the son occupied the premises personally, or received rents from them. *Held* that, if plaintiff had a vendor's lien at the time of the last agreement, he then and thereby lost it.

Department 2. Appeal from superior court, Yuba county; E. A. Davis, Judge.

Action by Jacob Gard, Sr., against Jacob Gard, Jr., and another. From a judgment for defendant, plaintiff appeals. Affirmed.

W. H. Carlin, for appellant. J. H. Craddock, for respondents.

HENSHAW, J. Appeal from the judgment rendered after demurrer sustained and plaintiff's refusal to amend. The action is to have declared and enforced a vendor's lien upon land conveyed by plaintiff under the following state of facts, disclosed by the complaint: In 1890, plaintiff, an old man, executed and delivered a deed of the land—all the property he owned—to his son, for the named consideration of $950. It was agreed that, as between themselves, the deed should not be operative until the mode, manner, and time of payment should at some indefinite future date be agreed upon. Plaintiff remained in possession of the land, and exercised full dominion over it, after the making of the deed, until 1893, when the defendant took possession and control of the land under the following agreement: "For value received from Jacob Gard, Sr., I, Jacob Gard, Jr., hereby covenant, promise, and agree to pay to said Jacob Gard, Sr., monthly during his natural life, three-fourths of all sums by me received for rent of the premises known as the 'Seven-Mile House,' situate on the public highway leading from Marysville to Brown's Valley, in Yuba county, state of California, and designated and described in a certain indenture of deed bearing date May 6, 1890, made and delivered by said Jacob Gard, Sr., as grantor, to myself, as grantee, and recorded in volume 39 of Deeds, Records of Yuba County, at pages 153 and following, which said premises are now under lease to one George J. Crossley at the monthly rental of twenty dollars. And in case I should occupy said premises myself, instead of renting the same, then, and in such case, I covenant to pay the said Jacob Gard, Sr., the sum of fifteen dollars monthly during his natural life. Said sums to be paid monthly on the fifteenth day of each and every month at the Northern California Bank of Savings, Marysville, California, to the credit of said Jacob Gard, Sr. [Signed] Jacob Gard, Jr." A short time after the date of this agreement, defendant entered into the personal occupancy of the premises, and has ever since continued in such occupancy. He has failed, after demand, to comply with his agreement, and has refused to pay to plaintiff the monthly sum of $15, or any other sum. His wife, with knowledge of all the facts, has placed a homestead upon the property. The defendant son has no property except that so acquired from the father, and the father, 80 years old, feeble and decrepit, has no means of subsistence unless the sum of $15 a month can be made a charge upon the property.

Such is the tale told by the complaint, and in this consideration it must be taken as true. It is the tragedy of Lear in a country setting, with the "Seven Mile House" for the revenues of a kingdom, and a country pauper for the distracted king. The case is one which appeals strongly to that sense of "natural equity" upon which it is sometimes said a vendor's lien rests; but at the same time a court of equity, no more than a court of law, can, because of individual hardship, reject from its consideration the well-considered and firmly-established principles and rules upon which the right to the relief asked has always been based. The enforcement of purely moral obligations is not within the domain of equity or law. An outlawed debt still holds the debtor under moral obligation, but no court can compel its payment. "The grantor's lien, wherever recognized, is only permitted as a security for the unpaid purchase, and not for any other indebtedness or liability. There must be a certain, ascertained, absolute debt owing for the purchase price. The lien does not exist in behalf of any uncertain, contingent, or unliquidated demand." 3 Pom. Eq. Jur. § 1251. This rule, as deduced by Prof. Pomeroy, has an overwhelming weight of authority in its support. See note to Mackreth v. Symmons, 15 Ves. 329, in 1 White & T. Lead. Cas. Eq. (4th Am. Ed.) 468; Peters v. Tunell, 43 Minn. 473, 45 N. W. 867; Perry, Trusts (4th Ed.) § 235; 2 Jones, Liens, § 1071. Conceding, without deciding, that plaintiff had a vendor's lien upon the property for the sum of $950 down to the time of his entering into the agreement as above set forth in 1893, he then and thereby lost his right to such lien. And this is so whether the last-named agreement be considered as a substitute by novation for the original indebtedness, or merely as a consummation, within the contemplation of its terms, of the original contract of sale. If the last agreement be treated as in novation of the original indebtedness, the lien is at once extinguished (3 Pom. Eq. Jur. § 1252); while, if considered as but the completion of the unconsummated original agreement, it is open to all objections of uncertainty and contingency as to time, amount, and mode of payment. The learned judge of the trial court, in an able opinion sustaining the demurrer, makes this clear and forcible presentation of the matter, which we adopt: "But it is claimed by counsel for plaintiff that this agreement amounts simply to a written acknowledgment of defendant's indebtedness to plaintiff for the amount of the purchase price, $950, and his promise to pay it. I do not see how it is possible to sustain that contention. The agreement is not that defendant shall pay the purchase price of the granted premises, which is $950, or any other or definite or fixed sum. His agreement to pay anything was wholly contingent, and dependent upon the uncertainty of a human life. If plaintiff had died the next moment after receiving the agreement, the obligation to pay would have died with him, and nothing would have been paid under it. But it was even possible under the agreement that nothing should be paid plaintiff even though he should live a term of years, for the promise is only to pay provided the defendant Gard occupied the premises personally, or received rents from them. He might never occupy them himself, and he might not receive any rents. The premises might remain vacant, or the tenant might fail to pay rent. Again, it might be possible that under the agreement the defendant would be compelled to pay a sum largely in excess of the alleged purchase price. It might be double that amount, or even more, depending upon the uncertain contingency of the length of plaintiff's life, the rental and receiving of rents, or the occupancy by the defendant. I cannot see how it is possible to conclude that this agreement was, in effect or in the intention of the parties, an acknowledgment of an indebtedness for the purchase price of the granted premises, and a promise to pay it. On the contrary, it seems clear that it was an independent and collateral contract or covenant, speculative in its character, and designed, if the original debt still existed, to cancel and extinguish it. It was speculative, because under it the plaintiff might receive a sum largely in excess of the purchase price of the land in the form of an annuity, while, on the other hand, the defendant might satisfy his $950 indebtedness by the payment of little or nothing. It seems to me that no argument is required to show that such an agreement, by no interpretation whatever, can be made the basis of a lien of a vendor. Under the agreement the defendant became personally bound only and subject to an action for damages for breach of his contract, the only remedy open to plaintiff. The case is analogous to that of Payne v. Avery, 21 Mich. 524, where the court held that while the grantor, upon the facts, might be able to maintain a remedy at law for damages caused by the grantee's failure to comply with his contract, such damages were too uncertain in their character to form the subject of a vendor's lien." The judgment appealed from is affirmed.

We concur: McFARLAND, J.; TEMPLE, J.

108 Cal. 14

## In re PHILBROOK. (No. 21,188.)

(Supreme Court of California. July 5, 1895.)

New Trial—Original Proceeding in Supreme Court.

Motion for a new trial is not the proper remedy to obtain a reconsideration of an original proceeding in the supreme court, especially after a motion for rehearing has been argued and denied.

On rehearing. For original opinion, see 38 Pac. 511, 884.

PER CURIAM. After the decision made in this case on the 5th of January, 1895, the respondent filed a petition to vacate the decision and judgment and for a rehearing. Upon this an elaborate argument was made, and the petition was denied. It is insisted that respondent has still pending and undisposed of a motion for a new trial. No notice of a motion for a new trial was given, other than in the petition referred to, in which it is said: "So far as this is a motion for a new trial, it is submitted upon the minutes of the court." Respondent cites two cases, decided under the former constitution of this state, in which it was held that the proper course to obtain a reconsideration of an original proceeding in this court is to move for a new trial. People v. Coon, 25 Cal. 635; People v. Holloway, 41 Cal. 409. Also, Bank v. Steinmitz, 65 Cal. 219, 3 Pac. 808, which decision was made after the present constitution took effect. But since those cases the question has been fully considered here, and the conclusion reached that a motion for a new trial is not the proper remedy in such a case. In re Tyler, 71 Cal. 374, 12 Pac. 289, and 13 Pac. 169; Granger's Bank v. Superior Court of City and County of San Francisco, 101 Cal. 198, 35 Pac. 642. In the case of People v. Coon it is said that "the party aggrieved must pursue the course prescribed in the practice act in like cases arising in the district courts." Respondent has not pursued that mode. He did not give the notice of intention prescribed by the Code, nor did he prepare a statement or bill of exceptions. And in this he was right. These things are not required here, for the record to be reviewed is the record of this court, and, therefore, a motion for a new trial and an application for a rehearing would present the same questions for consideration. And since, as said in Granger's Bank v. Superior Court of City and County of San Francisco, the constitution requires that a judgment in department shall be final unless ordered into banc or a rehearing is granted within 30 days, and since the constitution does not distinguish between a judgment in an original hearing and in an appealed case, it would seem to follow that a motion for a new trial, which might cause a delay beyond the 30 days, is not an appropriate remedy. As it would serve no useful purpose, it would seem to follow either that the application for a rehearing could not be heard, or a motion for a new trial would not lie. It would be preposterous to expect that a motion for a new trial would prevail, after an application for a rehearing has been denied, upon a consideration of the same points which are presented by the motion for a new trial. The motion is denied.

HARRISON, J., not participating.

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108 Cal. 88

## EMIGRANT DITCH CO. v. WEBBER. (No. 18,453.)

(Supreme Court of California. July 11, 1895.)

Corporations—Right to Sue—Filing Articles of Incorporation.

1. Civ. Code, § 299, providing that any corporation holding property in a county shall not maintain an action in relation to such property without filing a copy of its articles of incorporation with the clerk of the county in which such property is situated, does not apply to corporations seeking to acquire property by condemnation.

2. Where a ditch company incorporated in T. county seeks to condemn defendant's land, in F. county, and pleads its ownership of ditches, canals, and water in F. county, which ownership defendant's pleadings deny, the issue involves the determination of the ownership of property claimed by plaintiff, and the action cannot be maintained until a copy of its articles of incorporation is filed in F. county, as required by Civ. Code, § 299.

Department 2. Appeal from superior court, Fresno county; M. K. Harris, Judge.

Condemnation proceedings by the Emigrant Ditch Company against A. A. Webber. From a judgment for defendant, plaintiff appeals. Affirmed.

Stanton L. Carter and E. D. Edwards, for appellant. L. L. Cory and N. C. Coldwell, for respondent.

HENSHAW, J. Appeal from the judgment under a plea in bar. Plaintiff averred its incorporation under the laws of the state for the purposes of building, owning, holding, obtaining, and selling ditches, canals, flumes, rights of way, water and water rights, reservoirs, headgates, etc., and to operate the same. It then averred its acquirement of certain valuable water rights in Tulare county; its construction and ownership of canals, ditches, etc., by which it conveyed water from Cole slough, in Tulare county, through that county, and into Fresno county. It is alleged that the purposes of diversion are for the distribution and selling and renting of the water to the inhabitants of the two counties, and for supplying farming neighborhoods therein with the water for farming, irrigation, domestic and other useful purposes; and it is further averred that the water is used for these purposes. Being unable to acquire by purchase the necessary rights for extending its ditches, etc., over the land of defendant, plaintiff begins these proceedings to condemn the same. Const. art.

14, § 1; Code Civ. Proc. § 1238. Defendant traversed all the material allegations of the complaint, and then, in bar, pleaded a noncompliance by plaintiff with section 299 of the Civil Code. This plea was first heard and determined by the court upon consent of the parties, and, judgment thereon passing in favor of defendant, plaintiff prosecutes its appeal.

Plaintiff was incorporated in the county of Tulare, and had not filed a certified copy of the copy of its articles of incorporation in the county of Fresno. Yet, as appears by its complaint, it did at the time of the commencement of the action, and had for many years prior thereto, owned ditches, canals, water, etc., in that county; and it is to enable it to extend its operations of distribution, rental, and sale of the water that the action is prosecuted. The contentions in support of the judgment are two: First. That plaintiff cannot maintain this action to acquire and hold the rights sought to be condemned, unless, as to that property, it has filed a copy of its articles of incorporation before the commencement of the action. Second. That the action, from its nature, and under the averments of the complaint, necessarily involves the determination of the ownership of and title to other property situated in the county of Fresno, and claimed by plaintiff as its own. To this extent, therefore, the action is "in relation to" that property, and cannot be maintained.

To the first contention we cannot accede. The statute provides, in effect, that any corporation holding any property in a county shall not maintain or defend any action or proceeding in relation to such property, its rents, issues, or profits, until such certified copy of the copy of its articles of incorporation shall be filed as required by law. The commencement of an action is a part of its maintenance. Byers v. Bourret, 64 Cal. 73, 28 Pac. 61. But the holding of property is radically different from the attempt to acquire a holding. Plaintiff does not even claim to have or hold any rights in defendant's property. It concedes full and complete ownership in defendant, but asks the court to decree it a holding after proof of its right of eminent domain, and after payment by it of just compensation to the owner. Section 299 of the Civil Code does not forbid corporations failing to comply with its provisions from acquiring property either by purchase or by condemnation, but does inhibit the maintenance or defense by them of any action in relation to the property which they have acquired.

The questions involved in the consideration of the second contention are essentially dissimilar. Plaintiff, to acquire by condemnation the desired rights over defendant's land, found it necessary to plead its ownership of ditches, canals, and water in Fresno county, and the uses made, and to be made, not only of its acquired property, but of that sought to be acquired. By defendant's answer, plaintiff's title to the property which it claims to own is put in issue. Nor is the issue an immaterial one. If defendant, even while conceding that plaintiff may invoke the right of eminent domain, can show that the right should not be exercised upon his property, plaintiff must fail. And this might be established, under the issues joined, by proof that plaintiff had acquired no property or rights in Fresno county which made condemnation of his land necessary or expedient. So that if no weight whatever be given to the suggestion that the acquirement of the new right has relation to the water already owned, and that, therefore, the action is in relation to property held by the corporation, nevertheless it manifestly appears that the decision upon the question of the holding of property claimed by plaintiff as its own may be determinative of the controversy. It must be, therefore, that this action is in relation to property held by plaintiff, and cannot, under the circumstances, be maintained.

Nothing herein said is to be construed as determining the sufficiency or insufficiency of the complaint. The demurrer upon the ground that it failed to state a cause of action was overruled, and the appellant here is not the aggrieved party under that order. It is preferable, under every consideration, that the question, if it reach this court, should, so far as this action is concerned, be considered as res integra. The judgment appealed from is affirmed.

We concur: McFARLAND, J.; TEMPLE, J.

108 Cal. 1

## WINONA WAGON CO. v. BULL. (No. 15,724.)

(Supreme Court of California. July 5, 1895.)

CORPORATIONS—LIABILITY OF STOCKHOLDERS.

1. Under Civ. Code, § 322, providing that the liability of each stockholder is determined by the amount of stock owned by him at the time the debt was incurred, a stockholder is not liable on a note given by the corporation in payment of an antecedent indebtedness, but on the original debt.

2. A stockholder's liability is original, and he is not a surety for the corporation.

3. A complaint, in an action to enforce a stockholder's liability on a note given by the corporation, which failed to allege that defendant was a stockholder at the time the original indebtedness was created, is insufficient.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; Walter H. Levy, Judge.

Action by the Winona Wagon Company against W. W. Bull to enforce defendant's liability as a stockholder. From the judgment therein rendered, plaintiff appeals. Affirmed.

William H. Jordan, for appellant. Bull & Cleary and Crandall & Bull, for respondent.

HAYNES, C. Plaintiff, a foreign corporation, claiming that the Bull & Grant Farm Implement Company, a California corporation, was indebted to it in a large sum of money, brought its action against defendant Bull to enforce his liability as a stockholder in the latter corporation for his proportion of said indebtedness. The cause was tried by the court, and plaintiff had judgment; but, being dissatisfied with the amount recovered, moved for a new trial, and appeals from the judgment and from an order denying its motion.

The complaint contained two counts upon a single cause of action, but upon the trial the first count was abandoned.

The second count, as it was stated in the amended complaint, was upon a promissory note made by the Bull & Grant Farm Implement Company to the plaintiff on November 12, 1890, at one day, for the sum of $4,954.53, and alleges that defendant Bull, at all the times mentioned in the complaint, owned one-third of the capital stock issued by the corporation, and prayed for judgment against him for one-third of said sum.

Afterwards plaintiff amended said second count by striking out certain lines and inserting the following: "That at the city and county of San Francisco, state of California, on the following dates, the Bull & Grant Farm Implement Company made, executed, and delivered its eight several promissory notes to the plaintiff, for the following sums, to wit:

| | | | | | | |
|---|---|---|---|---|---|---|
| "On March | 30, 1889, | for the | sum | of...... | $723 | 89 |
| " April | 18, | " | " | " ...... | 663 | 95 |
| " May | 13, | " | " | " ...... | 698 | 42 |
| " May | 17, | " | " | " ...... | 747 | 37 |
| " July | 25, | " | " | " ...... | 496 | 56 |
| " July | 25, | " | " | " ...... | 496 | 56 |
| " August | 31, | " | " | " ...... | 772 | 73 |
| " August | 31, | " | " | " ...... | 772 | 74 |

"That said eight promissory notes were renewed from time to time by other notes of the Bull & Grant Farm Implement Company. That said last-mentioned renewal notes were on November 12, 1890, renewed by the promissory note of the Bull & Grant Farm Implement Company to the plaintiff for the sum of four thousand nine hundred and fifty-four and fifty-three one-hundredths ($4,954.53) dollars. That said last-mentioned note is in the words and figures as follows, to wit." The note set out is sufficiently described above. Following the note, the complaint alleges: "That plaintiff is still the owner and holder of said promissory note, and that no part thereof has ever been paid. Wherefore, plaintiff prays judgment," etc.

The court found that the Bull & Grant Farm Implement Company had issued 500 shares of stock; that, at the date of the execution of each of the eight promissory notes mentioned in said amendment to the complaint, the defendant owned 49 of said shares; and that on November 12, 1890, the date of said last-named note, he owned but 20 shares. The court further found that said note of November 12, 1890, was not given in renewal of any of the notes set out in said amendment to the complaint, but that it was given in payment of them. Upon these facts the court concluded that plaintiff was entitled to judgment for twenty five-hundredths of said last-named note, while appellant contends that the judgment should have been for forty-nine five-hundredths. Appellant's only specification is that the finding that the note of November, 1890, was not taken in renewal, but in payment, is not justified by the evidence. Respondent contends that the judgment must be affirmed, whether said finding is justified by the evidence or not, for the reason that appellant was not entitled to any judgment upon its complaint, and, having obtained a more favorable judgment than it was entitled to, it cannot complain; and he thus puts in issue the sufficiency of the complaint.

It will be observed that the complaint nowhere alleges when "the debt or liability was incurred." It is alleged that on November 12, 1890, a promissory note was executed to the plaintiff by the corporation in which the defendant was a stockholder; but appellant contends that the debt or liability had its inception long before that date, and therefore concedes that the giving of a note does not necessarily show the date of the creation of the debt or liability. But it is not alleged that the debt or liability was created at the date of the several notes given in 1889. For aught that appears in the complaint, they may have been given in renewal of other notes, or upon settlement of accounts for goods sold and delivered, or services rendered, long before their respective dates. "The liability of each stockholder is determined by the amount of stock or shares owned by him at the time the debt or liability was incurred." Civ. Code, § 322. The complaint here cannot be distinguished, as to the point under consideration, from that in Hunt v. Ward, 99 Cal. 612, 34 Pac. 335. It was there said: "It will be observed that there is no averment of the time of the incurring of the indebtedness or liability for which the note was given, or of the nature of such indebtedness, or the facts upon which it was founded; the only averment upon the subject being the making and execution of the note and mortgage. The complaint bases the right to recover on the making of the note and the judgment against the corporation; but as the liability of the stockholder is a separate and independent one, commencing with and dependent upon the original indebtedness, it is doubtful if the averments of the complaint in the case at bar are sufficient." That case, however, was decided upon the plea of the statute of limitations; though the court cited with approbation the case of Tilden v. Gashwiler (No. 4,052), decided in 1875, where it was held that the liability was upon the original indebtedness, and not upon the note. That the conclusion there reached was right scarcely needs argument or illustration. It is well settled that the liability of the stockholder is an original liability created by the statute; that his liability is dependent upon the fact that he is a stockholder at the time the debt is created, and the extent of his liability is measured by the proportion between the stock then held by him and the total number of shares issued. A corporation may incur a debt, or several distinct debts, to the same person, during a series of months, or years, and afterwards give its note for the aggregate amount, while B., a stockholder at the time the note was given, may not have been such when any one of the several debts included in the note was contracted. An allegation, therefore, that the defendant was a stockholder at the time the note was given, is not an allegation that the debt was incurred at that date. nor that the defendant was a stockholder at any prior date when the indebtedness was in fact contracted. That the stockholder's liability is not upon the note of the corporation was necessarily decided in the late case of Bank of San Luis Obispo v. Pacific Coast Steamship Co., 103 Cal. 594, 37 Pac. 499. In that case the bank loaned the San Luis Hotel Company, a corporation, a large sum of money on December 30, 1886, and took the note of the corporation therefor, payable six months after date The note became due June 30, 1887. The action against the defendant, as a stockholder, was commenced June 3, 1890, less than three years after the maturity of the note, but more than three years after the loan was made, and it was held that the making of the note did not prevent the statute from running in favor of the stockholder, and that the action was barred under section 359 of the Code of Civil Procedure.

Section 322 of the Civil Code provides: "Each stockholder of a porporation is individually and personally liable for such proportion of its debts and liabilities as," etc. In Tripp v. Huncheon, 82 Ind. 307, the action was upon a judgment rendered against the Kankakee Valley Draining Company, a corporation, to recover the amount thereof from the defendants, who were members of the association, under a statute which provided as follows: "The members of every such association shall be individually liable for all debts contracted by and all damages assessed and accrued against the association during their membership." The court said: "This imposes upon the members of such a corporation, as individuals, not as corporators, an absolute primary obligation to pay all debts contracted by the company of which they are members. Their liability is created by the statute, and is distinct from any obligation which they, as corporators, owe to the corporation or its creditors. The corporation has nothing to do with this liability, nor has it the right or power to represent its members as to this individual obligation. It is a matter between the creditors of the corporation and its members, not as corporators, but as individuals. * * * In this and similar cases, by becoming members of the corporation, such members impliedly agree that, as individuals, they will pay all debts contracted by the corporation, and to this agreement the creditors become parties. It is upon this obligation that the creditor who seeks to charge the members of the corporation, as individuals, must sue—not upon a judgment obtained against the corporation." In Mining Co. v. Woodbury, 14 Cal. 265, it was held "that an individual corporator, in respect to his personal liability for the debts of the corporation, does not occupy the position of a surety, but that of a principal debtor." But the defendant, though a principal debtor as to debts created while he is a stockholder, is not a party to the note or notes executed by the corporation, and is not liable thereon, but is liable only by force of the statute, and to the extent limited by it. The action here is upon the last note, as to which the allegation is that it remains wholly unpaid. But, even if it were true that the action is upon the eight notes mentioned in the amendment to the complaint, the result must be the same. In neither case does the complaint state a cause of action against the defendant. It must be apparent that the defendant may have been a stockholder, owning a certain number of shares, at the date of the execution of a promissory note by the corporation, and yet not have been a stockholder at the time the debt or liability evidenced by the note was created, or, if then a stockholder, he may have owned a different number of shares. The stockholder's liability is upon the debt to the extent and under the circumstances defined by the statute, and not upon the express promise of the corporation to pay at a particular time and place. There may be cases where the written promise of the corporation is necessary to create a liability against either the corporation or the stockholder, but such cases are not considered here. It is therefore not necessary to consider whether the finding excepted to is justified by the evidence.

As the defendant has not appealed, and the plaintiff has obtained a more favorable judgment than it was entitled to, the judgment and order appealed from should be affirmed.

We concur: BRITT, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.